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/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2014-419-000473
[2015] NZHC 1264

UNDER	the Care of Children Act 2004
IN THE MATTER OF	an appeal against a decision of the Family Court at Hamilton
BETWEEN	GORDON Appellant
AND	CAMPBELL Respondents

Hearing: 25 May 2015

Counsel: J I Walker for the Appellant
C E Flynn for the Respondents

Judgment: 8 June 2015

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 8 June 2015 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J I Walker, Hamilton

Solicitor: C E Flynn, Thames

[1] The appellant is the birth mother of a seven year old boy who shall be known as R. On 22 July 2009 he was adopted by the respondents. The appellant now seeks to have contact with R. As the adoption has severed the appellant's legal ties with R, she now comes within the category of persons under the Care of Children Act 2004 ("the Act") who require leave from the Family Court to bring an application for an order allowing contact with a child.[1] Her application for leave was opposed by the respondents. The application was refused in the Family Court by Judge Brown. She now seeks to appeal against the refusal to grant leave.[2]

[2] The appellant has not sought leave from the Family Court to appeal against Judge's Brown's decision. The respondents contend that such leave is necessary, whereas, the appellant contends that it is not. I heard argument from the parties on questions of jurisdiction and of the merits of the appeal.

[3] The appellant also requires leave to appeal out of time.[3] The respondents did not oppose her being given an extension of time for bringing the appeal. This issue is easily resolved. The appellant provided a reasonable and acceptable excuse for the appeal being late. The ultimate test is whether the extension of time would meet the overall interests of justice.[4] I am satisfied that this test is met. Accordingly, leave to bring the appeal out of time is given.

[4] The hearing proceeded on the basis that I would hear and determine the parties' arguments on both jurisdiction and the merits of the appeal. Thus, the issues for determination are whether I have jurisdiction to hear the appeal in the absence of leave from the Family Court; and if I do, where do the merits of the appeal lie.

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1 See s 47(1)(e) of the Care of Children Act 2004; contact with a child is achieved by a parenting order made under s 48 which determines the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.

2 Throughout this judgment I will refer to the parties as the appellant and the respondents, this will include when I refer to them in the context of appearances in the Family Court and in any other context outside this appeal.

3 Rule 20.4 allows the Court by special leave to extend the time prescribed for appealing if, as is the case here, the enactment that confers the right of appeal permits the extension or does not limit the time prescribed for bringing the appeal. Here the Act is silent on the question of extensions of time.

4 See for example *Wood v Glover* [2015] NZCA 36 at [13]-[14]; *Wood v Glover* [2014] NZHC 738 at [12]; and *P v Ministry of Social Development* HC Auckland CIV-2008-404-6888, 24 November 2008.

Jurisdiction

[5] The ability to appeal against the Family Court's decision is to be found in s 143 of the Act:

> **143 Appeals to High Court**
>
> (1) This subsection applies to a decision of a Family Court or District Court, in proceedings under this Act (other than criminal proceedings), to—
>
> (a) make or refuse to make an order (other than an interlocutory or interim order); or
>
> (b) dismiss the proceedings; or
>
> (c) otherwise finally determine the proceedings.
>
> (2) A party to proceedings in which there is made a decision to which subsection (1) applies, or a child to whom those proceedings relate, may appeal to the High Court against the decision. However, if the proceedings are under section 46C or 46R, the party or child may appeal only with the leave of the High Court.
>
> (3) A party to proceedings under this Act in a Family Court or District Court in which an interlocutory or interim order is made, or a child to whom those proceedings relate, may, with the leave of the Family Court or District Court (as the case requires), appeal to the High Court against the order.
>
> (3A) However, no appeal may be made to the High Court under subsection (3) in relation to—
>
> (a) any interlocutory or interim order made in the following kinds of proceedings:
>
> (i) criminal proceedings; or
>
> (ii) proceedings under section 46C; or
>
> (iii) proceedings under section 46R; or
>
> (b) a decision under—
>
> (i) section 7 to appoint, or to direct the Registrar of the court to appoint, a lawyer to represent a child; or
>
> (ii) section 130 to appoint, or to direct the Registrar of the court to appoint, a lawyer to assist the court; or
>
> (iii) section 133 to obtain a written cultural report, medical report, psychiatric report, or psychological report; or

> (c) a direction under section 7A(6) that the parties may, or may not, be represented at a settlement conference.
>
> (4) The High Court Rules and sections 73 to 78 of the District Courts Act 1947, with all necessary modifications, apply to an appeal under this section as if it were an appeal under section 72 of that Act.
>
> …

[6] The appellant argued that the decision to refuse her leave to bring her application in the Family Court fell within s 143(1)(c) as the refusal had finally determined her proceedings in that Court.

[7] The respondents argued that the subject decision was an interlocutory decision and so leave to appeal was mandated by s 143(3). The respondents did not seek to argue that there could be no appeal to this Court; rather, their stance was that as s 143(3) governed the appeal, the appellant had to obtain leave from the Family Court before there could be an appeal to this Court.

[8] It was common ground between the parties that the subject decision was a decision on an interlocutory application. However, as leave was refused, no interlocutory order was made.

[9] Section 143(1)(a) excludes interlocutory or interim orders from the appeal right created by that subsection. But that is as far as s 143(1)(a) goes. It does not serve to prohibit an appeal against an interlocutory order.

[10] Section 143(3) expressly provides a right of appeal with leave against interlocutory orders of the Family Court made in proceedings under the Act. It follows that when no interlocutory order has been made by the Family Court, on the face of it, that section cannot apply.

[11] Can s 143 be read in a way that would allow this appeal? Section 143(1)(c) is relevant. This subsection applies to decisions of the Family Court made under the Act that would "otherwise determine the proceedings". In this case, the proceedings before the Family Court were an application for a parenting order permitting the appellant to have contact with R, for which leave was required. The decision of the

Family Court to refuse leave has brought the progress of those proceedings in the Family Court to an end.

[12] In *Barker v Cargill*, Baragwanath J found that leave was required for an appeal against a Family Court order granting grandparents leave to apply for a parenting order.[5] The Judge left open what the position might be when leave to bring such an application was refused; the Judge acknowledged that from the perspective of the party seeking leave, a refusal "might arguably be construed as final".[6] I consider that from the perspective of all concerned in such an application, a refusal to grant leave would finally determine the proceedings in the Family Court. For once leave is refused, there is nothing further that anyone can or need do in the Family Court in relation to the substantive application. It is effectively halted in its tracks. I am satisfied, therefore, that this appeal meets the requirements of s 143(1)(c). Thus, the appeal can be brought as of right.

[13] I do not accept the respondents' argument that s 143(3) imposes a leave requirement for this appeal. The Family Court would have no jurisdiction under s 143(3) to entertain a leave application for the present matter, as it does not involve an appeal against an interlocutory order made by the Family Court. On a plain reading of s 143(3), it is the making of an "interlocutory or interim order" by the Family Court that provides the foundation for an appeal under the subsection. Before s 143(3) could be applied to the present matter, the language of s 143(3), which refers to "proceedings … in which an interlocutory or interim order is made", would need to be read as if it included the phrase "or not made as the case may be". The draftsperson of s 143 has expressly referred to "a decision of the Family Court ... to make or refuse to make an order" in subsection (1), and then avoided the use of this phrase in subsection (3). Had the intent been to have s 143(3) create a "leave appeal right" for Family Court decisions to make or refuse an interlocutory order, that could readily have been done using language that was similar to that used in s 143(1). In such circumstances, I cannot place a gloss on s 143(3) to achieve that outcome.

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5 See discussion in *Barker v Cargill* [2007] NZFLR 1108 (HC).
6 At [9].

[14] It seems to me that Parliament may not have intended to permit all refusals of interlocutory orders to be subject to appeal.[7] This intent does not detract, however, from there being an appeal right when the refusal to make an interlocutory order will finally determine the proceedings. Looked at overall, I consider that the scheme and purpose of s 143 is to allow: (a) a right of general appeal against all forms of decisions that finally determine proceedings in the Family Court;[8] (b) a more limited right of appeal for interlocutory orders;[9] and (c) to exclude from appeal any refusals to make interlocutory orders that have no effect on the final determination of the proceedings in the Family Court.

[15] I find, therefore, that I have jurisdiction to hear and determine the appeal. I now turn to deal with the merits of the appeal.

Background facts

[16] The respondents are R's paternal grandmother and her husband.

[17] R has been in the respondents' care since his birth. Since the adoption, his first and second names have changed. He does not know that he is adopted.

[18] There have been a number of proceedings in the Family Court regarding R. Evidence provided in respect of each proceeding was included in the bundle of evidence for the appeal. This evidence reveals that before R's birth, there was a family group conference on 19 November 2007 with Child, Youth and Family Services ("CYFS"), where the decision was made to place R in the respondents' care. The appellant was 21 when R was born. At that time, she had three older children, who were in the care of CYFS. Since R's birth, she has had two children. At present, all her children are in the care of other persons.

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7 In relation to the leave requirement for appeals against interlocutory orders, there is judicial comment recognising a policy requirement in s 143(3) to prevent proceedings under the Act from becoming unduly protracted: see *Malone v Auckland Family Court* [2014] NZHC 1290 at [28] where the Family Court is seen as having a "gate-keeping" role in relation to interlocutory appeals; and see *T v E* Auckland FAM-2007-004-2481, 2 July 2008. An alternative possibility is that s 72 of the District Courts Act 1947 may allow such appeals. However, as the present appeal is clearly within s 143(1)(c) of the Act I see no reason to look beyond this provision.

8 This is the practical effect of s 143(1)(a) and (b).

9 Through the imposition of a leave requirement.

[19] On 9 April 2008, the respondents applied for: (a) leave to apply for a parenting order granting them the day-to-day care of R; (b) a parenting order; (c) to be appointed as additional guardians of R; and (d) for the Chief Executive of the Ministry of Social Development to be appointed as an additional guardian for the purpose of any future litigation or access disputes in respect of R. In an affidavit sworn on 2 April 2008 in support of these applications, the respondents stated that the appellant was originally having contact at their place with R once a month. They had arranged access between themselves. They stated that generally the appellant greeted R but then barely spent any time with him. They stated that she had not visited R since January 2008, by which time he would have been somewhere between two and three months old.

[20] The appellant did not file a notice of defence, and the matter was set down for formal proof.

[21] In a later affidavit sworn on 26 June 2008, the respondents stated that the appellant, who was then 22 years old, had a long history of involvement with CYFS and all of her children were now in CYFS' care. The respondents said that they "will continue to welcome and encourage both natural parents to have contact with [R] by agreement with us".

[22] The matter was due to be heard by formal proof on 15 October 2008. However, the appellant arrived at the Court and Judge Brown adjourned the proceedings.[10]

[23] The appellant then swore an affidavit in support of her defence of the respondents' applications. She stated that:

> I have had little contact with [R]. I was not permitted to change [R's] nappies or feed him at the [respondents'] home as [the grandmother] always did it.

The appellant said that she felt excluded and forced to take a step back from participating in any aspect of [R's] care. Further, she said that:

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[10] Judge Brown has been involved in other proceedings in the Family Court involving the appellant.

> when we came to visit [R] I was allowed to hold him however the [respondents] were always in the room with me and I felt that contact was artificial and not relaxed. I rang the [respondents] when I felt like having contact however this did not occur very often as I felt uncomfortable and unwelcome.

In this affidavit, the appellant said that she would eventually like to have day-to-day care of her children.

[24] On 22 May 2009, at a Family Group Conference, the parties signed a memorandum of consent agreeing that R would be placed in the day-to-day care of the respondents. However, the child's father did not attend the conference and give his consent, and the matter was set down to be heard by a Judge.

[25] A parenting order was made on 22 July 2009 placing R in the day-to-day care of the respondents. Provision was also made for the appellant and R's father to have contact with the child as agreed with the respondents. A condition of the parenting order was that the appellant should be provided with photos of R at least once a year.

[26] On 12 May 2010, an adoption order was made. The file contains an undated "consent to adoption order" signed by the appellant. The front page of this bears a stamp with the words "CYFS 25 July 2008 Paeroa". There seems to be a dispute between the parties as to which one of them proposed the adoption. The respondents stated that they would have been satisfied to leave the matter under the Care of Children Act but that the appellant "hounded us to adopt R". They applied purely because of her insistence. On the other hand, the appellant states that "they brought it up and were quite persistent. I felt pressure, not the other way round".

[27] On 20 December 2013, the appellant filed an application for a contact order. In an affidavit supporting this application, she states that when she visited R "it felt awkward and uncomfortable and I stopped attending". She also notes that she has three older children who live with caregivers. She states that she is also making applications for contact with them. She says that she also has two younger children, who live with caregivers in Hamilton. She says that she sees these children every week. Her "proposal" is that she would like to start having contact by writing letters and eventually she would like to send photographs and progress to physical contact.

[28] The appellant's application was made without jurisdiction, as she did not apply for leave to make the application, as required by s 27(1)(e).

[29] On 17 March 2014, the appellant applied for leave.

[30] The respondents opposed leave being granted. They filed an affidavit in support of their notice of defence. They said by way of explanation for their presence when the appellant had contact with R that they had always been told by the social worker not to leave the appellant alone with R or any other child. They also said that R does not currently know about his parentage or adoption and has never known his mother. They contend that she also does not know him.

[31] In their affidavits, the respondents expressed their concerns about the psychological and emotional impact on R of him finding out through court proceedings that he was adopted. They intend to tell him, in time, when he is at an appropriate age to take on the information. Further, they expressed concern about the impact on R if the appellant made contact with him and then stopped:

> We would have concerns for [R] having contact with this person who he does not know after all this time. We also have concern that [the appellant] has never followed through with the contact she had at the beginning. So we would be devastated to see R put though all this upset just to be let down by [the appellant] not following through, as is her nature.

[32] Their evidence concluded with the assertion that they do not believe that it is in R's best interest for leave to be granted: "she was the one who pushed for the adoption, and when that Order was made it was our understanding that any rights she might have, ceased".

[33] In a reply affidavit, dated 16 May 2014, the appellant states:

> I ended up signing the Consent because I understood that the adoption was open and that I would still be able to see R. I was told there were two types of adoptions. One was closed and you never saw your child again. The other was open and you could see your child. That's why I agreed.

[34] The appellant maintained that she stopped contact because she felt uncomfortable, and that she is happy for contact to be at a pace that fits with R's needs.

Family Court decision

[35] Judge Brown summarised the facts of the case. He noted that the appellant had been born into a dysfunctional family with inter-generational abuse. He described her as having a mild intellectual disability. He referred to a psychological report prepared for the Court in relation to proceedings concerning her older children, which recorded that she was not capable of being a competent and safe parent for the children.[11] The Judge also noted that while the appellant had initially visited R at the respondents' house, she greeted him but barely spent any time with him, and that her visits stopped by the time he was three months old.

[36] The Judge then traversed the history of the earlier proceedings, some of which he presided over. The Judge noted that the adoption papers made it clear that it was intended that R would know the truth of his parentage and that the appellant would be able to see him by arrangement.

[37] The Judge then turned to considering whether to grant the appellant leave to apply for a contact order. He noted that respondents had opposed the application for leave saying that there had been only a very small amount of contact, the last time being nearly six years ago. They stated that they were willing for the appellant to visit the child but she did not continue to do so, and even when she did, her interest in the child was not great. On the other hand, the appellant said that she felt uncomfortable about the situation.

[38] Turning to the law, Judge Brown said that since the Care of Children Act, it has been legally possible for a natural mother whose child has been formally adopted to apply for leave for a contact order. Citing *AHP v RGJ*, he noted that the question for determination was whether there is an arguable case that a contact order would be in the child's best interests.[12]

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[11] The documents filed in the bundle of documents in this appeal included a memorandum of lawyer for the child, dated 4 June 2009, in which the lawyer for the child refers to a report prepared by CYFS for the earlier proceedings involving these parties, which contained references to the appellant's history, CYFS' involvement with three of her other children, and previous reports, including a psychological assessment that concluded that the appellant was unable to care adequately for her children.

[12] *AHP v RGJ* FC Hamilton FAM-2007-019-1613, 29 April 2008.

[39] The Judge considered that the test was very difficult to apply in the current circumstances. On the one hand, the adoption of the child was initially agreed to be open and the appellant was to have contact with the child. However, against this was the fact that the appellant had not persisted in her involvement with the child. This may have contributed to the respondents' failure to tell the child who his parents were.

[40] Judge Brown said that the respondents believed the child was still too young to have it explained to him that he was adopted. He noted that their failure to have already told the child was "perhaps explicable in the circumstances". If the present application proceeded, the Judge was of the view that this would require the respondents to tell the child that he was adopted at a time not of their choosing.

[41] Judge Brown noted that this in itself was insufficient for him to refuse leave. However, he considered that the situation had come about because of the appellant's inability to identify and stick with a clear position in regards to the child in the early stage of his life. He noted that on the balance of probabilities, there were grounds to question whether the appellant would persist in her application.

[42] Accordingly, the Judge found that the fact that the child did not know that he was adopted and his concern that she might not persist with the application for contact, persuaded him, "narrowly", that leave should not be granted. So, the decision was finely balanced.

Submissions

Appellant's Submissions

[43] The appellant raises two main grounds of appeal:

(a) The Judge failed to apply the correct legal test as to whether leave should be granted; and

(b) The Judge made findings of fact and otherwise presumed facts without affording the appellant the opportunity of adducing or testing evidence in relation to those facts.

[44] In relation to the first ground, the appellant contended that the requirement for a person other than the parents, or the parents' spouse or partner is to protect the parents or caregiver from vexatious, unjustified or possibly vindictive applications. The appellant argued that an order granting leave to apply for a parenting order is a procedural order and does not involve consideration of the merits of the case. Rather, the court must consider the welfare and best interest of the child. The applicant must demonstrate an appropriate and sustainable interest in promoting the welfare of the child, and show that there is an arguable issue.

[45] The appellant submitted that, although Judge Brown identified this principle, the Judge failed to state specifically whether it was in R's best interest that leave was granted. The Judge's decision was based on the appellant's inconsistent conduct and no consideration or balancing of any positive elements was given.

[46] Additionally, the appellant submitted that the fact that the respondents would have to tell the child that he was adopted at a time not of their choosing was irrelevant to the question of whether to grant leave. This could be canvassed at the substantive hearing. Further, the appellant was prepared to take contact at a pace that fits with the child's needs.

[47] In relation to the second ground raised, the appellant argued that the Judge made findings of fact without giving the appellant the chance to respond. Further, that the findings were speculative.

[48] The appellant stated that she found having contact at the respondents' home uncomfortable and felt unwelcome. The appellant submitted that whether or not she would persist with her application was not relevant to whether leave should be granted.

[49] The appellant submitted that the question is whether there is an arguable case that a contact order is in the child's best interests. The test applied by the court should not apply such a high threshold as to eliminate applications prematurely. She contended that this is effectively what the Judge did.

Respondents' submissions

[50] The respondents conceded that the Family Court has jurisdiction to consider an application for leave to apply for a parenting order by a biological mother whose child has been formally adopted. The only issue, therefore, is whether leave should have been granted in this case.

[51] However, the respondents argued that it was not specifically intended that a biological parent should be able to apply for leave when the relevant section, s 47(1)(e), was enacted. Counsel submitted that what is a general provision in the Care of Children Act should not be used to cut across the scheme of the Adoption Act 1955. They argued that there must be some caution when a contact application goes against s 16 of the Adoption Act.

[52] The respondents submitted that Judge Brown was aware of the best interests of the child principle and indirectly referred to his duty to consider this. They argued that where the applicant for leave is seeking to change the status quo, the question is whether it would be conducive to the welfare and best interests of the child to have the question of the child's contact reconsidered.

[53] The respondents submitted that the Judge applied the test identified by the appellant and considered that the appellant could not show an appropriate and sustainable interest in promoting the welfare of R.

[54] In relation to the second ground of appeal, the respondents submitted that the decision for a hearing to be by submissions only was made with the consent of both counsel, and that the appellant should have objected if she wanted a full hearing. Further, the Family Court did have evidence from the appellant, in the form of an affidavit that was filed out of time.

[55] The respondents acknowledged that Judge Brown took into consideration early proceedings involving R. They submitted that he was entitled to take this knowledge into consideration as it was relevant to both the appellant and the child.

[56] Finally, they submitted that evidence of the appellant's behaviour throughout the proceedings showed that she chose not to have contact with R from an early age.

Discussion

Approach on Appeal

[57] By virtue of ss 143(4) of the Care of Children Act, which imports ss 73-78 of the District Courts Act 1947, an appeal against a Family Court decision is conducted by way of a rehearing.

[58] The scope of the Court's appellate jurisdiction is of the kind described by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[13] The appellate court must exercise is own judgment and make its own assessment of the evidence and weight to be given to it.[14] It has the responsibility of considering the matter afresh.[15]

[59] The Court is entitled to exercise any power or discretion available to the Family Court, and come to its own view on the merits.[16] However, where appropriate, the Court must give weight to the findings of the Family Court in the manner described by the Court of Appeal in *D v S*:[17]

> Whilst the High Court will naturally give weight to the views of the specialist Court and may in some cases think it best to remit the case for reconsideration, it is fully entitled to substitute its views on questions of fact, including the issue of what is in the best interests of the child or children concerned. There is no rule of law requiring the High Court to defer in these respects to the Family Court even in a finely balanced case.

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13 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
14 At [16].
15 *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].
16 *NR v MR* [2012] NZHC 2859 at [17].
17 *D v S* [2003] NZFLR 81 (CA) at [18].

[60] Therefore, where the Family Court's decision is based on findings of credibility, allowance must be made for the fact that the Family Court Judge saw and heard the parties to this dispute give evidence and respond to questioning.[18]

Statutory provisions

[61] Section 47 of the Act specifies the people who are eligible to apply for a parenting order. The section provides:

> **47 Who may apply for parenting order**
>
> (1) In section 48(1), eligible person, in relation to a child, means any of the following persons:
>
> (a) a parent of the child:
>
> (b) a guardian of the child;
>
> (c) a spouse or partner of a parent of the child;
>
> (d) any other person who is a member of the child's family, whānau, or other culturally recognised family group, and who is granted leave to apply by the court;
>
> (e) any other person granted leave to apply by the court.
>
> …

[62] Section 48 provides:

> **48 Parenting orders**
>
> (1) On an application made to it for the purpose by an eligible person, the court may make a parenting order determining the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.
>
> …
>
> (3) A parenting order determining that a person may have contact with the child may specify any of the following:
>
> (a) the nature of that contact (for example, whether it is direct (that is, face to face) contact or some form of indirect contact (for example, contact by way of letters, telephone calls, or email)):
>
> (b) the duration and timing of that contact:

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[18] *NR v MR*, above n 14, at [18].

(c) any arrangements that are necessary or desirable to facilitate that contact.

…

[63] Section 4(1) of the Act provides that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration. The principles relating to a child's welfare and best interests, set out in s 5, are:

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

Substantive appeal

[64] Under earlier legislation, it was difficult for persons other than a legal parent or step-parent to obtain visiting rights to a child. *Tito v Tito* illustrates the difficulties that grandparents once faced when they sought to gain visiting rights to a grandchild.[19] Under the present Act, s 47 has introduced a broader and more liberal approach to the categories of persons who may apply for and obtain those rights from the courts; so that now it is possible, with leave of the court, for grandparents to make those applications.[20]

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19 *Tito v Tito* [1980] 2 NZLR 257 (CA).

20 See for example, *Barker v Cargill* (2007) 26 FRNZ 641 (HC).

[65] In *Barker v Cargill*, Andrews J dismissed an appeal against the grant of leave to grandparents to apply for a parenting order permitting contact with their grandchild, saying:[21]

> The application of the test in any particular case must of course be informed by the purpose and principles set out in the Act. When that occurs, the requirement for leave to be obtained will adequately provide a filter to protect children and their families against unwarranted and improper applications, while leaving substantive applications to be determined in accordance with the Act, for each child, in that child's own circumstances.

[66] There are other examples of cases where leave to apply for a contact order has been given to persons other than legal parents or step-parents.[22] However, there are few cases where the applicant for leave under s 47(e) is the biological parent of an adopted child.

[67] The difficulty in such cases is the interplay between s 47(1)(e) of the Care of Children Act and s 16 of the Adoption Act. The latter Act legally severs the legal connection between an adopted child and her birth parents and creates a legal fiction that treats the adopting parents as if they were the child's birth parents:

> **16 Effect of adoption order**
>
> (2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:
>
> …
>
> (b) the adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents …

[68] When the present matter was before the Family Court, the respondents did not challenge the jurisdiction of that Court to entertain the leave application. The same approach was taken in the appeal insofar as the respondents conceded that "an application for leave can be made by a biological parent in an adoption situation";

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21 At [63].

22 See for example, *W v G* Waitakere FAM-2008-090-155, 1 July 2008 involving a step-grandmother; *AJS v AEIB* [2013] NZFC 376 involving former caregivers of children.

however, the respondents went on to argue that this was not a specifically intended outcome of s 47(1)(e) but rather an unintended consequence. This led the respondents to argue that "the doorway while open, is only narrowly so in the circumstances of adoption".

[69] The respondents then referred to case law where the barriers that the Adoption Act imposes against permitting a birth parent to have contact with an adopted child were considered. However, those cases either pre-dated the Care of Children Act, or their focus was on other legislation. Neither counsel was able to refer me to any authority in this Court or higher where the court has considered the interplay between 16 of the Adoption Act and s 47(1)(e) of the Care of Children Act.

[70] In *Re T (An Adoption)*,[23] Blanchard J considered whether he could impose a requirement on an adoption order that the child's biological father have access to the child. Blanchard J found that the Adoption Act did not allow for making provision for access in that way. In reaching this view, the Judge considered the existing authorities and the purpose and policy of the Adoption Act. The Judge noted that there was a trend towards more open adoption and that informal arrangements between adopting parents and birth parents, which he termed "de facto open adoption" were "being made with increasing frequency".[24] The Judge recognised that such approaches to adoption were not prohibited by the Adoption Act. The Judge also noted that there were suggestions that reform of the law on adoption was needed.

[71] After giving full consideration to the material before him,[25] Blanchard J concluded that there was no basis for him to interpret the Adoption Act in a way that would permit him to impose a condition in the order of adoption that would allow the child's biological father to have a legal right of access:[26]

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23 *Re T (An Adoption)* [1996] NZLR 368 (HC). Also reported as *Re Adoption of PAT* (1995) 13 FRNZ 651 (HC).

24 At 371.

25 This material included case law from other jurisdictions; relevant international instruments decisions of the Family Court recognising that open adoption were beneficial for adoptees; and commentaries from academics and law reform bodies.

26 See 376.

> Whatever the merits of open adoption for the welfare and interests of the child, I find that there is presently no statutory jurisdiction to order access in favour of birth parents when an adoption order is being made.

[72] However, Blanchard J made reference to "other possible mechanisms for enforcing open adoption agreements outside the Adoption Act itself".[27] His view was that through other legislation, a biological parent of an adopted child might obtain access to the adopted child without fouling the legal fiction imposed by the Adoption Act. He referred to the High Court's wardship jurisdiction and applications under the Children, Young Persons and Their Families Act 1989 and said that:[28]

> These potential courses of action are consistent with the general premise of our current legislative scheme, namely that: (i) adoption orders are absolute and operate to sever biological ties completely; and (ii) legally enforceable access for persons who are in law strangers to the child is inappropriate, except in relatively rare circumstances.

[73] I do not, therefore, read the discussion in *Re T (An Adoption)* to suggest that applications under s 147(1)(e) by birth parents to have contact with adopted children should be approached differently from other applications under that subsection.

[74] In a more recent decision, Courtney J in *R v Chief Executive of the Ministry of Social Development* stated:[29]

> I respectfully agree with Blanchard J that the provisions of the Adoption Act should not be interpreted so as to allow steps to be taken that would be inconsistent with the clear purpose of the Act, notwithstanding changing social attitudes. Such developments must await action by Parliament.

[75] The respondents relied upon Courtney J's comments as evidencing continued reluctance by this Court to read the Adoption Act in a way that would allow for legal recognition of open adoption. However, I do not read Courtney J's comments in such a broad way. The case before Courtney J involved a de facto open adoption where the child had chosen to go to live with her birth mother. Her adoptive parents were agreeable to this. The birth mother applied for an allowance to cover the costs of caring for the child. Under the relevant welfare legislation, such allowances were

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27 At 376.
28 At 376.
29 *R v Chief Executive of the Ministry of Social Development* [2012] NZFLR 337 (HC). The Judge cited *Re T (An Adoption)* as its alternative name – *Re Adoption of PAT*.

not available to the "natural" parents of a child. The Chief Executive of the Ministry of Social Development argued that under that legislation, the birth mother was the "natural parent" of the child, and therefore disqualified from receiving the allowance she sought. Thus, the Chief Executive wanted Courtney J to look through the legal fiction imposed by the Adoption Act and recognise the birth mother as the child's parent when it came to interpreting separate legislation.

[76] Thus, there is nothing remarkable about Courtney J's refusal to disregard the effect of the Adoption Act on the birth mother's legal relationship with the adopted child. The approach is consistent with that followed by Blanchard J in *Re T (An Adoption)*. There is nothing in Courtney J's approach that touches upon the use of other legislation to allow a birth parent to have access to an adopted child. This issue was beyond the scope of Courtney J's consideration.

[77] In *B v G*,[30] the Court of Appeal dealt with an appeal by the adopting parents of a child against a decision of a Full Court of this Court on the legal test to be applied when a birth mother seeks to revoke her consent to an interim adoption order. The judgment predates the Care of Children Act. One of the reasons why the birth mother wanted to revoke her consent was due to difficulties with her having access to the child. At an earlier stage, there was agreement between the birth mother and the adopting parents allowing her access to the child. On the question of access, the Court of Appeal stated:[31]

> Ms G is not asserting that there is any current deficiency in Mr and Mrs B's care of S, apart from the issue of access and some concerns relating to cultural heritage. Access has, however, been restored through other means and Mr and Mrs B say they are now committed to ongoing access. If access causes difficulties later although at present there is no means of accommodating access either under the Adoption Act or the Guardianship Act after a final order is made, there is the possibility of wardship raised by Blanchard J in *Re T (An Adoption)* [1996] 1 NZLR 368 at 376. In this regard we note that a statutory provision for permitting access for birth families without having to resort to the wardship jurisdiction would do much to bring adoption law into line with contemporary social and cultural values.

[78] This passage from the Court of Appeal's judgment shows that it did not see the Adoption Act as a barrier to a court using other legislation to permit a birth

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30 *B v G* [2003] 3 NZLR 233 (CA).
31 At [65].

parent to have access to an adopted child. Nor was the Court of Appeal circumspect about such use. Indeed, the passage reveals that the Court of Appeal was alive to the trend towards open adoptions and the need for the Adoption Act to make provision for such adoptions.

[79] It is clear, therefore, that even before the Care of Children Act was passed, courts were amenable in principle to the use of other legislation to allow both parents to have contact with an adopted child. Whether contact would be ordered was a separate issue.

[80] The relationship between the Adoption Act and the Care of Children Act was recently considered by the Family Court in *Masters v Spencer*.[32] The case involved the same parties as *B v G*. By this time, the birth parent had been having regular contact with the child for over 10 years. The parties had returned to court because the birth parent sought more contact, which the adoptive parents resisted. The Care of Children Act was in force. Judge Murfitt found that s 47(1)(e) allowed the birth mother to apply for a contact order. The adoptive parents had argued that the section could not be applied in this way. The Judge accepted the adoptive parents' argument that the Adoption Act is a code and that a final adoption order extinguished the guardianship and parental status of the birth parent. However, Judge Murfitt found compelling reasons for rejecting an interpretation of s 47(1)(e) that excluded it from applying to the circumstances before him:[33]

> … this case turns on the interpretation of the Care of Children Act and in particular, s 47(1)(e). I am not prepared to adopt a restrictive interpretation of that in the fashion that Mr Maciaszek ledges [sic]. To interpret that section so that any person in the world other than a biological parent may apply for leave to apply for a parenting order would be nonsensical, and would perpetuate a widely acknowledged shortcoming in adoption law.

[81] Instead, Judge Murfitt preferred a liberal interpretation that focused on the best interests of the child, and which left undeserving cases to be filtered out when the question of leave was considered. The Judge considered that:[34]

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32 *Masters v Spencer* [2013] NZFC 5325.
33 At [46]
34 At [47].

> Relying on the simple and unequivocal wording of s 147(1)(e), I am satisfied that any person, including the birth parent of an adopted child may apply for leave to bring an application for a parenting order.

[82] I consider that there is much to be said for the view that it would be nonsensical to exclude a birth parent from applying under s 47(1)(e) for contact when anyone else who is a legal stranger to the child can make such an application. I also agree with the view that the requirement for leave in s 47(1)(e) provides sufficient protection against unmeritorious cases. Despite the continuance of closed adoptions in the Adoption Act and the legal fictions that they create, I too see no need to read down the "simple and unequivocal" language of s 47(1)(e) in circumstances that involve a birth parent seeking contact with an adopted child.

[83] At the present time, in principle, open adoptions are seen to be beneficial. The movement is towards open adoptions. This trend was recognised in 1995 in *Re T (An Adoption)*. One of the consequences of open adoption is that adopted children who have contact with their birth parents will develop attachments to them. If there is a change of circumstance such as a child wanting more contact with the birth parent when that is against the wishes of the adoptive parents, or the adoptive parents decide to terminate the child's contact with the birth parent against the child's wishes, there needs to be some way to bring the matter to the court if resolution cannot otherwise be achieved. Once a child is permitted some contact with his birth parents, there is the prospect of the child suffering harm if informal arrangements break down. Thus, the best interests of the child favour the Court having the same jurisdiction under s 47(1)(e) that it has in other cases that fit within the subsection.

[84] In the present case, Judge Brown declined the appellant leave because: (a) the Judge was concerned that R would have to be told that he was adopted at a time not of his adoptive parents' choosing; and (b) that the appellant had earlier failed to "identify and stick with a clear position in regard to" R. The appellant argued that in reaching this view, Judge Brown had not applied the correct test for whether to grant leave under s 47(1)(e).

[85] The appellant accepted that earlier in the judgment, at [12], Judge Brown cited a previous judgment of his where he had stated the test as being:

> … whether leave should be granted in my view is whether there is an arguable case that contact order would be in [the child's] best interests.

The appellant did not dispute the correctness of Judge Brown's formulation of the test. Her argument was that having stated the correct test, the Judge failed then to apply it properly to the facts at hand. In this regard, the appellant pointed to the absence of any express findings as to (a) why there was no arguable case for the appellant having contact with R; and (b) where the best interests of R lay.

[86] In *Barker v Cargill*, Andrews J identified the test for granting leave when bringing an application for contact as:[35]

(a) The application is not frivolous, vexatious, or vindictive; and

(b) The applicant is shown to have an appropriate and sustainable interest in promoting the welfare and best interests of the child, then

(c) It is sufficient if the applicant can show there is an arguable issue.

[87] I see no essential difference between the test stated by Judge Brown at [12] of his judgment and that stated by Andrews J. I am satisfied, therefore, that the Judge had identified the proper test to be applied.

[88] I also consider that Judge Brown applied the test correctly to the circumstances before him. Judge Brown identified two concerns that led him to refuse to grant leave to the appellant. He was concerned that if the appellant was granted leave to apply for a parenting order, she might later abandon the proceedings, or if contact with R were granted, she might later abandon that contact. Either way, the outcome would be that R would learn that he was adopted and that he had a birth mother who wanted to have contact with him. Further, there could be no going back from this position once R learned about the appellant's quest for contact

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35 *Barker v* Cargill above n 19, at [60].

with him. It would necessarily follow that any later abandonment of this quest would leave R exposed to emotional harm. The concern that the appellant might not continue with either the proceedings or with contact, should a parenting order be granted, was based on the Judge's previous dealings with the appellant in proceedings in 2008 and 2009. At that time, the appellant was 22 and 23 years old.

[89] I accept that Judge Brown did not expressly apply the test for granting leave or its outcome to the appellant and to R. However, it is clear to me that the concerns the Judge identified underlay the refusal to grant leave. It is also clear to me that the presence of those concerns was enough to cause the Judge to conclude that the appellant had not presented him with an arguable case that contact with the appellant was in R's best interests. Thus, I am satisfied that the Judge implicitly applied the correct test; I am also satisfied that he arrived at the right conclusion.[36]

[90] The appellant argued that in reaching the decision to refuse to grant leave, Judge Brown improperly took into account knowledge of the appellant that he had gained from his involvement in other matters before the Family Court that concerned her. The respondents accepted that the Judge had drawn on his knowledge of the appellant and argued that he was right to do so.

[91] It is not clear to me from reading the judgment that the Judge was influenced by knowledge beyond what was available to him in the present application. He clearly referred to the appellant's conduct in the prelude to the adoption of R, as well as her earlier abandoned attempts to have contact with R, all of which were included in the case on appeal. His reference to the appellant's dysfunctional family background and the recommendations in a psychological report suggest a broader knowledge of the appellant. However, this report was mentioned in a later CYFS' report that had found its way into the appeal via mention in a memorandum of lawyer for the child that was filed in one of the earlier proceedings involving R.[37] Given the appellant's history of involvement with CYFS, it would not be surprising if an account of this history were included in the CYFS' report prepared for the earlier proceedings involving R. This memorandum of lawyer for the child and other

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[36] See discussion from [95] onwards.
[37] See above n 12, at [35].

material from earlier proceedings involving these parties and R was included in the case on appeal, which suggests to me that this material was before Judge Brown at the opposed hearing of the leave application. No one advised me that this was not so. So I infer that material from those earlier proceedings was in evidence before Judge Brown. There is no suggestion in the judgment that the appellant objected to the admissibility of any of the evidence that was before the Judge. So for her now to argue that the Judge should not have taken into account what he learned from the material from the earlier proceedings involving the parties and R is wrong. The time to object to the admission of this material was at the Family Court hearing.

[92] As to the appellant's argument that Judge Brown took into account information he had learned when dealing with Family Court matters involving the appellant and her other children,[38] if this information were not before the Judge in the leave application, it would be wrong for him to have considered it. It would be wrong for the Judge to have allowed himself to be influenced by adverse impressions that he had formed of the appellant in those other proceedings, as the appellant would have had no notice of the Judge doing this and so no opportunity to address such impressions. However, there is no evidence to suggest that the Judge acted in this way. Without such evidence, I am not prepared to conclude that Judge Brown has acted in this way.

[93] For completeness, however, I propose to look at the present matter afresh and so reach my own view on the leave application. I propose to apply the three-stage test adopted by Andrews J in *Barker v Cargill*.

[94] I am satisfied that the application for leave is not frivolous, vexatious or vindictive.

[95] When it comes to assessing whether the appellant has an appropriate and sustainable interest in promoting the welfare and best interests of R, I consider that her interest must be assessed on the basis that she is a stranger to R both legally and factually. The Adoption Act imposes the requirement to view her legally as a

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[38] The impression I gained from the parties is that Judge Brown has presided over applications under the Act that involve the appellant and her other children.

stranger to R.[39] The evidence establishes that in fact R has no knowledge of her and so in that way too, she is a stranger to him.

[96] Given the appellant's status as a stranger to R, I consider that in the context of the leave application, she must establish that she has a sustainable interest in promoting the welfare and best interests of R. The evidence that she filed in support of the leave application does not go far enough to establish this requirement. It explains why, in the appellant's view, contact with R, which he no longer remembers, broke down earlier on. However, this explanation is insufficient to establish the presence of the relevant interest now. More is required. The appellant provides nothing in the way of evidence that would provide the Court with confidence that she now has an appropriate and sustainable interest in promoting R's welfare and best interests. There is the fact that she is R's birth mother and her application evidences a desire on her part for contact with him. But, in my view, those facts alone cannot be equated with the appellant having an appropriate and sustainable interest in promoting the welfare and best interests of R. The appellant has to provide evidence that, in particular, shows she now has a sustainable interest in promoting R's welfare and best interests. Mere assertion of this would not be enough.

[97] As matters stand, if the leave application were to be allowed, the Court cannot be confident that it would be pursued, or if contact were granted that it would be maintained. If the application for contact were to proceed in such circumstances, it would carry the implicit risk that a seven year old boy who presently believes the respondents are his parents would learn that they were his grandparents, and that the appellant was his mother. The introduction of such information to a seven year old boy carries a risk of emotional disturbance. If the contact then ceased, or the application was abandoned after R had been told the truth of his birth, he would then be left not only with this new found knowledge of his parentage, but also knowing that his birth mother had not maintained the contact or attempt to have contact with

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[39] For the reasons expressed by Blanchard J in *Re T (An Adoption)* and by Courtney J in *R v Chief Executive of Ministry of Social Development*, the Court must respect the legal fiction regarding parentage that the Adoption Act creates. It is for Parliament to set that aside.

him as the case may be. Such an outcome is not likely to promote his welfare, nor is it likely to be in his best interests.

[98] Finally, and in addition to the above, the appellant must establish that there is an arguable issue. This would require her to satisfy a Court that there is an arguable basis for her to have contact with R. Her present evidence appears to me to be heavily reliant on her being R's birth mother and for this reason it being in R's best interests for there to be contact. However, this assumption flies in the face of the Adoption Act. For the same reason that Courtney J refused to legally recognise the birth mother of an adopted child as a "natural parent" of the child,[40] I consider that I cannot give legal recognition to the appellant being R's birth parent. If she had built up regular contact with him over the years and he knew she was his birth parent, I could have recognised this as a matter of fact, but that is not the case here.

[99] I can see that for a birth parent of a young adopted child like R, who is unknown to that child and who faces opposition from the adoptive parents, meeting the test for leave will be difficult. However, as was recognised by Andrews J in *Barker v Cargill*, the purpose of the test for leave is to:[41]

> … provide a filter to protect children and their families against unwarranted and improper application, while leaving substantive applications to be determined in accordance with the Act, for each child, in that child's own circumstances.

[100] An application by someone who cannot establish that he or she has an appropriate and sustainable interest in promoting the welfare and best interests of the child; and who cannot show that there is an arguable issue is necessarily an unwarranted and improper application.

[101] Thus, I am satisfied for the reasons that I have already stated that the present application for leave cannot meet the test for granting leave, and accordingly the appeal must fail.

Result

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40 See *R v Chief Executive of Ministry of Social Development*, above n 28.
41 *Barker v Cargill*, above n 19 at [63].

[102] The appeal is dismissed

[103] The parties have leave to file memoranda as to costs.

Duffy J