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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4286
[2013] NZHC 3185

BETWEEN	GMO Appellant
AND	SPS Respondent

Hearing:	30 October 2013 and (written submissions) 6, 13 and 19 November 2013
Appearances:	P Spring and B M Hojabri for the Appellant R C Knight and T A Chubb for the Respondent E Parsons lawyer for the Children
Judgment:	2 December 2013

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 2 December 2013 at 12:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr P Spring and Ms B M Hojabri, Keegan Alexander, Solicitors, Auckland
Mr R C Knight and Ms T A Chubb, Barristers, Auckland
Ms C Atchison (respondent's instructing solicitor), Martelli McKegg, Solicitors, Auckland
Ms E Parsons, Barrister, Auckland

[1] The appellant is the father and the respondent is the mother of three children. The appellant has appealed against two Family Court decisions relating to the children and made under the Care of Children Act 2004 (the Act).[1] These decisions are a substantive decision made on 27 August 2013 on a range of applications (the substantive decision) and a ruling made on 11 September 2013 arising out of the substantive decision (the ruling).

[2] By application to strike out the appeal, the respondent has raised a preliminary point as to whether there is jurisdiction to bring the appeal. I will come to the grounds for the application after noting the scope of the appeal.

[3] Parts of the appeal have been withdrawn. For the record these are:

(a) Parenting orders in the substantive decision relating to two of the children.

(b) Adjournment, in the substantive decision, of an application by the appellant for two of the children to be made guardians of the Court.

(c) In the ruling, the refusal of leave for the appellant father to appeal against two orders made in the substantive decision. These are orders expressed to be interim orders relating to the third child, A. They are orders placing A under the guardianship of the Family Court (the wardship order) and appointing a senior social worker of the Ministry of Social Development as the Court's agent (the agency order).

[4] Although leave was refused to appeal against the wardship and agency orders, and this Court has no jurisdiction to grant leave, an appeal is maintained against those orders. This is on two main grounds:

(a) That the orders purport to be interim orders, but there is no jurisdiction for the Family Court to make the orders in question as interim orders, and the orders that were made are therefore a nullity.

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[1] *GMO v SPO* [2013] NZFC 7119, 27 August 2013; *GMO v SPO* FAM-2012-004-002706, 11 September 2013.

(b) Whether or not there is jurisdiction to make interim orders, the orders are final in substance and leave is not required to appeal final orders.

[5] The essence of the respondent's argument in support of the application to strike out is as follows: there is jurisdiction to make interim wardship and agency orders; the orders made are interim in substance; leave of the Family Court is required to bring an appeal against interim orders (or interlocutory orders); leave was sought and declined in the ruling; the appellant is not entitled to seek leave to appeal from the High Court (and does not contend otherwise); there is no right of appeal against refusal of leave to appeal, and the appeal in that regard has now been abandoned.

The Family Court substantive decision

[6] There were a number of applications by both parents dealt with by the Court in the substantive decision. These included applications by both parents relating to guardianship of all three children. The father applied for an order that the mother be removed as a guardian, that the children be placed under the guardianship of the Court (which I am referring to as "wardship" for convenience), and that, in effect, he be given primary responsibility as guardian. The mother sought an order that A, then aged 9, be placed under the guardianship of the Court, that A be placed as a resident at Westbridge, a residential school for children with special needs, and that Child Youth and Family be agents for A's education or health needs.

[7] A does have special needs. There were two reports under s 133 of the Act from a clinical psychologist, Dr Louise Smith, and she was cross-examined. Dr Smith was the only witness who was cross-examined. Judge I A McHardy summarised some of Dr Smith's evidence, relating to A, as follows:

> [16] As indicated, the hearing on 20 August was specifically to allow cross-examination of Dr Smith in respect of her reports. Her evidence was somewhat chilling and sad in respect of these children. It highlighted the need for urgent action to be taken to put in place a parenting arrangement which meets their immediate special needs.
>
> [17] Dr Smith's evidence was that [A] has a diagnosis of conduct disorder child-onset, regressive type/severe. This is the diagnosis completed by Dr Moir. Dr Smith was of the view that [A]'s behavioural problems must be

> addressed before anything else and that needs to occur through a coherent behaviour management programme operating 24/7. The diagnosis means that outcomes are significantly more adverse and [A] is at a greater level of risk without intervention.

[8] There was affidavit evidence from the mother and father, but they were not cross-examined. This is because the Judge considered that there was pressing need to make a decision relating to A's immediate requirements including, and in particular, his placement at Westbridge. The Judge concluded that there was insufficient time for a full hearing with cross-examination of the parents and any other witnesses apart from Dr Smith.

[9] In the course of the hearing the father accepted that A's placement at Westbridge was appropriate, and in conjunction with a wardship order, but the father, in his affidavit evidence and submissions on his behalf, firmly contended that it was most appropriate that he be appointed as the sole decision maker for A.

[10] The Judge considered that there was insufficient evidence to determine whether the father's factual assertions supporting his application were correct. He concluded that, for that reason, he was not able to accede to the father's proposal that he be the sole decision maker. The father declined to meet the cost of an independent third party acting as the Court's agent. The chief executive of the Ministry of Social Development, through counsel for the Ministry, had given notice of consent to appointment of an appropriate officer of the Ministry as the Court's agent.[2]

[11] In the result the Court made the wardship and agency orders in relation to A and which are now under appeal. There were a number of related orders, but the two main orders were expressed in the judgment as follows:[3]

> (a) Pursuant to s 31(1)(a) Care of Children Act [A] be placed under the wardship guardianship of the Court (general not specific). I do not think that there is any dispute that that is the order that should be made in respect of [A] today. Accordingly that s 31 order is made.

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2 I was not referred to a copy of the written advice from counsel for the chief executive of the Ministry. What I have recorded conveys the essence of the advice from counsel; that is to say, it is not in issue that, before the guardianship and agency orders were made, the chief executive had given consent.

3 As recorded in the substantive decision at [50].

(b) The interim order proposal made by mother can be modified as follows, pursuant to the order that I have made under s 31:

(i) A senior social worker is to be appointed as the Court's agent from the Ministry of Social Development.

…

[12] There were five additional orders, recorded in the remainder of sub-paragraph (b), to the following essential effect:

(a) Placing A at Westbridge residential school with supplementary provisions for schooling.

(b) Appointing a psychiatrist to provide specialist care and treatment to A in consultation with the Court's agent and Westbridge.

(c) Appointing a clinical psychologist to provide counselling services to A in consultation with the court's agent and Westbridge.

(d) Directing the Court's agent to be responsible for attending to a number of matters.

(e) Directing that until A commenced at Westbridge he was to remain in his father's sole care.

[13] The formal order drawn up by the Court, and sealed on 3 September 2013, is headed "INTERIM GUARDIANSHIP ORDERS". Seven numbered orders are recorded. Order number 1 in fact contains two orders: the wardship order relating to A and adjournment of the wardship application in relation to the two other children. Order number 2 is the agency order, with an added provision that the social worker is not to be changed without the knowledge and approval of the Court. The remaining orders were those recorded above at [12].

[14] The Judge then turned to the applications relating to the other two children. He briefly explained why he was adjourning the wardship applications relating to those children, but made interim parenting orders. The Judge then said that there

needed "to be a review of these arrangements" and directed a review on 30 November 2013. Mr Knight, for the respondent mother on this application, accepted that this is a direction related to the parenting orders only; that it is not a provision for review of the wardship and agency orders, or either of them.

Discussion

[15] I received written submissions for the parties and from Ms Parsons as lawyer for the children. Ms Parsons, in her oral submissions, presented an additional argument in support of the proposition that the Family Court has jurisdiction to make interim wardship and agency orders. This argument had not been advanced in her written submissions or in Mr Knight's submissions for the respondent mother. It concerned the extent of the powers of the Family Court arising from s 34(2) of the Act which, in essence, extends to the Family Court the original *parens patriae* jurisdiction of the High Court. The statutory provisions and the extent of the *parens patriae* jurisdiction are discussed below. For reasons recorded in a minute of 30 October 2013 I granted Mr Spring's application for an adjournment to give him an opportunity to file further written submissions in response to this argument with leave to Mr Knight and Ms Parsons to reply. The original and the further submissions have been taken into account without necessarily being addressed in this judgment.

[16] All counsel proceeded on the basis that the question whether the Family Court has jurisdiction to make interim wardship and agency orders depends on whether there are statutory provisions in the Act to that effect.

[17] The most relevant provisions of the Act are as follows:

> **31 Application to Court**
>
> (1) An eligible person may make an application to a Court with jurisdiction under this section for—
>
> (a) an order placing under the guardianship of the Court a child who is not married, in a civil union, or in a de facto relationship:
>
> (b) an order appointing a named person to be the agent of the Court either generally or for any particular purpose.

…

32 Notice to be given to chief executive in certain cases before Family Court

(1) This section applies when—

(a) an application is—

(i) made under section 31 to a Family Court;

… and

(c) any of the following applies:

(i) the application seeks an order appointing the chief executive to be the agent of the Court, either generally or for a particular purpose, in respect of the child who is the subject of the application; or

(ii) the application does not seek an order of the kind described in subparagraph (i), but the Court considers, at any stage of the proceedings, that it is likely to make such an order;

…

(2) When this section applies,—

(a) the Court must give notice of the application to the chief executive; and

(b) on receipt of the notice, the chief executive is entitled to appear and be heard on the application.

(3) Subsection (2) does not apply if the Court considers that the delay that would be caused by giving notice would or might entail serious injury or undue hardship to the child.

(4) If this section applies and the Court makes an interim order without giving notice to the chief executive,—

(a) the Court must give notice of the application and the interim order to the chief executive; and

(b) on receipt of the notice, the chief executive is entitled to appear and be heard on the matters of the application and the interim order.

33 Orders of Court

(1) A Court to which an application is made under section 31 may—

(a) make an order described in section 31(1)(a); or

(b) make orders described in section 31(1)(a) and (b); or

(c) make—

(i) an order described in section 31(1)(a); and

(ii) an order appointing any person whom the Court thinks fit to be the agent of the Court either generally or for any particular purpose.

(2) An order under subsection (1) in respect of a child ceases to have effect when the first of the following events occurs:

(a) the Court orders that the order ceases to have effect; or

(b) the child turns 18 years; or

(c) the child marries [or enters into a civil union]; or

(d) the child lives with another person as a de facto partner.

34 Powers of Court

(1) A Court to which an application is made under section 31 has the rights and powers specified in subsection (2)

(a) between the making of the application for an order and its disposal; and

(b) while an order is in force.

(2) The Court has the same rights and powers in respect of the person and property of the child as the High Court had in relation to wards of Court immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, except that the Court may not—

(a) direct any child who is of or over the age of 16 years to live with any person unless the circumstances are exceptional; or

(b) commit for contempt of Court a child or the child's spouse for marrying without the Court's consent while the child is under the guardianship of the Court.

(3) The High Court has all the powers of a Family Court in relation to who has the role of providing day-to-day care for, or contact with, a child who is the subject of an application under section 31 or an order under section 33. An order of the High Court about providing day-to-day care for, or contact with, any child of that kind may be enforced under this Act as if it were an order of a Family Court.

35 Further provisions relating to powers of Court

(1) This section applies to a Court if it is a Family Court or the High Court hearing or otherwise dealing with proceedings under section 31.

(2) The Court may, before or by or after the principal order, make any interim or final order it thinks fit about the role of providing day-to-

day care for, or about contact with, or about the upbringing of, a child who is the subject of the proceedings.

…

(4) The Court may, if in all the circumstances it thinks it appropriate to do so, make an order vesting the sole guardianship of the child in 1 of the parents, or make any other order with respect to the guardianship of the child that it thinks fit. However, if the Court makes no order with respect to the guardianship of the child, every person who was a guardian of the child continues to be a guardian of the child.

(5) An order may be made under this section, and an order made under this section may be varied or discharged, even though the Court has refused to make the principal order or to give any other relief sought.

[18] Provisions relating to the nature of guardianship are also relevant. The most relevant provisions are as follows:

15 Guardianship defined

For the purposes of this Act, guardianship of a child means having (and therefore a guardian of the child has), in relation to the child,—

(a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child:

(b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment:

(c) every duty, power, right, and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.

16 Exercise of guardianship

(1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—

(a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and

(b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and

(c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

[19] In the substantive decision the Judge did not consider the question whether there was jurisdiction to make interim wardship and agency orders. It appears that the issue did not arise. It did arise, squarely, when the father applied for leave to appeal. The Judge concluded that such jurisdiction was found in the interlinking of ss 31 and 32. The Judge accepted a submission from Mr Knight for the mother that the jurisdiction arose from s 32(4), which makes expression provision for an interim order, and s 32(1) which applies s 32 when there is an application under s 31 for a wardship or agency order.

[20] On the present application Mr Spring argued that, in the circumstances of this case, s 32 had no application. This was accepted by Mr Knight and by Ms Parsons. I am satisfied that the concessions by Mr Knight and Ms Parsons were properly made. Although there is some ambiguity in s 32(4), in my opinion what it means is that, if the Court intends to make wardship or agency orders, but notice has not been given to the chief executive, an interim order is to be made, rather than a final order. The interim nature is also for the limited purpose recorded in paragraphs (a) and (b) of s 32(4). As earlier recorded, the chief executive had in fact provided consent before the order was made.[4]

[21] The primary argument for the respondent at this hearing was that jurisdiction for interim orders is provided in s 35. The essence of the argument was that s 35(2) makes express provision for interim orders to be made in respect of orders under s 31.

[22] Ms Parsons, as indicated earlier, supported the respondent's argument that the Family Court does have jurisdiction to make interim wardship and agency orders. She emphasised that s 35(2) refers to the Court making orders "before or by or after" the principal order. The submission was that the Court in this case "by" the principal wardship and agency orders it made, made them as interim orders.

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4 See above at [10].

[23] Ms Parsons then developed her *parens patriae* argument based on s 34(2). The essence of the submission was that, given the very wide scope of the *parens patriae* jurisdiction, and with the powers from that jurisdiction being vested in the Family Court, the Family Court had and has power to make interim wardship and agency orders. I will come back to this argument.

[24] Mr Spring submitted that s 35, and s 35(2) in particular, only make provision for interim orders that are ancillary to principal orders made under s 31. The principal orders under s 31 are wardship and agency orders and therefore, it was submitted, the provision in s 35(2) to make interim orders has no application to wardship and agency orders.

[25] I do not agree with Mr Spring's submission. It would result in a construction of the provision which effectively removes some of the words used. I agree with Ms Parsons' emphasis on the word "by" as used in s 35(2). Refining Ms Parsons' submission, the relevant words in s 35(2) applied to the circumstances of this case, would be as follows:

> The Court may … by … the principal order, make any interim … order it thinks fit about the … day-to-day care for, or … the upbringing, of a child who is the subject of the proceedings.

[26] What the Judge did in this case is what s 35(2) empowered him to do. Section 35(2) empowers the Court to make interim or final orders as orders ancillary to "principal" wardship and agency orders. But interim principal orders are not excluded; they are included.

[27] Mr Spring further submitted that s 35(2) is in any event not directed to orders relating to full guardianship by the Court. This was on the basis that the subsection makes provision for interim orders (or final orders) relating to the specific matters referred to – day-to-day care for, contact with, and upbringing of, a child. Reference was made to ss 15 and 16 of the Act, and related provisions. Mr Knight and Ms Parsons relied on the words "the upbringing of a child" as covering matters of guardianship. Having regard to the provisions of ss 15 and 16, I am satisfied that the words "upbringing of the child" and "day-to-day care" extend the power to make interim orders to wardship and agency orders.

[28] Section 35(2) is not completely free from ambiguity. However, I am satisfied that the construction of the provisions to this point is a reasonable construction. This is also consistent with s 4(1) of the Act which requires the welfare and the best interests of the child to be the first and paramount consideration in the administration and application of the Act, amongst other things. To the extent that there is some ambiguity in s 35(2), the provision should be construed in a way which gives the Family Court (and the High Court, which has concurrent jurisdiction under s 30) the flexible powers that are often needed, and often under some urgency, to ensure that the welfare and best interests of a child are met. These considerations underpinned the Judge's decision in this case to make interim orders.

[29] In coming to this conclusion I have not overlooked a further submission by Mr Spring based on s 48(4) of the Act. Section 48 makes provision for parenting orders and s 48(4) expressly provides that "a parenting order may be a final order or it may be an interim order that has effect until a specified date or event or until the Court orders otherwise". Mr Spring pointed to the absence of a clear provision to that effect in relation to wardship and agency orders. It is a reasonable point for the purposes of interpretation. However, the contrast between the clear expression in s 48(4) and the somewhat indirect expression in s 35(2) does not persuade me that s 35(2) should be construed more narrowly than I have construed it.

[30] The further submissions from Ms Parsons relating to the *parens patriae* jurisdiction reinforce the conclusion I have reached or, if I am wrong in the construction of s 35(2), the *parens patriae* jurisdiction in any event provides power to make interim orders. This is the jurisdiction expressly conferred on the Family Court, and preserved in respect of the High Court, by s 34(2).

[31] Mr Spring, in his further memorandum on the *parens patriae* question, referred to the statutory predecessors of s 34(2) in the Guardianship Act 1968; s 9(3) in the Guardianship Act 1968 as originally enacted, and subsequent amendments. These provisions are in terms similar to s 34(2). Mr Spring referred to the decision of this Court in *W v Director-General of Social Welfare* in which s 9(3) was

considered.[5] That decision is not on point. The Court in that case was considering an argument by one party that the mere filing of an application made the child a ward of Court. The argument was rejected by Eichelbaum CJ. The reasons for doing so, which required consideration of s 9(3), do not bear on the questions now arising. Mr Spring also referred to a decision of the Family Court in *Re K*.[6] In that case, as in *W v Director-General of Social Welfare*, the Court was considering the powers of the Court between the making of an application and its disposal, with the primary focus in *Re K* being on the power to make an ex parte order. The decision does not support the appellant's argument on the jurisdiction to make interim orders. In fact, the passage cited by Mr Spring supports a conclusion that the Court has wide powers if required. Judge von Dadelszen said:

> [96] Each application will need to be considered on its own merits. However, in cases involving disagreement about medium or long term care, the Court is likely to take the view that orders should only be made following a hearing at which the arguments put forward by all parties are heard. Nevertheless, those parties will need to be aware that the Court is able to exercise what might be described as a supervisory role and intervene following the filing of the application and prior to any hearing should the need arise; that is the effect of the "protective umbrella" created by s 10E.

Section 10E(2) in the Guardianship Act 1968, a substituted provision, was another statutory predecessor of s 34(2) in the Act.

[32] Mr Spring did not make submissions on the scope of the *parens patriae* jurisdiction. The further memorandum from Mr Knight referred to a number of authorities on this point, which is the central point for the purpose of determining whether there is jurisdiction to make interim wardship and agency orders. Mr Knight referred to seven authorities.[7] These authorities confirm what has long been established: the *parens patriae* jurisdiction which the High Court had in relation to wards of Court immediately before the commencement of the Guardianship Act 1968 was a very wide jurisdiction to make whatever orders might be required "in

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5 *W v Director-General of Social Welfare* [1990] 1 NZLR 378.

6 *Re K* FC Hastings FP020/194/00, 30 June 2000.

7 *Eve (Mrs) v Eve* 1986 CanLII 36 (SCC), [1986] 2 SCR 388 at 407-408, 410 and 411; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 38 ER 236 at 241; *Wellesley v Wellesley* (1828) 2 Bli NS 124, 4 ER 1078 at 1085, [1824-34] All ER Rep 189 at 196; *Re X (a minor)* [1975] Fam 47, [1975] All ER 697 at 699 and 705, [1975] 2 WLR 335, 119 Sol Jo 12; *Palin v Department of Social Welfare* [1983] NZLR 266 (CA) at 272, (1983) 2 NZFLR 321, (1983) 1 FRNZ 117; *Hawthorne v Cox* [2008] 1 NZLR 409 (HC) at 425-426, [2008] NZFLR 1, (2007) 26 FRNZ 440; *ARG v Chief Executive of the Ministry of Social Development* [2012] NZFC 7841.

respect of the person and property" of a child. Under the present Act this power, conferred now by s 34(2), must be exercised in accordance with the primary provisions of the Act and in particular s 4(1). Provisions such as s 4(1), however, do not in any way suggest that the power to make interim wardship orders, plainly within the original *parens patriae* jurisdiction, has been removed.

[33] For these reasons I am satisfied that the Family Court, and the High Court, has power to make interim wardship and agency orders.

Are the orders final in substance?

[34] Mr Spring submitted that, if the Court has jurisdiction to make interim orders, the orders in this case were nevertheless final in substance. If that is correct, then the appellant would be entitled to appeal as of right; leave of the Family Court to appeal is not required.

[35] I am satisfied that the orders are interim in substance as well as in form. In coming to this conclusion I have had regard to the cases cited by Mr Spring.[8]

[36] The starting point, perhaps, is that it is abundantly clear that the Judge intended the orders to be interim. This was then reflected in the formal order subsequently sealed by the Court. The intituling of an order is far from determinative, but the order as approved by the Judge is expressed to be an interim order.

[37] The reason why the Judge proceeded as he did, with the clear intention of making orders that were interim, in turn indicates that the orders are interim in substance. I will record some of the most relevant paragraphs from the substantive decision:

> [34] As I have indicated above, I have not had the benefit of hearing either party under cross-examination. Therefore these submissions that are made in support of father's position cannot at this time be the subject of any findings on my part. In particular I cannot make a finding as to who the

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8 *Edwards v Nouradien* [1990] NZFLR 295; *Fletcher v Blackburn* [2009] NZFLR 354; *S v B* HC Wellington CIV-2008-485-1071, 1 August 2008.

> proponent of conflict is, or whether or not father has kept his composure, as he says, despite significant and repeated physical provocation by mother.
>
> …
>
> [37] I find myself in a position where I simply cannot accept the proposals made by father that he is the appropriate person to put in the role of decision making. He may well be right in a number of the contentions he makes. However, as I have said, the ability of the Court to enquire into those matters has not yet been afforded. *That will be no doubt the focus of future hearings.*
>
> (emphasis added)
>
> [38] Today, I can only do what is best given the unfortunate information that is before me. I cannot make decisions on an assumption that father is not a perpetrator of any difficulties in relation to the adult issues. There is a prime need for decision to be made in respect of how the immediate future can be handled for these children. I do not see that the evidence allows me to support the submissions that I have detailed in length which had been given on behalf of father. I do not find that the evidence is such that that can be a finding I will make today.
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> …
>
> [45] Having considered the evidence and submissions before me, *I have decided as to what the best interim arrangements are for the present time*. I do so having considered the views of the children as expressed to their counsel, which can be summarised as follows, as set out in Ms Parsons' report of 19 August:
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> (emphasis added)

[38] Given the fact that the Family Court formally issued all of the orders, including the wardship and agency orders, as interim orders, and given the further fact that Judge I A McHardy subsequently reviewed the matter and expressly affirmed that he was making interim orders, the appellant is entitled to seek a hearing in the Family Court for a final determination of his particular application for wardship and agency orders, and such other orders as he considers are appropriately sought in respect of A. This was acknowledged by Mr Knight for the respondent and by Ms Parsons for the children at the hearing before me. It is recorded in my minute of 30 October 2013.

[39] For these reasons I am satisfied that the orders in question which were issued as interim orders are interim orders.

Result

[40] I am satisfied that there is no jurisdiction for the appellant to bring this appeal. It is accordingly struck out.

[41] If costs and disbursements are sought, memoranda in support should be filed and served within one month and any memoranda in opposition within a further month.

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Woodhouse J