NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA341/2020
[2023] NZCA 223

BETWEEN	WH First Appellant WW Second Appellant
AND	RH First Respondent LA Second Respondent

Hearing: 2 May 2023

Court: Gilbert, Thomas and Woolford JJ

Counsel: First and Second Appellants in person
No appearance for First and Second Respondents
A J Pollett for the Chief Executive of Oranga Tamariki as Intervener

Judgment: 12 June 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Paragraph 8 of the Order made in the High Court is quashed and replaced with:

There shall be no contact between the first appellant and the second appellant (or either of them) and either or both of the children.

REASONS OF THE COURT

(Given by Thomas J)

[1] This appeal concerns two of the biological children of the first appellant and the second respondent, a daughter and a son. The second appellant is the children's grandfather. In 2009, the children were placed under the guardianship of the High Court and the Chief Executive of Oranga Tamariki (the Chief Executive) was appointed the Court's agent.[1] The children have been in the care of the first respondent since that time. In 2020, the High Court discharged the Court's guardianship of the children and made various orders under the Care of Children Act 2004 (the 2020 Orders).[2] While most of the 2020 Orders were made by consent, the appellants have appealed part of them.

[2] Although the grounds of appeal were relatively broad, the first appellant, who addressed us on behalf of both appellants, identified three real issues:

(a) whether there was jurisdiction for the High Court to make an order preventing contact between the first appellant and the second respondent (or either of them) on the one hand, and the first respondent on the other, except for contact initiated by the first respondent in respect of guardianship matters, as recorded in paragraph [8] of the 2020 Orders (the Paragraph 8 Order);

(b) bias on the part of the High Court Judge and whether she should have recused herself; and

(c) whether the parenting order was lawfully made, given the age of the daughter at the date of the 2020 Orders.

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1 *WAH v RDH (No 1)* HC Auckland CIV-2007-404-7415, 15 September 2009. Order made pursuant to Care of Children Act 2004, s 33.

2 *In Re: various applications in relation to the children* [*names redacted*] [2020] NZHC 1183.

[3] The relief the appellants seek relates to the Paragraph 8 Order only.

[4] The second respondent filed a memorandum with the Court supporting the appeal. The first respondent has taken no part in the appeal.

[5] On 5 July 2021, this Court granted the Chief Executive's application for intervener status.

[6] While the appellants are clearly concerned about a number of aspects of the proceedings, for example the role of the Chief Executive as intervener, the relief they seek is limited as we have explained and, for that reason, this decision is likewise limited.

Background

[7] The daughter was born in 2004. Oranga Tamariki, or Child, Youth and Family Service (CYFS) as it then was known, became involved in her life as early as December that year. The son was born in 2005 and CYFS became involved in his life early the following year. The involvement of the Family Court and the High Court on appeal continued almost unabated since that time, culminating in orders in 2009 placing the children under the guardianship of the High Court and appointing the Chief Executive as the Court's agent. Orders were made that the first respondent should have the day-to-day care of the children. Numerous applications to the courts followed.

[8] In February 2018, Hinton J directed that matters should be brought to a conclusion. She directed various reports to that end and encouraged the parties to agree on final orders for the court to approve.

[9] On 11 December 2019, a hearing took place before Hinton J to discuss the draft orders with a view to discharging the High Court's guardianship of the children. This followed various applications and cross-applications by the parties. Neither the second respondent nor the second appellant attended the hearing. The first respondent was represented, as were the children and the Chief Executive. The first appellant appeared on his own behalf. Counsel to assist the Court also attended.

[10] The Court made an order changing the names of the children by consent.[3] There was some agreement as to the other orders which should be made. The Judge indicated that the Court's guardianship would be discharged and a final parenting order made.[4] She also heard from the Chief Executive and lawyer for the children seeking an order in respect of contact, and clarification of which court had future jurisdiction in relation to issues affecting the children.

High Court judgment

[11] By her judgment dated 29 May 2020, Hinton J formally discharged the High Court's guardianship of the children and the Chief Executive's agency, and made a final parenting order in favour of the first respondent.[5] She appointed the first respondent additional guardian of the children pursuant to s 27 of the Care of Children Act, and vested the duties, powers, rights and responsibilities of guardianship as they related to the day-to-day care of the children exclusively in the first respondent.[6] The Judge recorded that the first appellant and the second respondent consented, in exercise of their guardianship rights, to the school the son was to attend and made an order accordingly. The Judge also made orders governing contact between the second appellant and the children.[7]

[12] It is the Paragraph 8 Order which is at issue in this appeal. It provides as follows:[8]

> [8] Paragraph 5(f) of the order made by this Court (by consent) on 14 October 2016 is discharged and replaced with the following order:
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> *There shall be no contact between* [*the first appellant*] *and* [*the second respondent*] *(or either of them) and either or both of the children or* [*the first respondent*] *unless such contact* ***strictly in respect of guardianship matters*** *is initiated by* [*the first respondent*] *in which case either or both* [*the first appellant*] *and* [*the second respondent*] *shall be at liberty to respond directly to her.*
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> **In the event that no agreement is reached, the guardianship dispute shall be referred to the Family Court at Nelson.**

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3 At [4].
4 At [15].
5 At [15]; and Care of Children Act 2004, ss 48(1) and (2).
6 Care of Children Act, s 16(3).
7 *In Re: various applications in relation to the children*, above n 2, at [20].
8 Emphasis added in bolded italics.

[13] The Judge recorded her understanding that the appellants objected to the wording shown in bold (the opposed wording) but otherwise consented to the Paragraph 8 Order.[9] The Judge said that the Chief Executive and lawyer for the children sought the Paragraph 8 Order in those terms. She noted that the first respondent agreed with the opposed wording. The first respondent was reported to have said she would not in any event make contact other than strictly in respect of guardianship matters but accepted the Chief Executive's point that it would help her avoid any potential pressure from the first appellant if those words were included. The Judge recorded that the children "strongly object[ed]" to any contact with the first appellant or the second respondent, whether through the first respondent or otherwise, and that counsel for the children was anxious to include the opposed wording. The Judge considered it appropriate the opposed wording was included, saying it would impose a restriction on the first respondent only and that it was a restriction she supported.[10]

[14] The Judge also recorded that the first appellant had filed a memorandum between the date of hearing and the date of judgment, referring to the fact that the daughter had turned 16 in early 2020.[11] This was relevant to the parenting orders as s 50 of the Care of Children Act prevents day-to-day parenting orders being made in respect of children over the age of 16 years unless there are special circumstances. The Judge noted that s 50 did not apply to children under the guardianship of the Court,[12] that the 2020 Orders were consented to as at 11 December 2019, and in any event "without doubt there [were] 'special circumstances'" in terms of s 50(1) of the Care of Children Act.[13]

[15] The Judge made the 2020 Orders, saying, in the circumstances, they were effective as at 11 December 2019.

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9 *In Re: various applications in relation to the children*, above n 2, at [18] and [19].

10 At [18]. Although the appellants objected to the wording referring to the jurisdiction of the Family Court at Nelson, that Court would clearly have jurisdiction and the appellants took no issue with that provision before us.

11 At [28].

12 Care of Children Act, s 50(3).

13 *In Re: various applications in relation to the children,* above n 2, at [29].

Was there jurisdiction for the Paragraph 8 Order?

[16] By their Notice of Appeal, the appellants appeal the whole of the Paragraph 8 Order, save for the introductory words, "Paragraph 5(f) of the order made by this Court (by consent) on 14 October 2016 is discharged".

[17] The Judge believed the appellants' objection was limited to the opposed wording whereby the first respondent was permitted to initiate contact with the first appellant and the second respondent but only in respect of guardianship matters. Before us, the first appellant said that the Judge's understanding was incorrect. The appellants' objection was as set out in the Notice of Appeal but in written submissions the appellants clarified that the appeal related only to the provisions governing contact between adults. The appellants did not object to the first portion of the Paragraph 8 Order prohibiting contact between the first appellant and the second respondent, or either of them, and either or both of the children. They sought deletion of the portion of the Paragraph 8 Order that governed contact between the adults.

[18] In the appellants' submission, there was no jurisdiction for the Court to make an order restricting contact between adults, which they described as a "de facto" protection order in the absence of the requirements for a protection order being met. The Paragraph 8 Order was made in breach of natural justice and was a breach of the right to freedom of association, they said.[14]

[19] The Chief Executive was discharged as the High Court's agent in respect of the High Court's guardianship of the children by the 2020 Orders. Ms Pollett, for the Chief Executive as intervener, explained that the Paragraph 8 Order was needed because the children requested it and it was supported, at the time anyway, by the first respondent. In her submission, given what had been protracted and acrimonious relationships and litigation between the parties, there was justification for the Paragraph 8 Order. Ms Pollett considered that it was incorrect to suggest the Paragraph 8 Order was akin to a protection order.

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[14] New Zealand Bill of Rights Act 1990, ss 27 and 17.

[20] Ms Pollett suggested a social worker should be asked to obtain the first respondent's response to the suggestion that the appealed portion of the Paragraph 8 Order restricting contact between adults be deleted. We note, however, that the first respondent has been served with these proceedings but has taken no part.

[21] We consider the appeal on this issue has merit.

[22] The Paragraph 8 Order begins with the discharge of the paragraph 5(f) order made by consent on 14 October 2016. Paragraph 5(f) reads:[15]

> 5. The application by [the first respondent] dated 9 September 2015, for leave to apply for a parenting order is granted and an interim parenting order in respect of the children is made, subject to the following conditions:
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> …
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> (f) There shall be no contact between either of the children and either [the first appellant] or [the second respondent], unless and until the children, of their own volition, indicate independently to the social worker that they are ready to seek such contact. In the event of such an intimation, the social worker will forthwith report to the Court, which, after hearing the parties and counsel, will make such orders as to the terms and conditions of contact as are then deemed appropriate.
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> …

[23] That interim parenting order was in favour of the first respondent and imposed a condition restricting contact between the children on the one hand, and the first appellant and/or the second respondent on the other. The Paragraph 8 Order was made in the context of the final parenting order in favour of the first respondent pursuant to s 48 of the Care of Children Act. It introduced a new provision which had not previously applied, that is, the restriction on contact between adults (the first appellant and the second respondent, and the first respondent). This restriction was requested by the Chief Executive and lawyer for the children.

[24] Section 48(1) of the Care of Children Act allows the court to 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, a child. Section 48(4) provides that a

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15 *In Re: Various applications in relation to the children* [*names redacted*] HC Auckland CIV-2007-404-7415, 14 October 2016 (Minute No 2).

parenting order may be made subject to any terms or conditions the court considers appropriate. In practice, this has included conditions which specify permitted modes and topics of communication between parents or other people with day-to-day care of a child.[16]

[25] Where an application has been made for a parenting order under s 48 (whether an interim or final parenting order), the court also has the power pursuant to s 57A to make an incidental temporary protection order in respect of all or any of the child, parent, or any person involved with the child, and a party to the application for the parenting order.[17] To make such a temporary protection order, the court must be satisfied that, had an application been made to it for the purpose, a protection order would have been granted under the Family Violence Act 2018,[18] and that any orders or directions under the Care of Children Act would not, by themselves, provide enough protection for all or any of those people.[19]

[26] Section 79 of the Family Violence Act sets out the requirements for making a protection order. The court must be satisfied that the respondent has inflicted, or is inflicting, family violence against the applicant and/or a child of the applicant's family,[20] and that the order is necessary to protect them.[21] "Family violence" under the Family Violence Act means physical, sexual or psychological abuse and includes a pattern of behaviour comprising all or any of such abuse that is coercive, controlling or causes cumulative harm to the applicant.[22]

[27] The Paragraph 8 Order could have been drafted so as to place conditions on contact between the adults, as we note has occurred in other cases, for example by specifying that communication between the first appellant and/or the second respondent on the one hand, and the first respondent on the other would be by email or text only and limited to issues concerning the child's care or guardianship.[23]

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16 Clare Barrett (ed) *Child Law* (online ed, Thomson Reuters) at [CC48.41]. See for example *Reed v Potiki* [2017] NZFC 9235; and *Todd v Walsh* [2016] NZFC 3160.
17 Care of Children Act, s 57A(1)(a)(iii) and (1)(b).
18 Section 57A(1)(b).
19 Section 57A(2).
20 Family Violence Act 2018, s 79(a).
21 Section 79(b).
22 Section 9(2) and (3).
23 *Reed v Potiki*, above n 16, at [35(d)]; and *Todd v Walsh,* above n 16, at [49(d)(v)]; *JBRS v HMJ*

However, the Paragraph 8 Order goes well beyond this and is more akin to a protection order. It prohibits the first appellant and second respondent from initiating contact with the first respondent as opposed to placing conditions on it. While the second respondent may contact them, this can only be in respect of guardianship matters.

[28] In her consideration of the Paragraph 8 Order, the Judge did not discuss whether the first appellant or the second respondent could be said to be inflicting family violence against the first respondent (or the children), or whether the 2020 Orders would be insufficient to protect them.[24] That was necessary in order to justify what amounted to an incidental protection order under s 57A of the Care of Children Act. Instead, the Judge considered that the inclusion of the opposed words was appropriate given the strong objection by the children to any contact with their biological parents and to help the first respondent avoid any potential pressure from the first appellant.

[29] We acknowledge the difficulties the Judge faced given her understanding that the Paragraph 8 Order was consented to save for the opposed wording. However, we are not satisfied there were grounds warranting the restrictions on contact between the first appellant and/or the second respondent on the one hand and the first respondent on the other whether under s 49(4) or s 57A. That portion of the Paragraph 8 Order must be quashed.

[30] We are pleased to record the first appellant's comment that "things are very good now" and the relationships between the parties, their children and indeed other adult children are developing well.

Bias

[31] The first appellant noted that he had alerted the Court on a number of occasions to a potential conflict on the part of Hinton J. Prior to being appointed a Judge, Hinton J had represented a former colleague of the first appellant who had not paid

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[Contact] [2012] NZFC 6039, [2013] NZFLR 807 at [77(14)]; and *JKB v JWN* FC Tauranga FAM-2004-080-1291, 4 July 2008 at [126(l)].

[24] No objection was taken to the Paragraph 8 Order as it related to contact between the first appellant and second respondent, and the children. We note this continued the terms of the previous 2016 paragraph 5(f) order albeit in more restrictive terms.

her account. The first appellant explained he had tried to assist at the time by seeking to have the account paid. He referred to his memorandum filed with the Court two days after the 11 December 2019 hearing:

> 14. In final, for the sake of transparency, the wh[ā]nau wish to again address the issue where Your Honour had represented … a former associate of [the first appellant's] in 2008 – 2009. Sizeable fees had been left outstanding and [the first appellant] had undertaken to seek funds from [the former associate's] father to resolve this, but failed. This is raised so it does not become an issue, and are at pains to do so because they all feel a good conclusion for the children is close. It is however raised as a matter of record.

[32] The first appellant said this matter had been raised in teleconferences in 2018 and 2019, and at the hearing on 11 December 2019 but had not been addressed.

[33] Before us, the first appellant conceded that he had simply raised this as "a matter of record" in the interests of transparency. He had not asked the Judge to recuse herself.

[34] Given the way in which the matter was raised, it is unsurprising that the Judge did not issue a formal decision addressing recusal. The standard for recusal is one of "real and not remote possibility", rather than probability.[25] In considering whether to recuse him or herself from sitting on a particular case, a judge must consider what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits and then, whether there is a logical and sufficient connection between those circumstances and that apprehension.[26] We do not accept that any assistance the first appellant might have offered an associate some time ago to resolve an unpaid account due to the Judge prior to her appointment meets the test warranting recusal.

Parenting order

[35] The parenting order was made by consent, as the first appellant confirmed before us.

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[25] "High Court recusal guidelines" (12 June 2017) Courts of New Zealand <www.courtsofnz.govt.nz> at [1.3]. Recusal guidelines developed and published as a requirement of s 171 of the Senior Courts Act 2016.

[26] At [1.4].

[36] We accept there were grounds to appeal the parenting order in terms of s 50 of the Act, given the discharge of the High Court's guardianship and the fact the daughter had turned 16 years old by the time the parenting order was made.[27] This issue arose because the daughter had turned 16 after the date of the hearing but before the judgment was issued and the 2020 Orders came into effect. As a consequence, the Judge's consideration of whether "special circumstances" existed to warrant the parenting order in respect of the daughter was brief and was without the benefit of submissions. Any special circumstances must exist at the time an order is being considered. The past history between the parties is of limited relevance.

[37] There is, however, no basis for us to interfere with the parenting order, given it was made by consent and the appellants are not asking for it to be amended or quashed. We note that the daughter is now aged 19 and the son will turn 18 in mid-2023. The parenting order is therefore no longer of effect in respect of the daughter and has minimal time left to run in respect of the son.

Result

[38] The appeal is allowed.

[39] Paragraph 8 of the Order made in the High Court is quashed and replaced with:

> *There shall be no contact between the first appellant and the second respondent (or either of them) and either or both of the children.*

[40] Nothing in this judgment affects any of the other 2020 Orders.

[41] In the circumstances of the appellants representing themselves, there is no order as to costs.[28]

Solicitors:
Crown Solicitor, Tauranga for Intervener

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27 The orders were made on 29 May 2020 and cannot be backdated.

28 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]–[56].