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 WHAKATANE

FAM-2010-087-000026
[2016] NZFC 7668

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	KYLIE ERUERA First Applicant
AND	JASON OTIMI Second Applicant
AND	KIM JONES First Respondent
AND	MARY OTIMI Second Respondent

Hearing:	13 September 2016
Appearances:	S Travers for the First Applicant Second Applicant appears in Person H Tucker for the First Respondent W Swanson for the Second Respondent P Marshall as Lawyer for the Children
Judgment:	13 September 2016

ORAL JUDGMENT OF JUDGE E B PARSONS

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[1] These proceedings relate to the children Katie, Sasha and Kia Eruera, born [date deleted] 2012, [date deleted] 2009 and [date deleted] 2013 respectively, they are now aged, therefore, four years six months, seven years one month and two years 11 months.

[2] The parties to the proceedings are; Ms Eruera the children's mother, Mr Otimi the children's father, Ms Jones the children's aunt and caregiver and Ms Otimi the children's paternal grandmother. Ms Eruera is represented by Mr Travers, Mr Otimi is unrepresented, Ms Jones is here with Ms Tucker, Ms Otimi is here with Mr Swanson and the children are represented by Mr Marshall.

[3] The matter was last before the Court in late 2015 when final orders were made at a settlement conference on 20 August 2015. These orders provided for the children to be in the primary day-to-day care of Ms Jones where they continue to be. The orders also provided for contact to happen between the children and their paternal grandmother and contact between the children and the father and also, in fact, saw Ms Jones and Ms Otimi appointed additional guardians to the children at that time.

[4] Ms Eruera was granted supervised contact as set out in the order, which at that time was two to three times week under supervision. There was a provision for the matter to come back to Court if there was a failure to comply with certain conditions and seek for contact to be suspended, but that has not occurred.

[5] The memorandum is problematic in that it went beyond what the law provides and sought to, in effect, usurp the very clear legal provisions made by Parliament when it enacted s 139A Care of Children Act 2004 in March 2014. At paragraph 3 of the 20 August 2015 memorandum, it purported to, in advance, provide leave under s 139A for the parties to apply to the Court within the statutory ban in effect of the two years. That is legally an impossibility. Section 139A is clear, it provides a statutory framework of analysis that must be undertaken at the time of application based on the evidence filed prior to a judicial determination being made to decline or grant such leave.

[6] The consent memorandum compounded the legal problems by endeavouring to, again in advance, stipulate how any, at that time, unknown application of the future was to be treated. Here it is said to be treated in the future as a without notice application such as to enable lawyers to act under s 7A Care of Children Act. While clearly it is understood what was endeavouring to be done was to enable ongoing legal representation, Parliament has again made it clear that they do not want lawyers acting on on notice applications and that is what s 7A provides.

[7] We, as a lower Court, only exist because of statute. We, as District Court Judges, can only operate within the limits of what our statutory powers are within this jurisdiction and what they provide. We hold inherent powers but these are by necessity legally limited to that which is provided under a statutory framework. We are not the High Court, we do not hold inherent jurisdiction which is quite distinct and held by High Court Judges specifically.

[8] It was, therefore, and is not available to any Judge to provide, ahead of any evidence filed, leave in anticipation pursuant to s 139A, nor determination of how an application is to be filed or on what track and so I pay no regard to those provisions of the consent memorandum which, in my view, have no legal basis to exist.

[9] The application that was presented for determination today for hearing was a s 139A determination that I had set down to be determined back on 10 August. Fortuitously today when I arrived it was confirmed when I went round the room, one by one, to specifically check consent that in fact all parties did consent to the reinstitution of proceedings within the two year time frame.

[10] Section 139A(4) Care of Children Act provides for that leave to be provided on the basis of consent without any analysis of whether or not there has independently been a material change in circumstance. I therefore do not need to go through any of the case law relating to do that. What we have decided to do is treat today, given everybody's presence and everybody's awareness of the proceedings as a r 416Z directions conference so that we can assume that this matter is on the without notice track and make directions to progress the matter to a hearing.

[11] What is required on this matter is really a two-pronged approach. The first is to allocate an urgent hearing in terms of dealing with whether or not there is any contact to occur. At present the situation is that Ms Jones continues with care of the children, Ms Otimi as the paternal grandmother, has ongoing contact as does Mr Otimi. However, after an incident in late 2015 where Ms Eruera [details deleted] prevent her entering [location deleted] which is where the contact is supposed to occur. There has therefore been no contact between the children and Ms Eruera since late 2015. She, in her application, of course seeks to vary the orders to provide for supervised contact somewhere else in Whakatāne.

[12] This is, at this stage, opposed by Ms Jones who has concerns about even the reintroduction of contact and if so, how that were to occur before even looking at the nature of the contact on an ongoing basis and wants that done incredibly cautiously.

[13] Therefore, there is to be a r 416ZF(2) limited hearing allocated for three hours on 22 November 2016 at 2.15 pm. This is to deal solely with the issue of whether contact is to be reintroduced between the children and their mother at all at that time and if so how and on what conditions and terms of what supervision.

[14] Everyone agrees today that that is the limitation of the hearing. Ms Otimi is content with her contact and does not seek to vary it or take an active part in the proceedings. Mr Otimi similarly is not wishing to take an active part in the proceedings other than to support Ms Eruera in her position. The protagonists, as it were, in terms of that hearing are to be Ms Eruera and Ms Jones.

[15] There is to be the opportunity for updating evidence to be filed by Ms Eruera and Ms Jones, strictly limited to the issues I have set out above by 8 November 2016. The hearing, because it is a r 416ZF hearing, will have the opportunity of limited cross-examination. There is to be the opportunity for Mr Otimi and Ms Otimi to file a notice of response and any affidavit in reply, even if it is just to state their position, within 21 days of today which is when they are receiving the papers.

[16] That deals with the interim position. In terms of the substantive matter, there has been discussion today around the need to have a s 133 psychological report given the history of the file and the issues we are now dealing with. It is said to be essential for the proper disposition of these proceedings to have a s 133 psychologist's report. It would be useful to have had that available for the hearing and it would be hoped that it may be able to be, but it is clear that the interim hearing is proceeding whether or not the report is filed.

[17] The brief is to be the standard brief contained in s 133 and if counsel want any variation to that, they are to file by consent, in consultation with Mr Marshall, any suggested amendment to the brief. It is likely that that will be focused on the reintroduction of contact between the children and their mother, the need for the report and ongoing contact. At this stage in the proceedings there is no suggestion but that the children remain in the primary care of Ms Jones, so it is a limited enquiry but given the background I imagine it will not be something that will be able to be done with much haste.

[18] Any submissions and a report from lawyer for the child which has been volunteered will be filed seven days prior to the hearing on 22 November.

E B Parsons
Family Court Judge