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IN THE FAMILY COURT
AT WELLINGTON

FAM-2008-085-001079
[2016] NZFC 4632

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	IMOGEN LEIGH Applicant
AND	ROY OWSTON Respondent

Hearing:	2 June 2016
Appearances:	R Newberry for Mother R Buchanan for Father
Judgment:	9 June 2016

JUDGMENT OF JUDGE A P WALSH
[Application for Rehearing]

Introduction

[1] The mother has applied for a rehearing of a judgment I delivered 9 October 2015 in respect of an award of costs pursuant to s 142 of the Care of Children Act 2004 (the Act).

[2] The application for re-hearing was filed out of time. At a conference 18 December 2015 I directed time be extended for filing of the application for a rehearing. I was satisfied the mother had taken all reasonable steps to file the application for rehearing given the circumstances disclosed in her supporting affidavit.

[3] Mr Buchanan advised he would take further instructions from the father as he anticipated the father opposed the application. He further indicated there may be an issue relating to costs awarded against the father in respect of his application for an order preventing the removal of the child from New Zealand.

[4] I directed the matter be set down for a submissions only hearing. No further steps were taken by the father. Mr Buchanan appeared at the hearing and sought the indulgence of the Court to make submissions. Mr Newberry opposed submissions being made for the father in respect of the application for a rehearing. He argued Family Court Rule (FCR) 41 had not been complied with. He submitted FCR 42 should be applied. FCR 42(2) provides if a person appears on the day of the hearing of the application to oppose or support the application the judge must decide whether it is in the interest of justice to allow the person to be heard. Applying FCR 42(2) I must have regard to FCR 42(3) and take into account the following matters:

- Any reason given by the person for failing to comply with FCR 41.
- The effect of the person's failure to comply with Rule 41 on:
  - other parties to the proceedings;
  - the management of the proceeding.

[5] Mr Buchanan acknowledged frankly no notice of defence had been filed through oversight on his part. In those circumstances he advised the father would abide the decision of the Court regarding the application for rehearing but he wished to be heard on the issue of costs if the rehearing was granted. In these circumstances I ruled I would hear submissions from Mr Newberry in respect of the application for the rehearing and would reserve my decision on that application and then hear submissions on the issue of costs. In making that decision I took account of FCR 42(4)(a) which enables the judge to allow a person to be heard in relation to the application on such terms as the judge thinks fit.

Background

[6] The background to the proceedings filed in January 2015 is summarised [11] to [14] of my judgment 9 October 2015:

> [11] On 27 November 2014 the mother telephoned the father, to advise that she had contacted Child Youth and Family Services (CYFS) and the Police about a disclosure made by Mia she had been molested by a 14 year old boy (X), who was a son of the father's current partner. It was alleged Mia had been sexually abused while she was in the care of the father.
>
> [12] The father said he was "*shocked and appalled at this news*". He advised the mother he had not seen X for 4 months and claimed Mia would be safe at his house. In the circumstances, however, he agreed to forgo the care of Mia for 4 nights. On 1 December 2014 Mia underwent an evidential interview. It transpired she made a detailed disclosure of being sexually abused by X. The father claimed the mother phoned him after the evidential interview claiming CYFS advised her she was to have full care of Mia. When the father sought information about the evidential interview he said the mother had been advised not to share that information with him. In these circumstances he instructed his solicitor to make enquiries with the mother's solicitor, CYFS and the Police. He produced copies of correspondence exchanged between the solicitors for the parties. It was evident the conflict between the parties escalated with allegations and counter allegations being made. The father felt he was being punished for the sexual abuse of Mia. He was concerned the mother had denied him having contact of Mia.
>
> [13] The mother responded she was concerned the sexual abuse of Mia by X had occurred at the father's home, the home of the father's partner and the home of the father's mother. The mother confirmed this pattern of sexual abuse had not come to the attention of the parties until late November/early December 2014. The mother claimed there were two issues in dispute between the parties:

(a) The first issue was whether or not it was therapeutically helpful for Mia to return to the places of abuse; the mother felt Mia should not go to these places but the father did not agree.

(b) The second issue was whether Mia should be medicated as part of a treatment regime; a doctor at CAMHS had prescribed an antidepressant for Mia but the father had expressed his disagreement to such medication. It appeared the father had not been initially consulted about this issue

[14] Extensive affidavit evidence was subsequently filed by the parties between February 2015 and April 2015. The intensity of the ongoing conflict between the parties is evident in the allegations and counter allegations each made against the other.

[7] Lawyer for Mia, Ms Lewes, filed a report 20 February 2015 reporting on enquiries with CYF, the Police and CAMHS and advised:

- Mia had made clear disclosures of sexual abuse, CYF considered the abuse was serious and the mother had protectively. Concerns were raised about supervision neglect as Mia had been left with X for periods which gave the opportunity for abuse to occur.

- Police considered Mia had made very clear disclosures of sexual abuse.

- Enquiries with the psychiatrist at CAMHS indicated Mia had been traumatised and was very distressed about the abuse. The psychiatrist had attempted to discuss matters with the father who had sent emails indicating he was opposed to anti-depressant medication being prescribed for Mia. There was concern she had expressed suicidal thoughts.

[8] Ms Lewes advised the father needed to consider Mia had been sexually abused and there were likely to be a number of complex issues for her. Ms Lewes was concerned the father might not have understood the nature and extent of abuse; he had heard it second hand from the mother and he did not trust her. He had told Ms Lewes if contact was not at his house then he would walk away and not have contact.

[9] On 26 January 2015, pursuant to s 7A(4)(b)(i) of the Act, the father filed applications to:

- To enforce a parenting order.
- To admonish the mother.
- For a bond to be fixed.
- For costs.
- For an order preventing removal.

All these applications were opposed by the mother.

[10] Subsequently the father withdrew from the proceedings. On 21 August 2015, at a formal proof hearing, I made a final parenting order granting the day to day care of Mia to the mother. I made no orders as to contact. The father advised he had become disillusioned with the Court process and that was the reason for his withdrawal. In my judgment 21 August 2015 I recorded it was important proceedings be finally resolved and at [4] noted:

> I have heard costs submissions from counsel today. Ms Leigh is seeking costs calculated on a 2B basis of $12,015. Mr Buchanan advised the application for cost is opposed and submits no cost should be awarded. I will need time to review the file given the issues raised in respect of the application for costs.

As noted the father had applied for an order preventing the removal of Mia from New Zealand. Mr Buchanan confirmed he had no instructions in respect of that application and it was dismissed.

The Law – Application for Rehearing

[11] FCRs 209 to 213 govern the procedure relating to a rehearing.

[12] FCR 209(1) provides a party may apply for a rehearing of all or any part of an application on the grounds there has been a miscarriage of justice. The application must state the circumstances alleged which have resulted in a miscarriage of justice.

[13] Under FCR 210, on an application for a rehearing, the Court may order a rehearing of all or any part of the application if, and only if, it considers there has been a miscarriage of justice in the proceedings.

[14] FCR 211 stipulates the Court must not receive an affidavit from a witness that explains or adds to oral evidence he or she gave at the hearing or an affidavit with any facts that might have been given in evidence at the hearing. The Court must not consider circumstances that do not relate to a miscarriage of justice.

[15] FCR 212 provides a Court may order a rehearing on any terms it thinks fit.

The Mother's Application

[16] In her affidavit sworn 13 November 2015 the mother argued she had succeeded in the proceedings when the father withdrew his applications to enforce a parenting order for admonishment of the mother and for a bond to be imposed. She understood the Court would consider this particular set of proceedings when addressing the issues of costs. She did not understand the Court would consider other aspects of various proceedings between her and the father without her or her lawyer having the opportunity to provide evidence or make submissions on which part or parts of the previous proceedings were relevant or what weight should be given to them.

[17] The mother was particularly concerned I had referred to the judgment 10 June 2010 of Judge Munro and a psychological report 10 April 2013 completed by Ms J Leech, a clinical psychologist.

[18] The mother's major concern with the referral to and reliance upon Ms Leech's report arose from the fact Ms Leech was working with Mia and the parties

over the period during which it had been established Mia had been sexually abused by X. She was concerned it was unclear when the sexual abuse began and ended. She did not know the impact of X's behaviours on Mia. For these reasons she did not have confidence in the opinions expressed in Ms Leech's report. There had been no opportunity for her to be questioned on the contents of her report.

[19] The mother also had a major concern about the judgment of Judge Munro; she accepted the judgment was made but was very concerned about it. She had sought advice about appealing the judgment but at that stage she did not have the resources financially to challenge by way of appeal or otherwise.

[20] The mother argued Judge Munro was deciding two issues; Mia's care arrangements and whether or not there should be a protection order. She contended Judge Munro ignored highly relevant evidence concerning the protection application. She referred to the judgment of Judge Aubin 28 September 2009 when she first sought the protection order. He had found it was not necessary to make a protection order although the father had used domestic violence against the mother. He referred to emails and communications he had sent to the mother. He considered the wording and the language of the father was objectionable and abusive.

[21] Some months later the mother applied for a protection order alleging the father had been psychologically abusive. A s 133 report 3 February 2010 had been prepared in respect of the proceedings under the Act. Given the contents of that report the mother applied to have the report admitted in evidence in the domestic violence proceedings. The father opposed that application. Judge Moss dealt with that issue and in her judgment 25 March 2010 determined the report should be admitted in the domestic violence hearing. Judge Moss noted there were both records of direct observations in the report's conclusions, based on the psychologist's analysis of data, which if accepted as credible evidence by the Court, might lead to findings of psychological abuse against Mia and the mother.

[22] The mother's concerns about the judgment of Judge Munro can be summarised as follows:

- Judge Munro ignored the way in which the father used the process of the s 133 psychological report to explicitly communicate further abusive messages to her.

- While Judge Munro was critical of the psychologist she did not make any findings as to whether or not the psychologist's observations or conclusions were reliable.

- Judge Munro did not consider the psychologist's report or her oral evidence in relation to the protection application.

- Judge Munro totally discounted all of the psychologist's expert opinion concerning contact and care arrangements for Mia and did not comment on or consider most of the psychologist's written or oral evidence in her judgment.

[23] The mother was not asking the Court to revisit the issue of whether a protection order should be made but she was concerned I had referred to the entrenched conflict between her and the father and had described it "*in an even handed way, as if each of us are equally or in different ways comparably responsible for creating and sustaining that conflict*". She contended if I was going to refer to Judge Munro's judgment and Ms Leech's report it was important the judgments of Judge Aubin and Judge Moss and the report of the psychologist were also considered. These other parts of the previous Court proceedings were relevant to a process of evaluating whether the father or she had made significantly different contributions to the creation and sustaining of the conflict.

[24] The mother argued the judgment of Judge Aubin and the report of the psychologist made it clear the father had behaved in ways that were psychologically abusive of her for a long period and that pattern of behaviour had made it very difficult for the parties to communicate civilly. She noted Ms Lewes reported

various professionals had expressed difficulty in communicating with the father. He had not adhered to the advice of his own lawyer or the advice of Judge Ullrich that he remain engaged with Mia.

[25] The mother disagreed with Judge Munro's finding she had contributed to the conflict by making a series of applications to the Court and had not tried to resolve difficulties through negotiations or other processes. She acknowledged she had made a number of applications but maintained almost all of them had been justified and necessary. Attempts to negotiate with the father had been unsuccessful; she referred to other proceedings between the parties relating spousal maintenance, child support and relationship property.

[26] The mother claimed when the father made his applications on 23 January 2015 he was aware Mia had been prescribed medication. He had discussed that issue with the doctor who prescribed the medication and had made it clear he did not accept the doctor's recommendation. He did not accept advice from CAMHS Mia would not be helped in her therapeutic process by going back to places where she had been abused. Throughout this process she had given the highest priority to Mia's needs. Given the history of psychological abuse and communication difficulties she was aware the father did not trust her as a source of information; she had provided him with details of the various professionals involved with Mia.

[27] The mother took issue with my observation, at the formal proof hearing, that the evidence had not been tested as a result of the father withdrawing from the proceedings. The mother had been present at that hearing and had confirmed the accuracy of her evidence. Her evidence was not questioned or challenged by counsel for the father or by the Court.

[28] Having regard to her concerns about the previous proceedings the mother believed it was unfair the Court was "*even handed*" in its description of the evidence not being tested when she had remained engaged in the Court process and had made herself available for questioning but was not challenged.

Submissions for Mother and Analsyis

[29] Mr Newberry submitted the specific miscarriage of justice related to an alleged breach of the rules of natural justice, which are incorporated into New Zealand law in s 27(1) of the New Zealand Bill of Rights Act 1990 which confirms the right to be heard concerning matters being considered by the decision maker.

[30] Mr Newberry referred to [4] of my judgment 21 August 2015. He understood from the final sentence it was my intention to review the file with such review to be confined to all the documentation on the file arising from the applications made by the father on 23 January 2015. The costs sought related specifically and only to those proceedings. He argued it was clear from my judgment 9 October 2015, my review of the file encompassed parts of the Court file between the parties before the relevant proceedings. Neither the mother or he were provided with an opportunity to provide evidence or make submissions concerning which part of parts of the previous proceedings between the parties should be taken into account and what weight or significance should be given to them. He submitted this was a breach of rules of natural justice as neither the mother or he had the opportunity to be heard concerning matters clearly being taken into account by me.

[31] Mr Newberry argued it was clear from [6] and [7] of the judgment I had taken into account the judgment 10 June 2010 of Judge Munro and Ms Leech's report 10 April 2013. He argued these two documents appeared to be cited in my judgment in relation to the "*indisputable conclusion that litigation has been intense and entrenched between these parties; and also in relation to an even handed conclusion that both parents are responsible for the higher degree of conflict between them"*. Mr Newberry understood the joint responsibility for conflict influenced the discretionary decision not to award costs in accord with the District Court Rule (DCR) 14.2(a) which can apply when the Court exercises its discretion regarding costs under FCR 207.

[32] Referring to the mother's affidavit filed in support of her application for rehearing, Mr Newberry submitted the Court should not give much weight to either the judgment of Judge Munro or the psychologist report. He further submitted if the

Court was minded to consider previous parts of the proceedings it should take into account the following judgments and minutes:

- Judgment of Judge Aubin 28 September 2009.
- Judgment of Judge Moss 25 March 2010.
- Minute of Judge Moss 29 April 2010.

and the s 133 psychological report 3 September 2010 which was considered by Judge Munro.

[33] Mr Newberry further argued if the Court was going to take into account previous proceedings, it should read the evidence filed in support of the application for a protection order, which was considered by Judge Aubin and also the transcript of oral evidence heard before Judge Munro, particularly the examination of the psychologist – transcript pages 186 to 354. When considering these parts of the file Mr Newberry submitted caution, as expressed by Dr Bruce Smyth in his paper "*Enduring child custody disputes – high conflict or pathological hatred"*, (NZ Family Law Conference October 2015 page 245) was relevant:

> The descriptor *'high conflict'* oversimplifies the nature of destructive dynamics in the small but significant group of separated parents who remain stuck in legal disputes and chronic parental acrimony.

Mr Newberry submitted these other parts of the previous proceedings made it clear there was a high risk of what Dr Smyth called "*oversimplification*" in reputing an even handed description of the parties as being engaged in high conflict.

[34] Mr Newberry submitted the Court had two options in relation to addressing the alleged miscarriage of justice:

(a) It could take into account other parts of the proceedings as referred to and in the evidence of the mother or

(b) It could decide that it was not in a position to make any clear conclusion concerning the origin and sustaining of the conflict between the parties and base its decision only on the proceedings in issue i.e from 23 January 2015.

[35] If the Court took the approach of just basing the costs decision on proceedings in issue then the first principle relating to costs as set out in DCR 14.2(a) applied, given the father's failure in relation to every remedy he applied for and the success of the mother in application for variation of the existing parenting order.

[36] In my judgment 9 October I referred to the ongoing conflict between the parties at [4] to [8].

> [4] For most of Mia's life the parties have been locked in litigation in the Family Court. For a number of years there has been ongoing litigation relating to division of relationship property, spousal maintenance, child support and parenting arrangements relating to Mia. The litigation has been intense; there have been a number of appeals to the High Court and to the Court of Appeal regarding the various proceedings. Presently there are proceedings in the Court of Appeal relating to relationship property.
>
> [5] There is no doubt the mother and the father are capable parents but a point has been reached in this litigation, which has become entrenched, where there is no prospect of the parties being able to set aside the hostility between them and focus on parenting Mia.
>
> [6] Time and again during the litigation between the parties the Court has noted the entrenched nature of the litigation. In May 2010 there was a defended hearing over parenting arrangements over Mia. The mother had applied to reduce contact, particularly to remove overnight contact, between Mia and the father. She sought a variation to an interim parenting order and had also applied for a protection order against the father. In a reserve judgment delivered 10 June 2010 Judge Munro commented at [5]:
>
> > The most significant factor relevant to these proceedings is that Ms Leigh and Mr Owston are totally embroiled in litigation. In addition to the present proceedings, there are currently before the Court proceedings in relation to child support, spousal maintenance and relationship property. Their lives are largely dominated by this extensive litigation, of which these proceedings are but apart.
>
> [7] In 2013 the parties privately instructed a clinical psychologist, with the instruction funded privately by the father, to provide advice and therapy for the ongoing needs of Mia and her care arrangements. The clinical psychologist completed a report 10 April 2013. At paragraph 38.2 the clinical psychologist observed:

38.2 There are a number of factors contributing to Mia's emotional and behavioural difficulties including a fragile attachment history complicated by the parent's early separation, changes to her living situation, new relationships for each of her parents and temperamental factors belonging to Mia, but the sustained parental conflict is undoubtedly the most significant contributing factor. Specifically, the inability of the parents to communicate effectively to address Mia's needs has left her struggling to integrate her experience across her two homes. Their lack of agreement on how her day to day care is to be managed is undermining her security and leaving her in a bind as she strives to please them both. She is also vulnerable to the repeated escalations in parental stress linked to the protracted litigation and she has an awareness of the involvement of the Court without capacity for understanding what that means. Mia needs to be able to self regulate in keeping with her age and stage of development if she is to achieve a healthy sense of self and she will be unable to do this without significant change at the parent level.

38.3 Both parents have the capacity to meet Mia's physical and intellectual needs, but their inability to resolve the conflict is undermining their respective capacities to meet Mia's emotional needs. This is not a problem of parenting capacity per se, but rather one that belongs to the parental relationship dynamic.

38.4 The effect on Mia of the parental conflict is already manifest in her emotional and behavioural dysregulation and her high emotional needs. If left unchecked it can be expected that Mia will struggle to negotiate her developmental milestones. Peer relationships will be problematic, school achievement will suffer and she will be vulnerable to anxiety and depression as she matures. As an adult, intimate relationships will be difficult to maintain.

38.5 The data indicate that Mia's attachment relationships with her mother and with her father are strong but they have yet to become secure. There is evidence of significant separation anxiety and also resistance with Mia in relationship with her mother. There is also resistance and a tendency to disorganisation evident in Mia's aggressive behaviour toward her father. With both parents Mia's emotional needs are high. The continued conflict is a significant compounding factor when considering Mia's insecurity and likely of greater significance than the attachment history on its own.

38.6 The parents seem to understand their conflicted relationship is problematic for Mia. Both want to change, however, they each view the other as to blame where the answer lies in each one understanding and managing his/her own behaviour. This is unlikely to be achieved without ongoing engagement and counselling. Moderation of the conflict and

> improved communication will alleviate Mia's felt distress paving the way for more secure attachments with each parent to emerge.
>
> [8] I have set out this extract from the report to provide the background to further proceedings under the Care of Children Act 2004 (the Act), initiated by the father in January 2015. I record there had been other proceedings under the Act between April 2013 and January 2015. In June 2013 a parenting order was made by consent which set out a detailed shared care arrangement. Subsequently a dispute arose over which school Mia should attend. A defended hearing was required to resolve that issue in November 2013; the mother wished to change schools but the Court determined Mia was to remain at the school she had been attending.

[37] When I noted in [4] of my judgment 21 August 2015 I would need to review the file, given the issues raised in respect of the application for costs, I was conscious of the history of litigation under the Act between the parties since 2009 coupled with litigation under the Domestic Violence Act 1995 since 2009. Judgments under the Act have been given as follows:

- 22 April 2009 – Judge Grace
- 10 June 2010 – Judge Munro
  (this judgement also dealt with the application for a protection order).
- 28 November 2013 – Judge Grace
- 2 February 2015 – Judge Ullrich QC.

Three judgments have been given under the Domestic Violence Act:

- 28 September 2009 – Judge Aubin
- 25 March 2010 – Judge Moss (re-admissibility of s 133 report)
- 10 June 2010 – Judge Munro (proceedings also dealt with application under Care of Children Act)

[38] I do not consider the issue of costs in respect of the proceedings filed in January 2015 can be considered in isolation from the earlier proceedings.

[39] As recorded [6] of my judgment 9 October 2015, the Court had noted, time and again, the entrenched nature of the litigation. I considered the observation of Judge Munro at [5] of her judgment about the parties being "*totally embroiled in litigation*" was relevant. These comments were made by her after hearing and seeing the parties give evidence. She had considered the 133 report and the report writer's oral evidence. She determined the applications under the Act and the Domestic Violence Act.

[40] The judgment of Judge Munro was not appealed. In these circumstances I was satisfied I was entitled to note Judge Munro's observations about the conflict and litigation between the parties. Although I referred to her comments at [5] of her judgment in my judgment 9 October 2015, I noted she made further observations about the conflict between the parties at [6]:

> I highlight the importance of the ongoing litigation because it has created an atmosphere of conflict and distrust between the parties which has a direct bearing on Mia, and is a major factor to be considered in assessing the care arrangements which will best meet her needs.

Further at [23] she observed:

> Indisputably, a major factor is that the conflict remains at a high level. It was clear from the parties' demeanour while giving evidence, and in fact throughout the hearing, that tension runs high. There can be no doubt that that conflict and tension affects Mia. In [report writer's] opinion the ongoing conflict between the parents is significant and a reduction of that conflict is required in Mia's interest.

At [32] Judge Munro observed:

> I find that the ongoing conflict between the parents, which appears to escalate as the litigation escalates, is the single greatest negative factor affecting this child. I remind myself that I am bound to consider the welfare and best interests of the child in her particular circumstances. Mia's particular circumstances are that she is the child of two intelligent, successful parents who both love her dearly and whom she loves dearly….

[41] I have considered the mother's "*major*" concerns regarding Ms Leech's report and Judge Munro's judgment. For the reasons expressed in her affidavit she did not have confidence in the opinions expressed by Ms Leech. When I reviewed Ms Leech's report I noted these factors:

- In 2013 the parties privately instructed Ms Leech to provide advice and therapy for Mia's ongoing needs and her care arrangements.

- Ms Leech's observations at paragraphs 38.2 to 38.6 explained the history and dynamics of the conflict between the parties. While noting a number of factors contributing to Mia's emotional and behavioural difficulties she considered the sustained conflict between the parties was "*undoubtedly the most significant factor*".

- Ms Leech's description of the conflict was not confined to the period Mia had been abused by X.

- The parties appeared to understand their conflicted relationship was problematic. Although they wanted to change each viewed the other as to blame when the answer was to manage and understand their own behaviour.

- Although Ms Leech was not appointed by the Court she had been jointly instructed by the parties and had acted independently in that role.

[42] There was a further dispute between the parties over the schooling of Mia. The Court was required to resolve that dispute in November 2013. I considered the need for that hearing demonstrated the ongoing conflict between the parents.

[43] The mother asserted Judge Munro ignored highly relevant evidence; she was particularly concerned Judge Munro had given insufficient weight to the psychological evidence. She noted the comments of Judge Moss in her judgment of 25 March 2010 about the admissibility of the psychological evidence. It must be remembered that Judge Moss was required to determine the admissibility of the

s 133 report. While she expressed views about the relevance of the report in the domestic violence proceedings she did not make any findings. That report was considered by Judge Munro in her judgment.

[44] As noted, in supporting the mother's concerns, Mr Newberry submitted if I referred to previous proceedings I should have regard to the judgments of Judges Aubin and Moss, the minute of Judge Moss and the s 133 report as well as reading the evidence filed in the protection proceedings and the transcript of oral evidence given at the hearing before Judge Munro.

[45] I do not accept the concerns of the mother or Mr Newberry's submissions for these reasons:

(a) Findings were made by Judge Aubin as at 28 September 2009. His judgment was not appealed. He was not satisfied it was necessary to make a protection order. He was critical of aspects of the father's behaviour.

(b) Findings were made by Judge Munro as at 10 June 2010. Her judgment was not appealed.

(c) It would be completely inappropriate for me to review the affidavit evidence and transcripts of the oral evidence relevant to those judgments and make my own findings. In effect I would be rehearing the applications which have already been judicially determined and not appealed.

(d) In referring to the conflict between the parties I noted the substantial history of that conflict from the perspective of the welfare and best interest of Mia. I was not in a position to conduct a new analysis of the cause of that conflict given the previous findings made in the course of litigation under the Care of Children Act and the Domestic Violence Act.

(e) Mr Newberry's submitted it was unsafe to go back to previous Court files because of conflicted findings. I do not accept that submission. A review of the judgments under the Care of Children Act confirms the concerns of the Court about the ongoing conflict between the parties. As to Mr Newberry's alternative submission I should confine my assessment of what happened since 23 January 2015 I consider this approach is inappropriate given the history of litigation under the Act and the concerns expressed by other judges about this conflict between the parties.

[46] Mr Newberry submitted a further issue of alleged miscarriage of justice arose from the way I considered the evidence of the parties in the judgment 9 October 2015. He noted I had observed at [21] of my judgment 9 October 2015 that such evidence "*was not tested as the father elected to withdraw from the proceedings"*. He argued this was an even handed conclusion that ignored the fact when the mother had appeared in Court on 21 August 2015 she had been called to swear as to the veracity of her filed affidavit evidence. He noted Mr Buchanan, Ms Lewes and the Court had the opportunity to question her or test her evidence but no questions were put to her. In contrast the father had not made himself available and so did not provide an opportunity for his evidence to be tested. In those circumstances he submitted the evidence of the mother should be give more weight than that of the father.

[47] At the hearing on 21 August 2015 the matter proceeded by way of formal proof after advice was confirmed by Mr Buchanan that the father was withdrawing from the proceedings. Concern was expressed by Ms Lewes and by myself about the decision of the father having regard to the welfare and best interest of Mia. The reality for the father, however, was he had become frustrated with the Court process and the impact of the litigation on Mia. The mother was seeking day to day care of Mia. In these circumstances I was satisfied she should be granted the day to day care of Mia to recognise the reality that she was the primary caregiver at that time. As the matter proceeded by way of formal proof, no findings were made by me regarding the merits of the position of the mother and father. The reality was the mother had been and would continue to be the primary caregiver.

[48] In reaching my decision about costs I noted at [25] the judgment of Dobson J in *Allan v Kettle* (High Court Wellington CIV 2008-485-165) when he observed what set costs considerations in cases under the Act apart from all others was the primacy required to be given to the welfare and best interests of the child as specified in s 4 of the Act.

[49] Having regard to the facts as set out in [31] to [38] of my judgment 9 October 2015 in the exercise of my discretion under s 142 of the Act I ordered the father to pay cost to the mother in the sum of $800. I was satisfied there was no basis for his application for an order preventing the removal of Mia from New Zealand and I considered the mother was entitled to award of costs in respect of that application.

Decision

[50] For the reasons I have set out I am not satisfied a miscarriage of justice has been established to justify a rehearing of the mother's application for costs. Accordingly the application is dismissed.

A P Walsh
Family Court Judge

Signed at am/pm June 2016