EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2013-009-002134
[2016] NZFC 7904

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	PRINCE CANNON Applicant
AND	RHIANNON THORPE Respondent

Hearing:	8 September 2016
Appearances:	Applicant appears in person J Wren for the Respondent A Beaumont as Laywer for the Child
Judgment:	21 November 2016 at 11:00 am

RESERVED JUDGMENT OF JUDGE G S COLLIN

Introduction

[1] Prince Cannon and Rhiannon Thorpe are fortunate to be the parents of Brody Cannon born on [date deleted] 2002. Unfortunately for Brody his parents, although intelligent people, are unable to work out his care arrangements. They have as a consequence been continually involved in Court proceedings over the last 3 years. This hearing is about whether an application filed by Mr Cannon to change an existing order can proceed. The issues the Court needs to determine are:

(a) Whether leave needs to be granted for the application filed on 16 February 2016 to be commenced.

(b) Whether or not the application filed on 16 February 2016 has been overtaken by the parenting order of 12 April 2016.

Background

[2] On 2 December 2013 the Court made an order that Brody not be removed from the jurisdiction of Christchurch District Court until further order of the Court.

[3] On 18 February 2014 the Court made an interim parenting order granting Ms Thorpe interim day-to-day care and Mr Cannon contact three days each week. This was varied by consent on 20 November 2014. Mr Cannon's contact was increased to occur overnight every Tuesday and on every second weekend Saturday until Sunday.

[4] On 18 May 2015 a further variation of the interim order occurred. This extended Mr Cannon's contact to every second weekend from Saturday to Monday and every week from Thursday until Friday.

[5] On 11 May 2015 Lawyer for Child convened a round table meeting at which some agreements were reached and recorded in a memorandum of consent. This consent identified the outstanding issues as holiday contact and whether or not the order preventing removal should be discharged. The report of Lawyer for Child, together with the memorandum of consent, were filed in Court and orders were made

on 18 May 2015. However a perusal of the file suggests that no order was ever prepared or sealed. The outstanding matters were set down for a direction conference.

[6] In preparation for the directions conference both parties filed memoranda:

(a) Mr Cannon identified as agreed issues:

(a) Shared care arrangements for day-to-day care for the next year;

(b) Shared care arrangements for Christmas Day and other occasions.

(b) Mr Cannon identified as issues in dispute:

(a) The length of time that Ms Thorpe could remove Brody from contact in a continuous period.

(b) Equality of time between parents during holiday times.

(c) Whether the order preventing Brody leaving New Zealand should remain in place.

(c) Ms Thorpe identified as agreed issues:

(a) Weekly care of the children;

(d) Ms Thorpe identified as issues in dispute:

(a) The definition of holiday time;

(b) The ability of the child to travel overseas.

[7] At the conclusion of the Directions Conference on 2 July 2015, Judge Strettell recorded that it had been agreed that Brody could have a holiday with his mother for 14 days on agreed conditions. There is no mention in the Judge's minute as to what agreement, if any, the parties had reached in respect to final day-to-day care and contact. The issue identified as not having been resolved was the issue of ongoing holiday contact. Directions were made to advance the holiday contact issue to a one day hearing. The Judge directed the parties to file affidavits setting set out their views in respect of holiday contact.

[8] Mr Cannon filed an affidavit on 15 July 2015. This refers to shared equal care but ultimately seeks that the Court makes a holiday contact order on a shared basis. The affidavit does not directly seek any variation to the interim orders made on 18 May 2015. However in an affidavit of 27 July 2015, filed by Mr Cannon in reply to Ms Thorpe's affidavit of 21 July 2015, Mr Cannon states at paragraph 11 "I do not believe that what Ms Thorpe proposes has any merit and she appears to be completely in denial that by 2017 I want to extend my care to full shared care (50%), which will only be a minor increase from what already occurs."

[9] On 17 December 2015 the matter was back before the Court in a fixture call over. Judge Moran commented that the outstanding issues were remarkably narrow, namely the length of time during holiday periods when Brody was to be in his father's care. The matter was set down for a hearing on 15 April 2016. No mention is made in the Judge's minute of any dispute in respect of issues pertaining to day-to-day-care or contact.

[10] On 16 February 2016 Mr Cannon filed an application for a parenting order seeking 50/50 shared care. Mr Wren on behalf of the mother accepted service but without prejudice to his client's right to oppose the application without leave first being obtained by Mr Cannon under s 139A. No notice of response has been filed by Ms Thorpe, her position being that leave to commence the proceeding needs to be granted before any notice of response has to be filed.

[11] On 14 March 2016 Lawyer for Child filed a memorandum. This noted that Mr Cannon had filed an application to vary the orders which were made by consent

on 11 May 2015, but which had not at that point been sealed by the Court. Directions were sought in relation to the hearing that had been set down on 15 April 2016, on the basis that the 2.5 hours allocated was insufficient when the issue of shared care had again arisen.

[12] On 23 March 2016 Judge Murfitt made directions:

(a) Requiring the holiday contact issue to proceed on 15 April 2016; and

(b) That "Mr Cannon's new application will proceed as a separate matter with standard track allocated once a Notice of Response is received."

[13] On 12 April 2016 a memorandum prepared by Lawyer for Child, and signed by all parties and counsel was filed in the Court. The memorandum included a consent which specifically dealt with the outstanding holiday issues. The memorandum noted that a round table meeting had occurred and final agreement had been reached on school holiday times. The memorandum states at paragraph 3:

> 3. Mr Cannon has before the Court a new application dated 15 February 2016 for variation of the existing parenting order. Following the round table meeting Mr Cannon and Ms Thorpe have agreed in principle to the possibility of a long term care outcome of Brody. It is requested that Mr Cannon's application be placed in a case management review list in 2 months time for monitoring on whether it is still to proceed or be withdrawn. It is agreed in the intervening period that Ms Thorpe is not required to reply or file a notice of response.
>
> 4. A direction is sought that Ms Beaumont's appointment continues for the purpose of assisting final resolution.

[14] Included with the memorandum was a draft order prepared by Lawyer for Child. The order, drawn as final parenting order, included the following paragraph:

> Any person affected by this order, or a person acting for a child who is the subject of this order, may apply to the Court to vary or discharge this order. Leave (permission) is granted for an application for a new parenting order to be brought within the two-year period should it be required by the parties.

[15] On 5 May 2016 Ms Beaumont filed the draft order for sealing. On 13 June 2016 she wrote to the Court "I send a copy of the draft order to the Court on

5 May 2016. Both parties have now confirmed that they approve the draft. Please issue the sealed order in due course".

Does Mr Turner need leave for his application filed 16 February 2016 to be commenced?

[16] S 139A of Care of Children Act 2014 states:

> (1) A proceeding (a new proceeding) may not be commenced under section 46R, 48, or 56 without the leave of the court if that new proceeding—
>
> (a) is substantially similar to a proceeding previously filed in a Family Court by any person (a previous proceeding); and
>
> (b) is to be commenced less than 2 years after the final direction or order was given in the previous proceeding.
>
> (2) The leave of the court may only be given under subsection (1) if, since the final direction or order was given in the previous proceeding, there has been a material change in the circumstances of—
>
> (a) any party to the previous proceeding:
>
> (b) any child who was the subject of the previous proceeding.
>
> (3) In this section, a new proceeding is substantially similar to a previous proceeding if—
>
> (a) the party commencing the new proceeding was a party to the previous proceeding; and
>
> (b) a child who is the subject of the new proceeding was the subject of the previous proceeding; and
>
> (c) the new proceeding—
>
> (i) is commenced under the same provision of this Act as the previous proceeding; or
>
> (ii) is for an order varying the order made in the previous proceeding; or
>
> (iii) is for an order discharging the order made in the previous proceeding.
>
> (4) This section does not apply if every party to the new proceeding consents to its commencement.

[17] It is Mr Wren's position that on 16 February 2016 when the application was filed on 16 February 2016 the issue of day-to-day care had been "finally determined" and that the only extant issue was holiday contact. Mr Wren argues that Mr Cannon's application was filed after "final directions" had been given by Judge Strettell on 2 July 2015 and Judge Moran on 23 December 2015 which settled the only issue in dispute between the parties as holiday contact.

[18] In *Words and Phrases Legally Defined* under the meaning of "direction", reference is made to the decision of *Benson v Benson* [1941] P 90 at 97, where Lord Merriman P said:[1]

> Mr Hollins [counsel] has directed my attention to Murray's Oxford Dictionary, from which it is quite clear, as I should myself have supposed, that in certain contexts "order and "direction" are interchangeable terms. A "direction" is said to be "an order to be carried out", and "order", for example, so far as the Supreme Court is concerned is said to be "a direction other than final judgment".

[19] Under the definition of the word "order": [2]

> "The word 'order' in relation to legal proceedings in itself is ambiguous; clearly it may mean, perhaps, a linguistic purist would say that its most accurate connotation was to indicate, an order requiring an affirmative course of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts: *R v Recorder of Oxford, ex p Brasenose College* [1969] 3 All ER 428 at 431, per Bridge J.

[20] *Words and Phrases Legally Defined* then further defines "final order":[3]

> I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action: *Salaman v Warner* [1891] 1 QB 734 at 7367 – 737, CA per Fry LJ.
> The matter in dispute was simply this: the applicant said the respondents were his solicitors and ought to give him a bill of costs, and that that bill ought to be taxed. The solicitors opposed that, and…objected to deliver a bill. That was in substance the matter in dispute between the parties; and what was the order made? It was an order dismissing the application. If the order had been the other way, if an order had been made in favour of the applicant, it would equally have disposed of the matter in dispute. That being so, the order would be a final order within the definition in *Salaman v Warner*, and, following that I am of opinion that this was a final order: *Re Reeves (Herbert) & Co* [1902] 1 Ch 29 at33, CA per Romer LJ

[21] Based on these definitions and the intention behind s 139A I think the words "final direction" and "final order" are intended to have the same meaning, that is, a decision of the Court finally determining the proceeding. A "final direction" for

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[1] David Hay *Words and Phrases Legally Defined* (4th ed, LexisNexis, London, 2007) at 675.
[2] Ibid at 386.
[3] Ibid at 387.

example might cover situations where an application was dismissed rather than the order sought being made.

Have final directions been made that finally determine the proceedings?

[22] S 139A was an amendment to the Care of Children Act, and Part 5A of the Family Court Rules an amendment to the rules, both of which became effective from 31 March 2014. Within the rules there are numerous references to the words "direct" or "directions" but no reference to the words "final directions". It is not difficult to conclude that reference to "final direction" in the Act is deliberate and differentiates it from the word "directions" as found in the rules. The principle purpose of the rules is to govern the processes of the Court, from the filing of an application to the making of a final order. Within the rules generally there are a number of references to directions that can be made by the Court and rules that apply if directions are not complied with. Where directions are made and not complied with the rules provide further steps that the Court may take, which include the making of final orders, the imposition of restrictions on participation, or for directions to be amended or revoked.

[23] The conference on July 2015 was a directions conference held pursuant to r 416Z Family Court Rules 2002. The purpose of a directions conference is to enable a Judge to make orders and give the directions necessary to ensure that a hearing takes place as early as possible. R 416Z does not enable a Court to make any final orders unless the respondent has failed to file a notice of response within the required time, or having failed to do so attends the conference and a Judge determines pursuant to r 42 to proceed with a hearing as if the person had not appeared.

[24] The general rules about conferences are set out in r 416W. R 416W(5) entitles a Judge to do any of the relevant things listed in r 175D(2). R 175D(2) entitles the Court to make orders and directions pending determination of an application and specifically enables a Judge to settle the issues to be determined at the hearing. Nothing in r 175D(2) provides a Judge with the power to make a final

direction or order, and consequently no final order or final direction can occur at a directions conference without express consent being given.

[25] Where the interests of justice requires the variation or revocation of an order made, or a direction given at a r 175D conference. R 177[4] enables the Court to do this. Therefore a direction made settling the issues can be varied. Consequently the settling of the issues is not a final direction which is incapable of being altered or varied by the Court during the course of the proceeding.

[26] In *SLS v KJG*[5] a final parenting order as to day to day care had been made at a directions conference on the basis it was unopposed, leaving only the issue of contact for final resolution. While the main issue was the application of s 49C, Heath J observed that the appellant's express and informed consent was required to make a final parenting order at any earlier stage of the proceeding (ie before final determination by the court), that such express and informed consent was not given, and the parenting application had not being finally determined as questions of contact remained at large.

[27] In this case, the Court minutes of 2 July 2015 and 17 December 2015 both indicate that the only issue that needed to be resolved was holiday contact. Although the Court assumed that day-to-day care issues had been resolved both minutes are silent as to the nature of the resolution and whether or not the parenting orders agreed in the consent memorandum dated 18 May 2015 could be made final. Although directions were made to settle the issues to be determined at the hearing, I am not satisfied that the minutes are conclusive enough to constitute a final direction on the issue of day-to-day care.

[28] Accordingly I do not consider that the proceeding filed by Mr Cannon on 16 February 2016 was filed after a final direction or order was given in previous proceedings. For that reason I find that leave was not required by Mr Cannon under s 139A in order for the application filed by him to be commenced as a new proceeding.

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[4] R 177 refers to a 175 conference and has not been amended to refer to r 175D, although this is clearly its intent.

[5] [2015] NZHC 928

Has the application filed on 16 February 2016 been overtaken by the parent order of 12 April 2016?

[29] The final parenting order of 12 April 2016 purports to finally determine the proceedings before the Court, and on the face of it finally determine the application made by Mr Cannon on 16 February 2016. Although the order was made by consent it must to be read in light of the memorandum prepared by Lawyer for Child and signed by all parties and counsel. The memorandum records that although final agreement had been reached on holiday times, Mr Cannon did not consider that his application for shared equal care of Brody had been finally determined. Relevantly the memorandum notes that the parties had agreed in principle to "the possibility of a long term care outcome for Brody" but does not suggest that final agreements had been reached or if so what they are. On the contrary the memorandum specifies that negotiations would continue and sought that Ms Beaumont's appointment remain extant for the purposes of assisting the parties to reached final resolution.

[30] Attached to the consent memorandum was a draft final parenting order. This expressly provides that "leave be granted to enable a new parenting order to be commenced within the two year statutory period." Mr Cannon's position, that the day-to-day care issue have not been finally determined, is recognised by Judge Murfitt's minute dated 12 April 2016. This minute makes orders which purport to be final, whilst preserving the application made by Mr Cannon for future determination. The only way to reconcile the conflict between the making of a final order, whilst contemporaneously preserving the application for shared care, is to read both Mr Cannon's consent, and the order made, as conditional upon the preservation of the 16 February 2016 application. If this is the case Mr Cannon either did not believe that the consent signed by him would finally determine his application, as in his mind, issues relating to the final day-to-day care of Brody remained at large, or he believed that if it did his application remained extent and would still be determined. In these circumstances it may well have been that an interim order not a final parenting order should have been made by the Court. Weight is given to this proposition by the minutes of the Court, the content of the consent and the leave provision contained in both the draft and final parenting orders.

[31] Even if I am wrong I nevertheless consider that the application made by Mr Cannon remains extant and should be commenced by the Court on the basis:

(a) Of my findings that s 139A leave was not required before the proceedings be commenced.

(b) That it was not at any time envisaged by Mr Cannon that the consent signed would finally determine the day-to-day care issue in relation to Brody;

(c) That the consent given by the parties and relied upon in the making of the final order included a condition that leave be granted. I am satisfied that this meets the requirement of r 139A(4) that leave should be granted, as every party to the proceeding to the in final order consented to its commencement.

[32] Accordingly I make the following orders and directions:

(a) The application filed by Mr Cannon does not require s 139A leave, and remains active.

(b) Ms Thorpe is to file a notice of response and affidavit in support within 21 days of today's date.

(c) A directions conference is to be allocated at a time fixed by the Registrar, so that further orders and directions can be made.

(d) Both parties are to file a directions conference memorandum in accordance with r 416ZA.

G S Collin
Family Court Judge