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

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IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2015-009-000855
[2016] NZFC 4016

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	BRIAR LINDON Applicant
AND	BENNETT LINDON Respondent

Hearing:	In Chambers on the papers
Appearances:	R Court for the Applicant R Crossman for the Respondent J Wilding Lawyer for the Children
Judgment:	23 May 2016

CHAMBERS JUDGMENT OF JUDGE E. SMITH
[AS TO INTER-PARTY COSTS]

The Application

[1] This is a defended indemnity costs application by the applicant ("Mother") against the respondent ("Father"). At all material times Mother was legally aided and Father was not.

[2] In essence Mother seeks a costs award on an indemnity basis to cover her complete costs of $7,996.64 being her total costs and billings rendered to the Legal Services Agency, which Mother says she has to repay.

Issues

[3] Two issues present, namely:

(a) Should costs be awarded against Father? and if so

(b) What ought to be the quantum of such an award?

The Law

[4] It is clear there is jurisdiction for the Court to make an award for costs in Care of Children Act proceedings pursuant to s 142 of that Act which provides:

> **142 Costs**
>
> (1) In any proceedings under this Act, the Court may make any order as to costs it thinks fit.
>
> (2) An order under this section may be made either in addition to, or instead of, an order under section 71 or section 87 or section 121.
>
> (3) This section is subject to sections 131 and 135.

[5] In that regard, I consider the law remains as outlined by my decision of *AHM v EAD*[1] paragraphs [7] to [9] and [11] in which I said (albeit now the District Courts Rules have been amended so that rules 14.2 to 14.12 apply):

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[1] 16 March 2010, FC Christchurch, FAM-2007-009-001579.

[7] There is clearly jurisdiction for the Court to award costs. Section 142 of the Care of Children Act 2004 provides:

> **142 Costs**
>
> (1) In any proceedings under this Act, the Court may make any order as to costs it thinks fit.
>
> (2) An order under this section may be made either in addition to, or instead of, an order under section 71 or section 87 or section 121.

[8] Rule 20 of the Family Courts Amendment Rules (No 2) 2009 (SR 2009/292) amended previous rule 207 of the Family Courts Rules which now provides:

> **207 Costs at discretion of Court**
>
> (1) The Court has discretion to determine the costs of—
>
> (a) any proceeding:
>
> (b) any step in a proceeding:
>
> (c) any matter incidental to a proceeding.
>
> (2) In exercising that discretion, the Court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:
>
> …

Should the Court award costs?

[9] While there is jurisdiction to award costs, it has long been emphasised that costs awards are discretionary in family law matters and do not always follow the event of success in favour of the successful party. While there remains potentially a differing view as to whether or not costs ordinarily should follow success in family law statutes, I prefer an approach in such matters that highlights the Court's discretion to award in the first place. In assessing whether or not to exercise the discretion to award costs, the Court should have regard to all relevant matters but particularly in cases involving childcare and/or child protection, such matters ought to include (but not exclusively) the following, namely:

> (a) The overriding need to ensure effect is given to the paramountcy principles in section 4 of the Care of Children Act 2004 if applicable;
>
> (b) The object of the legislation;
>
> (c) The disputes in question;
>
> (d) The way the parties and their advisors conducted the proceedings;
>
> (e) The means of the parties;

(f) The actual cost incurred by the parties;

(g) The overall interests of justice;

(h) A need to be mindful that a genuine and reasonable litigant ought not to fear an award of costs and given the inquisitorial jurisdiction it is important all relevant arguments are heard.

…

[11] One of the reasons why traditionally costs have not followed the event of success in family law matters and particularly those involving children is because welfare arguments can be finely balanced and legitimate positions argued by both parties, and given the inquisitorial nature of the proceedings genuine arguments should always be able to be considered. Parents often raise arguments or positions that ought properly to be heard and determined by a Court and although ultimately unsuccessful, it cannot be said in general terms the arguments were unmeritorious in being raised for consideration . Equally, there are occasions in family law matters particularly those involving children when a party's position may be significantly unmeritorious on any view.

[6] Not only is it discretionary whether or not Court awards costs so is the level of any costs awarded similarly discretionary. With respect to the discretion as to quantum and whether or not costs ought to be awarded by scale, I similarly refer and adopt my comments I formulated in *AHM v EAD* at paragraphs [17] to [21] where I said:

What ought to be the quantum of costs awarded to the respondent in these circumstances?

[17] There remains a continuing, debate with opposing High Court authority as to whether in circumstances where the Court does exercise its discretion to award costs whether the quantum ought to be in accordance with "scale" under now rules 4.1 to 4.12 of the District Court Rules 2009 or whether the "scale" ought to be but a tool in determining ultimate quantum because of the diversity of factors and situations within the Family Court context that render a Family Court Judge to retain full discretion not only as to award of costs but the quantum thereof.

[18] There are powerful reasons for invoking this scale such as the advantages of consistency, predictability and transparency. Balanced against that are again the diversity of facts and situations and the wide ranging considerations that can be applicable in family law circumstances where answers to legal questions may not necessarily be obviously black or white or right or wrong and therefore the unfettered discretion to award not only costs but at a level deemed fit by the Court ought to be preserved.

[19] Randerson J in *Radisich v Taylor* (albeit in considering the then rule 45 DCR 1992 the predecessor to now rules of the DCR 2009) in considering

how the question of costs was to be fixed in Relationship Property Act 1976 matters said:

> [19] Rule 207(a) provides that r 45 District Court Rules applies to proceedings in the Family Court "so far as applicable and with all necessary modifications". Rule 45 deals with costs. The only other rule relating to costs in the Family Court Rules is r 238 which provides that the costs of an application are in the discretion of the Court and if allowed, are costs in the proceedings unless the Court or the Registrar orders otherwise. While r 238 on its face appears to give the Court a broad discretion, it must be read in the light of r 207 which imports the District Courts Rules in relation to costs.
>
> ...
>
> [23] But the legislative intention is also clear that, in proceedings in the Family Courts, costs are to be dealt with in accordance with the District Courts Rules as applicable and with all necessary modifications, subject, of course, to any contrary statutory provision. It follows that the authorities dealing with the costs rules in the general courts are also applicable to proceedings in the Family Courts, as Harrison J found in Anderson.
>
> [24] The decision of this Court in *L v W* (above) was given in 2003, prior to the introduction of the new costs regime for the District Court with effect from 1 February 2005. It must therefore be considered in that light, and in the light of the principles established later by the Court of Appeal in *Holdfast*.
>
> [25] Applying the principles enunciated in *Holdfast* to the present case, the correct approach for the Judge to have adopted was:
>
> > a) to select the appropriate category for the various steps in the proceeding under r 47 and the appropriate band under r 47B and Schedule 2A District Court Rules.
> >
> > (b) Having arrived at the appropriate scale costs, to consider whether to award increased costs or indemnity costs under r 47C.

[20] The application of scale costs by reference to appropriate daily recovery rates and determination of reasonable time as now provided in the District Court Rules 2009 (see Rule 4.4 and 4.5 thereof) is itself able to be varied by an award of increased costs, indemnity costs or alternatively a reduction or refusal of costs (refer rr 4.6 and 4.7).

[21] Section 142 of the COCA tends to support a wide discretion both as to whether costs ought to be awarded and if so, the quantum to be fixed. There may be good reason why "scale" costs ought not to apply to Family Court proceedings but a close look at rule 4.6 and 4.7 which permit increased costs, indemnity costs and reduced costs are wide enough to enable appropriate alteration to scale where a failure to do so would be unjust. This includes consideration of all matters of the type Heath J in *L v W* was concerned to ensure were balanced in a just cost award given the sometimes differing nature of family law proceedings. The advantage

> however of using "scale" as a starting point and then adjusting it appropriately in accordance with rules 4.6 or 4.7 is that the award is transparent, likely more predictable (at least at starting point) and removes possible arbitrariness. I consider the applicability of rules 4.6 and 4.7, where appropriate. enables the "custom fit" of costs awards for family law matters where that is demanded.

[7] While it is clear the quantum is discretionary it would also be fair to say that cases of more recent times, particularly Higher Courts in which they are deciding costs matter under Family Law Acts and many Judges of the Family Court itself are readily applying the scale under the District Court Rules. Certainly such an approach is available but given the extraordinary permutations of family law matters I maintain that the application of the Schedules under the District Courts Rules does not have to be employed but if not, it seems sensible to articulate the Court's reasons as to any quantum finding.

[8] Albeit more recently, however, in a matter involving a costs appeal, Priestley J quashed an order made by the Family Court Judge for costs of $6105.00 in a COCA matter saying, having identified the merits were comparable[2]:

> *[16] In awarding costs it is clear High Court and Court of Appeal authority that Family Court Judges need to give consideration to the impact of a costs award on the parent and thereby on the welfare of the children involved. As a general rule of thumb, in the absence of behaviour which has led to protracted litigation, a reasonable stance is, or general obdurateness, finely balanced cases do not usually attract costs.*
>
> *[17] I also observe, although it is ultimately a matter for the Rules Committee and the profession, that arguments can be made that general scheme of costs, as described under the District Court Rules 2009, might not necessarily be suitable across the board for Family Court litigation. Some consideration may be given to a separate costs regime for the Family Court.*

[9] Further, recently in *H v M*[3] Keane J emphasised a consideration of the child's interests remains completely apposite in cost applications where he said:

> …
>
> **Costs principles**
>
> [8] Section 142(1) of the Care of Children Act 2004 says rather than "In any proceeding under this Act, the Court may make any order as to costs it

[2] *PRH v CTB* (CIV-2011-419-1739, Hamilton, Priestly J)
[3] *H v M* [2015] NZHC 3264 (16 December 2015

> thinks fit"; and in *Hawthorne v Cox* the Court of Appeal expressed the preliminary opinion that any award must be consistent with the s 4 principle making the welfare of the child "the first and paramount consideration".
>
> [9] In that case the Court endorsed Panckhurst J's conclusion at first instance that, when deciding whether to make a costs award and in what amount, it is necessary to assess what impact an award would have on the parents and their ability to care for the child and to work co-operatively in the child's best interests; and as he said, the impact of an award can be more than economic.
>
> [10] Furthermore, as he said also, parents, acting in the interests of their children, and who seek the Court's assistance, should not be inhibited by the risk of a costs award. An award should be reserved for the case where a parent pursues litigation unreasonably without regard to a child's interests.

[10] In my view, the tenet that costs decisions under the Care of Children Act 2004 matters in particular must consider what is in the child's welfare and interests as a matter of paramountcy, strengthens the argument that the application of the District Court Rules is permissible, at times useful, but is not mandatory, determinative or should not be slavishly followed.

[11] For clarity I note at paragraph [3] of Father's counsel's submissions, while counsel acknowledges inter-party costs in Care of Children Act matters are discretionary (which is right), counsel advocates they will normally be awarded "only in exceptional circumstances". That is incorrect. There is no test either in the legislation or indication in any case law that inter-party costs can only be awarded in COCA matters if there are "exceptional circumstances". If, however, where a party is legally aided certainly s 45 Legal Services Act applies and no costs award can be made against that party unless exceptional circumstances exist. Father is not legally aided.

Background

[12] The background to the proceedings is important.

[13] The parties are the parents of twins being Loraine and Lynette born [date deleted] 1998 (now aged 17 years 6 months).

[14] Since birth, the children lived in Christchurch and at the time of the proceedings attended [name of school deleted]. The children have been diagnosed with [details of medical conditions deleted] and clearly require full time care and supervision. For Mother's part she considered the girls function at about the level of an eight year old and their medical condition requires assistance with dressing, toileting, bathing, eating and mobility. The children have undergone numerous surgeries to assist them with walking and while Loraine is more mobile, Lynette remains unstable when walking. The level of care these two children require was detailed in Mother's pleadings to the point of the degree of care Loraine requires when eating. In addition, the children have had very consistent caregivers from Healthcare New Zealand, one in particular, Ann, had been in the children's lives since they were eight months old and another, Nicky, regularly on weekends. The children had required teacher aides at [name and detail of school deleted]. Mother advocated routine and consistent attendance at this specialised school was critical given their teacher aides and classmates.

[15] The parties separated in May 2014 and by agreement the children remained in Mother's care. Mother complains that during the relationship Father was physically and psychologically abusive to her and psychologically abusive to the children. For Father's part he said he was concerned about Mother's care of the children and concerned she sometimes would not let him have contact.

[16] Each party in their pleadings have made serious allegations against the other about violence to the children and utterances by the children complaining of their behaviour by either parent to them. It is clear that the parties had a strained relationship, prior to and post separation.

[17] The parties did, however, reach an agreement regarding the children's care at [Family Dispute Resolution] in January 2015 that saw the children in Mother's day to day care and in loose terms with Father for half the school holidays and agreements regarding Christmas and transport, Father having left Christchurch to live in Dunedin.

[18] Father was to have them for half of the July 2015 holidays. Mother had thought that the children were to go to [location deleted] but it transpires that that did not occur and Father had them in Dunedin. During that holiday, following from comments Father said the children had made to him prior, he says the children disclosed that their mother was physically abusive to them and psychologically abusive by way of verbal put-downs. As a result of that, and Father talking with Child Youth and Family and the Police (whom he says suggested he retain the children and obtain a parenting order), he advised Mother that the children would not be returning. Father had recorded the children saying that they did not want to return to their mother and he eventually played that to Mother over the telephone. Father says that both Child Youth and Family and the Police counselled him to say very little about what was happening on the basis that he anticipated some investigation into the children's alleged disclosures that their Mother had physically and otherwise abused them.

[19] Mother was distraught. She was adamant she had never done such a thing and points to the evidence of the children's long term caregivers and school and all other persons who had very close and consistent contact with the children to whom they had never disclosed any inappropriate behaviour or that any abuse could be detected at all.

[20] It is clear that Father has a differing assessment as to the children's needs. He has made complaints about the way Mother cares for the children, believing she does not promote their independence and treats them as babies, him saying they need no such level of constant care that Mother professes they do. Father suggested that once the children stayed with him in July, in all regards their wellbeing improved.

[21] Mother was correct in quickly concluding that Father was not going to return the children, so accordingly on 21 July 2015 Mother made an application for a parenting order seeking the children be returned to her day to day care in Christchurch, an order determining a dispute between guardians – that is, that their school be determined as [name of school deleted] and a successful application to reduce time for three days. Father filed a defence. He also filed an application for a transfer of the proceedings to Dunedin (which was defended).

[22] The matter was triaged to proceed on a without notice track with appointment of Mr Wilding as counsel for the children.

[23] The matter first came to the court by way of a directions conference on 8 October 2015 for determination as to the transfer and for other directions. Prior to the conference, Mr Wilding as counsel for the children reported.[4] He confirms that Father made a notification to Child Youth and Family on 30 September 2014 and a different person on 10 July 2015. Lynette was interviewed by the Police on 15 July 2015. The evidential interview could be interpreted as describing a number of allegations of violence by her mother but there was some caution regarding the disclosures which included Lynette not providing any context around the events, she said that the last time it happened she was three months old, Lynette's intellectual impairment was evident during the interview and mainly responses which were not related to the question that was asked. Clear caution as to the veracity of the "disclosures" was required in my view given that context.

[24] Loraine was interviewed the same day. She made limited disclosures. The summary of those disclosures, however, included again, Loraine not providing any detailed context around the name calling, did not disclose any physical violence from her mother towards her or Lynette and her intellectual impairment was very evident. It was clear that the children's speech was difficult to interpret and in the case of Lynette mostly unintelligible.

[25] Mr Wilding had instructed an agent, Ms Beck to meet with the children. They made a number of allegations of violence to her regarding Mother. I have considered Ms Beck's report. The children were anxious that Ms Beck promise that they did not have to see their mother again.

[26] The above information suggested that there needed to be high caution regarding the disclosures. This was clearly a nuanced matter. It was not a simple matter of taking the children's disclosures (if there was any) at face value without further inquiry, particularly against a context where the children appeared incredibly happy in their mother's care and well settled at their school prior. Equally, their

[4] See his report of 5 October 2015

intellectual impairment may have meant it was difficult for them to disclose in detail if violence had occurred.

[27] The pleadings by that point had intensified with allegations flowing between the parties about their inability to care properly for the children and inter-party violence during the relationship. Mr Wilding was very clear there needed to be determination.

[28] At the directions conference before myself on 8 October 2015 there was a very long and robust discussion about where to go. I was particularly concerned at that stage that there had been no contact by the children with their mother even by telephone, Father purporting that the children were petrified of their mother. However, by that time Father has indicated a preparedness to initiate and implement as many telephone calls as he could and I adjourned the matter so that interim telephone calls could be made and further discussions about progress.

[29] The matter was reconvened before me on 20 October 2015.[5] When the matter was reconvened on 20 October 2015 Mr Wilding reported that the children had in fact by that time spoken with their mother extensively and sometimes for multiple hours which I recorded as defying previous suggestions of their reluctance, horror or fear on their part prior of such telephone contact. The parties had only agreed tentatively regarding some interim contact pending disposition of the matter, at that stage Mother certainly wanted the return of the children and Father opposed it. In terms of contact, the very tentative arrangement was Father's offer that the children have the upcoming long weekend and weekends thereafter from Friday to Monday (unsupervised) with changes at [location deleted]. Father agreed at that stage that there was no need for supervision at all. Mother accepted that position only by way of capitulation just to see the children again. Mr Wilding preferred an agreement in stone so there could be no prevarication. I allowed the parties seven days to reach resolution and file a consent and if that did not come to hand I directed a submissions only hearing on the interim contact/care matter. In terms of the substantive proceedings (Mother seeking the children's return and Father opposing)

[5] Refer to my Minute of 20 October 2015 in its entirety

comprehensive directions for the viewing of the DVD, the filing of affidavits and a section 133 report given the children's clear high special needs.

[30] The children were over sixteen years of age so to have an order past sixteen years of age there has to be special circumstances anyway and the parties readily agreed that this was such a case. The children were to be eighteen in November 2016 after which the Court had no jurisdiction to make orders and therefore it was critical that there be speed attached to disposition.

[31] I considered the transfer from Christchurch to Dunedin premature and declined to make a determination.

[32] Despite protestations that the parties would be able to reach interim agreement regarding interim contact, they simply could not.

[33] Disturbingly the parties could not reach agreement regarding interim care or contact, accordingly on 16 December 2015 I gave timetabling for a three hour, submissions only hearing.

[34] I approved the brief for the substantive proceedings of the s 133 report writer on 4 December 2015, a very experienced report writer, Ms Evans, was appointed.

[35] It transpires, however, that in January 2016 Mr Lindon's father passed away and as a result of which he went to Australia for an undefined period of time to be with his mother. Father transferred the children back to Mother's care and had been there since 27 December 2015.

[36] Ms Evans, the report writer, on 4 February 2016 wrote to the Court that day asking how to proceed as by 4 February 2016 Mother had not re-enrolled the children at their old school ([name of school deleted]) concerned that Father may return from Australia at any stage and pick them up and take them back to Dunedin. The report writer did not consider that satisfactory for either of the girls. She was absolutely right in that regard. The report writer talked to Father who by that time had signalled an intent to stay in Australia for a number of weeks and that he stood

by his claims of violence by Mother to the children, and upon his return he intended to seek their day to day care. He was, however, of the view that the children should be enrolled back in [name of school deleted].

[37] Not unsurprisingly, Mr Wilding in his advocacy for the children, sought that their care be urgently cauterised by court order so as to stop any unilateral change for the children and to ensure that they could be enrolled in school. As a result of those concerns expressed by Mr Wilding[6] I directed a case management conference before myself on 22 February 2016 to particularly address whether the s 133 report should continue, the process to enable care orders to be made and the schooling issue. I directed that by 22 February both counsel were to have up to date instructions and if they did not, their respective client's position was in jeopardy of being struck out for want of prosecution or debarring from defending. I directed counsel to explicitly obtain instructions from their clients as to any reason why the Court ought not to make an interim parenting order in Mother's favour given the significant change of events. That would enable re-enrolment at school and to stop any unilateral collection of the children.[7]

[38] Father's position was he instructed his counsel that by that time he says (no detail or deposed evidence) by physical, mental, psychological, emotional and financial exhaustion (particularly given his late father's passing) he was unable to defend the applications. He was agreeable to determine the dispute that the children be enrolled in [name of school deleted]. He took no position whether there should be a s 50 order (given the girls are to turn eighteen in November anyway) but if there was, he sought a reasonable contact provision for regular telephone and direct control as could be agreed. The only issue that had arisen was whether Father could call the children at school which seemed to happen from time to time.

[39] After hearing from the parties I formed the adamant and clear view that even though the children were to turn 18 in November 2016, I agreed with Mr Wilding's reasoning in its entirety, he arguing there is a powerful combination of reasons for a s 50 order including: children's limited intellectual development and the need for

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[6] See Mr Wilding's memorandum of 5 February 2016.
[7] See my Minute of 22 February 2016 in its entirety

ongoing decisions; the children's difficulties making it hard to express a view; the parties' relationship resulted in disruption to the children's care in the past; the need for clear, consistent care; and the need for stability going forward.

[40] Accordingly, I made an order pursuant to s 50 vesting the care of the children until they reached the age of eighteen in Mother and preserving to Father reasonable contact (he not wanting any definition at all).

Issue 1 – Should costs be awarded?

Object of Legislation

[41] The object of the Act is straightforward and well understood. In the context of this dispute it was to promote the welfare of both children in the widest view and to determine all of their interests and facilitate their development by ensuring appropriate arrangements were in place for their care and to determine the dispute between the parties.

Questions in Dispute

[42] The questions in dispute while limited were not straightforward. There was: contested inter-parental allegations of domestic violence; allegations that the children had been assaulted; children's presentation and intellectual impairment was making it difficult to determine veracity; the unilateral shifting of the children; inability to reach urgent contact arrangements; Father then capitulating in all regards by returning the children in an unsupervised fashion; and the children being unable to be enrolled in school given fears of again unilaterally being removed.

[43] Matters should have been easier than they were. I say clearly while the ultimate disposition might have required some further investigation I saw no reason why there could not have been interim contact to Mother and the setting down of the submissions only hearing should not have been required. Ultimately it did not take place because Father returned the children which seems commensurate with his going to Australia or he otherwise, in his view, being exhausted by the proceedings.

[44] There was, to be fair to both, some complexity however but the parties early on in the proceedings should have, as Mr Wilding did, appreciated that simple overt disclosures by the children were always going to be the subject of significant scrutiny given the context suggesting the children were otherwise happy with their mother despite their limited protestations otherwise and subsequently returning to their mother's care and Father's facilitation of that.

The way the parties conducted the proceedings

[45] In this regard I am not considering the merit or otherwise of their positions but rather was there any "procedural misconduct". While to some extent one can see why this issue overlaps with the outcome of the proceedings and it is often hard to divorce from the merits of the parties' respective arguments, in my view if I purely look at their procedural approach, each party complied with directions by and large, while their pleadings involved in the end wide ranging allegations, in and of themselves there was no procedural misconduct by either, other than perhaps Father being more retentive regarding coming to a very clear agreement regarding interim contact and ultimately his being slow in my view to resolve the matter by way of consent as it somewhat needed the Court and Mr Wilding to push on for the hearing on 22 February 2016. Father could well have consented prior to this.

[46] Mother was successful in all her applications. In particular, she applied for and was granted an order pursuant to s 50 for having day to day care and the dispute as to schooling was determined as she sought. Father was not successful in his applications or on his transfer application.

Actual Costs and the Means of the Parties

[47] Throughout the proceedings the applicant has been legally aided. Her actual costs will total $7,996.64. Her counsel advises she will likely have to repay those costs.

[48] The respondent father's actual legal costs have totalled $13,344.60.

[49] The means of the parties is a matter of essential assessment when considering costs. One of the reasons that is often argued that any costs awarded might affect the care of the children. Neither party has provided, for argument's sake, a declaration of the means of assets or liabilities or acute submissions as to their means. The applicant mother for her part has simply said she is in receipt of legal aid. She alludes that relationship property matters are yet to be settled but it seems reasonably clear that there is an equity in the house of $162,000.00 (plus) which will have to be divided, even if not equally, Mother will have some capital available to her in due course.

[50] For Father's part, he says he is unemployed, lives with and is entirely financially supported by his partner who works as [occupation deleted], she having three teenage children of her own. He argues he has no assets other than a vehicle and an (eventual) share of the proceeds of the sale of the home and says he is likely to receive less than half of the sum that remains in trust of $162,261.50.

[51] Bar the above, there is rather a paucity of detail as to the parties' means. Counsel well know that the means of the parties is an important matter and if they are going to take an approach where they provide a paucity of information as to income and capital expenditure, they may well invite a robust decision from the Court as to costs.

[52] The submissions are also peppered with counter-allegations regarding Mother's legal aid status. Mother received legal aid, Father appears to have taken exception and applied or certainly made moves to have that grant withdrawn. Mother says he was unsuccessful and her grant endured. Father takes real exception to Mother being granted legal aid even though they have similar financial circumstances. Father did not apply for legal aid.

[53] The parties were also granted an interim disbursement of funds of $20,000.00 each, Father says to cover legal costs.

[54] It is clear even though there is little information, that each of the parties will be able to repay legal costs from the eventual disbursement of their capital released

from the sale of the former relationship home. That said, each argue that the "eating into" that capital by payment of their legal costs would impact on the children's welfare and interests. Without doubt, the less money a family has, the less children get. That is just common sense and a common occurrence in everyday life. I cannot, however, conclude from the information available that the repayment of the respective legal costs is likely to impact significantly on the welfare and interests of the children that there is simply not going to be as much disposable capital available. If that is said to affect the ability to purchase a home and therefore affects the children, this has not been demonstrated.

[55] Similarly, I discount as irrelevant, claims by Father that given he lives at a distance his increased travel costs to have contact with the children ought to be taken into account. I am not going to exercise my discretion to do so. For whatever reason he moved to Dunedin from Christchurch. The current order is not precise as to what his contact obligations are and he did not seek definition of contact. The children are going to be eighteen in November in any event. The cost of contact is and was always going to be a cost of daily life for Father to take into account and in the context of this matter, if not irrelevant, little weight needs to be given to this issue.

[56] For Father's part he also suggests that he is likely to have to make a contribution for Lawyer for the Child and the s 133 report writer's costs whereas the applicant is not given her legal aid status. There is not yet a determination as to contribution and it is difficult to know what submissions Father will make in that regard. While he is unlikely to succeed in reducing the mandatory requirement because of exceptional circumstances, he may well yet plead other circumstances. I cannot foresee what award a Judge may or may not make pursuant to s 135A COCA. The costs for Lawyer for the Child are yet unknown.

Genuine litigation – merit

[57] It is appropriate for the Court to remind itself that it is a critical tenet of family law that the Court does to a degree have an inquisitorial jurisdiction and that it is charged with ensuring that orders are made that optimise a child's welfare, development and safety. Therefore genuine and reasonable litigants ought not to fear

an award of costs as it is important all relevant arguments are heard. This reason has been consistently advanced why awards of costs do not automatically follow the event in family law cases – especially COCA and domestic violence proceedings and why the Court is charged with a very wide ranging discretion.

[58] Mother's arguments are, however, that Father's litigation was not genuine and it palpably lacked merit, arguing variably:

(a) Father brought the action on himself by unilaterally relocating the children;

(b) Mother was successful in every regard;

(c) The allegations by Father were baseless, his position changed substantially and frequently throughout the proceedings including suggestions the children were fearful with any telephone contact then that was clearly and palpably wrong and then subsequently returning the children to Mother's care commensurate with his life circumstances. Opposition to the children even having telephone contact at the directions conference of 8 October 2015 quickly dissipated and by 20 October 2015 the children had spoken to Mother extensively and for multiple hours defying Father's suggestions there was reluctance or fear on their part;

(d) Father's protestations that he was agreeable to interim contact did not come to fruition and a hearing was required (although it did not take place because of intervening events);

(e) Father returned the children to Mother's care and then did not prosecute his defence in any meaningful way;

(f) Taking into account the above, Mother believes Father's application was, when analysed properly, a result of baseless allegations that she had physically assaulted the children against a background where she

had cared for them all her life, substantially since separation and the children were well placed at school;

[59] For Father's part he argues that his litigation was genuine at all times and he should not be penalised in any way. He advances in particular:

(a) He had no alternative than retaining the children given the advice from Police and CYFS and the children's expressed wish not to return, therefore he did not act wrongfully but responsibly;

(b) His application for transfer was on the basis of counsel's advice that her experience was that urgent hearings could be granted sooner in Dunedin than in Christchurch;

(c) Rather than his position being inconsistent and baseless, he says he was at all times motivated by what the girls were telling him and the parties had very clear differing views about the girls' ability to express their own views and points to Lawyer for the Child's agent suggesting the girls were "impressive" and the principal of their special school in Dunedin stating "they are independent minded and certainly able to make good choices". At all times he was guided by his 16 to 17 year old daughters and as soon as the girls' views changed and they said they wanted to visit their mother and stay with her, he facilitated that;

(d) Overall Father cannot see how he could have done things differently throughout the proceedings. He obtained counsel, he at all times hoped matters would be dealt with more quickly and he engaged in negotiation, complied with all directions and ultimately returned the children when their views changed;

(e) Given there were no findings it cannot be said that the abuse did not occur.

[60] Given the matter resolved without acute findings it cannot be said that Father's allegations that the children had said to him that their mother had physically or psychologically abused them could be said to be baseless. That said, Father did not apply an appropriate, objective view as to the disclosures (limited as they were and in the context of the children's significant intellectual impairment) so as to better assess whether the supposed disclosures had veracity or not. Certainly, in my view, having been the hearing Judge throughout, I considered Father retentive about his position regarding interim contact and he could have afforded more urgency and readily reached agreement regarding interim contact so as to avoid the need for a hearing (albeit that hearing did not proceed given Father's intervening events of moving to Christchurch). Father's position seems even less objective and meritorious given the children quickly spoke to their mother without fear on the telephone, quickly went into her unsupervised care without difficult or fear and resumed their life and eventual schooling back in Christchurch.

[61] However, one has to be cautious about apportioning blame in family law matters that were not ultimately rigorously tested. While some of Father's actions in my view lacked the degree of objectivity that ought to have been applied and reasonableness, his position came from a context of an acrimonious separation and advice from the Police and MOSD.

[62] I cannot find Father's allegations completely baseless but in a more ideal world without the colouring of each party's view of the other, a more objective resolution should have been able to be afforded earlier.

Outcome

[63] This is a matter from which it can be seen exactly why the Court has in family law matters a wide discretion reposed in it. Simply because someone is successful (as Mother has been) there may be reasons why applications were made or defences filed. In this case, the matters that need balancing are: no party made any defalcation in their actual conduct of the proceedings; both have limited means and while there is going to be some costs to each of them, those legal costs are likely to be met from capital from the home which while this will reduce the disposable

income available indirectly to the children, there is no evidence it will affect their welfare other than every child enjoys better circumstances when their parents have more money; the litigation was not baseless yet Father could have acted with more objectivity; and the objects of the legislation. By a small margin I have determined costs should like where they fall and I do not exercise my discretion to award costs. It is a finely balanced case.

[64] Accordingly, there shall be no order for inter-party costs.

E Smith
Family Court Judge

Signed at Christchurch on 23 May 2016 at am/pm