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.

NOTE: EXTANT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES: [2020] NZHC 3165.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA19/2021
[2022] NZCA 207

BETWEEN	D NEWTON First Appellant
	L NEWTON Second Appellant
AND	FAMILY COURT AT AUCKLAND First Respondent
	R F VON KEISENBERG Second Respondent
	B LAKE Third Respondent
AND	ATTORNEY-GENERAL Intervener
	NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA Intervener

CA50/2021

BETWEEN	FAMILY COURT AT AUCKLAND Appellant
AND	D NEWTON First Respondent
	L NEWTON Second Respondent
	B LAKE Third Respondent

	AND	ATTORNEY-GENERAL Intervener NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA Intervener

Hearing:	23–24 November 2021
Court:	Cooper, Collins and Goddard JJ
Counsel:	DAT Chambers QC for First and Second Appellant in CA19/2021 and First and Second Respondent in CA50/21 No appearance for First Respondent in CA19/2021 and Appellant in CA50/2021 V A Crawshaw QC and S M Wilson for Second Respondent in CA19/2021 No appearance for Third Respondent in CA19/2021 and Third Respondent in CA50/2021 A Chan QC, B M McKenna and C N Tocher for Attorney-General as Intervener ACM Fisher QC for New Zealand Law Society | Te Kāhui Ture o Aotearoa as Intervener A J Cooke as lawyer representing children
Judgment:	24 May 2022 at 3.00 pm

JUDGMENT OF THE COURT

CA19/2021

A The appeal is dismissed.

B The appellants must pay costs to each of the second and third respondents for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

C This Court's file may not be searched by any person without the leave of a judge, which must be sought by written application on notice to the parties.

CA50/2021

A The appeal is allowed.

B The proceeding is remitted back to the Family Court to determine whether, in the current circumstances, a psychological report should be obtained under s 133 of the Care of Children Act 2004. In making that determination the Family Court must have regard to this judgment.

C Costs in respect of this appeal are to lie where they fall.

D This Court's file may not be searched by any person without the leave of a judge, which must be sought by written application on notice to the parties.

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REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] The two appeals before this Court have their genesis in an application for a parenting order under s 48 of the Care of Children Act 2004 (COCA) in respect of two children, whom we will refer to as Paul and Susan. The application was made by their maternal grandmother (whom we refer to as Ms B Lake). She seeks an order providing for her to have contact with Paul and Susan. The application is opposed by the

children's father and stepmother (whom we refer to as Mr and Mrs Newton), with whom the children live.[1]

[2] Ms B Lake's application was made in June 2017, almost five years ago. No progress has been made towards a substantive determination of that application because the parties have been embroiled in litigation in the Family Court, in the High Court, and now in this Court, about whether a psychological report in respect of the children should be obtained under s 133 of COCA.

[3] The appeals raise three main legal issues:

(a) Is it necessary, before a Family Court judge makes an order under s 133 of COCA that a psychological report be prepared, that the judge ascertain and take into account the views of the child who would be the subject of that report?

(b) Is it open to a party to proceedings under COCA to apply to the High Court for judicial review of a s 133 order, or is such an application an abuse of process?

(c) In what circumstances, if any, can a party to proceedings under COCA seek judicial review of reports prepared by a person appointed as lawyer for the child (LFC) under that Act?

[4] We summarise our conclusions on each of those issues as follows.

Ascertaining the views of a child before making a s 133 order

[5] A Family Court judge may consider, in a particular case, that it is desirable to ascertain the views of a child in connection with a proposal that a s 133 report be obtained. But the judge is not required to do so in every case. Whether it is appropriate to ascertain the child's views, and the specific issues in respect of which their views

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[1] We have adopted fictitious names for the children and their parents and grandmother to protect the children's privacy.

should be obtained, are matters for the judgement of the Family Court judge having regard to ss 4 and 6 of COCA and the particular circumstances of the case.

Judicial review of s 133 orders

[6] Judicial review is in principle available in respect of an interlocutory decision made by a Family Court judge under COCA, where the judge has failed to exercise a statutory power in accordance with that Act. But such a decision will be set aside in judicial review proceedings only where such relief is consistent with the scheme of the legislation, including the carefully structured appeal rights set out in s 143 of COCA. Judicial review is intended to ensure fidelity to the statutory scheme, not to undermine it.

[7] Section 143(3A) of COCA expressly provides that there is no right of appeal from a s 133 order, even by leave. That restriction reflects two considerations: the nature of a s 133 order — it is a preliminary order made to obtain information that the judge considers will assist the court to make substantive decisions — and the need for prompt decision-making under COCA. It would undermine the statutory objective set out in s 4(2) of making decisions in a timeframe consistent with a child's sense of time if parties could delay obtaining a s 133 report, and delay informed decision-making on a substantive application, by pursuing challenges to s 133 decisions.

[8] It would be inconsistent with the statutory scheme for relief to be granted in judicial review proceedings in respect of a decision under s 133 except in a very clear-cut case of fundamental error. An order under s 133 will not be set aside in judicial review proceedings merely because the High Court judge considers that the criteria set out in s 133(6) were not met. The High Court judge would need to be persuaded that it was not open to the Family Court judge to form the view that the criteria were met.

[9] Section 133(7) of COCA requires the court to have regard to the parties' wishes before deciding whether or not to make a s 133 order, if the court knows the parties' wishes or can speedily ascertain them. But the child who is the subject of an application for a parenting order is not a party to the proceedings. Section 133(7) does not require the court to ascertain the child's views. Nor are those views a mandatory

relevant consideration before a Family Court judge can make an order for a s 133 report to be obtained. A s 133 order cannot be challenged in judicial review proceedings on the basis that the child's views were not obtained before the order was made.

[10] Judicial review of a s 133 order may be granted in rare circumstances where:

(a) the ground of review is consistent with the statutory scheme. Thus for example judicial review might be sought on the grounds of apparent bias; and

(b) it is necessary to do so in order to avoid consequences that could not be remedied by waiting for the Family Court to make a final decision, and a party exercising rights of appeal in respect of that final decision.

[11] Review of a s 133 order on the grounds of pre-determination is also in principle available. But care needs to be taken to distinguish between prompt decision-making on a frequently encountered preliminary issue by a well-prepared judge with substantial experience of such matters, and a decision made by a judge with a closed mind that is made up in advance, and is not open to persuasion. Only the latter amounts to pre-determination.

LFC reports are not amenable to judicial review

[12] The report of an LFC appointed under s 7 of COCA is simply a submission on the facts and the law made by the LFC to the court on behalf of the child. It decides nothing. It will be taken into account by the judge along with the parties' submissions, and the other material before the court. Any decisions affecting the parties and the child are made by the judge, who may or may not accept the submissions of the LFC.

[13] A report prepared by an LFC is not amenable to judicial review. The LFC is not exercising a statutory power of decision, or any other form of statutory power, when preparing a report. Nor is there any basis for judicial review of an LFC's report at common law.

[14] The LFC is an officer of the Family Court, under the direction and supervision of that court. If there are concerns about the conduct of an LFC, there are established mechanisms for making complaints to the Family Court and to the New Zealand Law Society | Te Kāhui Ture o Aotearoa (NZLS). Judicial review is neither necessary nor appropriate in order to ensure proper performance by an LFC of their statutory and professional responsibilities.

[15] An order made by a Family Court judge cannot be challenged in judicial review proceedings on the basis that it was made in reliance on an "ultra vires" report by an LFC. It is conceptually incoherent to describe submissions by an LFC as "ultra vires", however wrong in law or inappropriate they may be. The submissions of an LFC that are wrong in law are not unlawful: they are simply wrong. Other parties can make submissions pointing out the respects in which they consider an LFC's submissions are wrong or inappropriate. The judge then makes a decision. The legislation sets out the rights of appeal to the High Court that are available in respect of different categories of decision. Judicial review of the judge's decision may also be available in rare circumstances, as already mentioned. But the judge's decision cannot be the subject of a collateral attack dressed up as an application for judicial review of the LFC's report. It is an abuse of process to attempt to do so.

Implications for these proceedings

[16] The consequence of our findings for the present proceedings is that the Family Court will need to consider whether a s 133 order should be made in the current circumstances, having regard to the guidance we have provided about the operation of s 133 and the interplay between that provision and s 6 of COCA. The Family Court judge may ask the LFC to ascertain the views of the children on their willingness to speak with a psychologist, and in particular on whether they are happy to speak with the psychologist who prepared s 133 reports in 2011 and 2014, if the judge considers that it would be helpful to do so in this particular case. But that will be a matter for the judge. Obtaining the children's views is not a prerequisite for the making of a s 133 order.

[17] Our reasons are set out in more detail below.

Relevant legislation

[18] Before we outline the lengthy procedural history of these proceedings, it is helpful to set out the statutory provisions that govern the grandmother's application for a parenting order, and the circumstances in which an order may be made under s 133 of COCA for a psychological report to be obtained.

Care of Children Act 2004

[19] The purpose of COCA is set out in s 3(1). It is to:

> (a) promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and
>
> (b) recognise certain rights of children.

[20] The fundamental principle governing decision making under COCA is set out in s 4. That provision emphasises that the welfare and best interests of a child are paramount:

> **4 Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
>
> (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
>
> (a) must take into account—
>
> (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
>
> (ii) the principles in section 5; and
>
> (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.
>
> …

[21] Section 5 sets out principles relevant to a child's welfare and best interests. Paragraph (b) provides that "a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians". Paragraph (e) provides that "a child should continue to have a relationship with both of his or her parents, and … a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened."

[22] Section 6 provides that in certain proceedings a child must have a reasonable opportunity to express their views on matters that affect them, and those views must be taken into account:

> **6 Child's views**
>
> (1) This subsection applies to proceedings involving—
>
> (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
>
> (b) the administration of property belonging to, or held in trust for, a child; or
>
> (c) the application of the income of property of that kind.
>
> (2) In proceedings to which subsection (1) applies,—
>
> (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
>
> (b) any views the child expresses (either directly or through a representative) must be taken into account.

[23] Section 7 provides for the appointment of a lawyer to represent a child in proceedings under COCA:

> **7 Appointment of lawyer to represent child in proceedings**
>
> A court may appoint, or direct the Registrar of the court to appoint, a lawyer to represent a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act if the court—
>
> (a) has concerns for the safety or well-being of the child; and
>
> (b) considers an appointment necessary.

[24] Section 48(1) provides for 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". An application for a parenting order must be made by an eligible person, as defined in s 47. It is common ground that the children's grandmother is an eligible person.

[25] Section 133 provides for the Family Court to seek reports from various sources to assist with the determination of proceedings: cultural reports, medical reports, psychiatric reports and psychological reports.

[26] Section 133(4A) provides that in certain proceedings, including an application for a parenting order, the court may obtain a psychological report. The meaning of the term "psychological report" for this purpose is set out in s 133(1):

> **psychological report** means a report that is about the child who is the subject of an application and that covers any or all of the following matters:
>
> (a) how current arrangements for the child's care are working for the child:
>
> (b) the child's relationship with each party, including, if appropriate, the child's attachment to each party:
>
> (c) the child's relationship with other significant persons in the child's life:
>
> (d) the effect or likely effect on the child of each party's parenting skills:
>
> (e) the effect or likely effect on the child of the parties' ability or otherwise to co-operate in the parenting of the child:
>
> (f) the advantages and disadvantages for the child of the options for the care of the child:
>
> (g) any matter that the court specifies under subsection (5)(b)(ii)

[27] Section 133(5) provides that where the court wishes to obtain a psychological report, either the court or the Registrar must request a psychologist to prepare the report. The court must specify which of the matters listed in paragraphs (a) to (f) of the definition of psychological report the report is to cover. The court may also specify any matter not listed in those paragraphs that the report is to cover.

[28] The circumstances in which the Family Court may seek a psychological report are set out in s 133(6) and (7), which are at the heart of the issues raised by this appeal:

> (6) The court may act under subsection (5) only if—
>
> (a) the court is satisfied that the information that the psychological report will provide is essential for the proper disposition of the application; and
>
> (b) the court is satisfied that the psychological report is the best source of the information, having regard to the quality, timeliness, and cost of other sources; and
>
> (c) the court is satisfied that the proceedings will not be unduly delayed by the time taken to prepare the psychological report; and
>
> (d) the court is satisfied that any delay in the proceedings will not have an unacceptable effect on the child; and
>
> (e) the court does not seek the psychological report solely or primarily to ascertain the child's wishes.
>
> (7) If the court is entitled by subsection (6) to act under subsection (5) and if the court knows the parties' wishes about the obtaining of a psychological report or can speedily ascertain them, the court must have regard to the parties' wishes before deciding whether or not to act under subsection (5).

[29] The court may direct that meetings take place between the report writer and the child and the parties under s 133(8) and (9):

> (8) If the court acts under subsection … (5), it may give directions at the same time on arrangements for—
>
> (a) the child to meet with the report writer; or
>
> (b) 1 or more of the parties to meet with the report writer; or
>
> (c) the child and 1 or more of the parties to meet with the report writer.
>
> (9) If a party or the child fails to meet with the report writer as directed by the court,—
>
> (a) the report writer must notify the court; and
>
> (b) the court may make further directions.

[30] After the report is provided to the Family Court, the Registrar provides copies of the report to the lawyers for the parties, or in certain circumstances to the parties themselves, and to any lawyer appointed to act for the child.[2]

[31] Before the report is copied to an LFC, the court must consider whether the report may be given or shown to the child.[3] An LFC may give or show the report to the child for whom the lawyer is acting only if the court so orders. But "in every case the [LFC] must explain to the child the purpose and contents of the report, unless the [LFC] considers that to do so would be contrary to the welfare and best interests of the child".[4]

[32] Section 143 provides for appeals to the High Court from certain decisions of the Family Court. There is a right of appeal from substantive determinations.[5] There is a right of appeal from interlocutory and interim orders with the leave of the Family Court. But, very importantly for present purposes, s 143(3A)(b)(iii) expressly excludes appeals from s 133 decisions:

> **143 Appeals to High Court**
>
> (1) This subsection applies to a decision of the 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 the 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.

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2 Care of Children Act 2004, s 134.
3 Section 134(4).
4 Section 134 (5).
5 Section 143(1).

(3A) *However, no appeal may be made to the High Court under subsection (3) in relation to—*

…

(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*.

(emphasis added)

Family Court Act 1980

[33] Section 9B of the Family Court Act 1980 provides guidance on the role of a lawyer appointed to represent a child under COCA and certain other Acts:

9B Role of lawyer appointed to represent child or young person in proceedings

(1) The role of a lawyer who is appointed to represent a child or young person in proceedings is to—

(a) act for the child or young person in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person:

(b) ensure that any views expressed by the child or young person to the lawyer on matters affecting the child or young person and relevant to the proceedings are communicated to the court:

(c) assist the parties to reach agreement on the matters in dispute in the proceedings to the extent to which doing so is in the best interests of the child or young person:

(d) provide advice to the child or young person, at a level commensurate with that child's or young person's level of understanding, about—

(i) any right of appeal against a decision of the court; and

(ii) the merits of pursuing any such appeal:

(e) undertake any other task required by or under any other Act.

(2) To facilitate the role set out in subsection (1)(b), the lawyer must meet with the child or young person and, if it is appropriate to do so, ascertain the child's or young person's views on matters affecting the child or young person relevant to the proceedings.

(3) However, subsection (2) does not apply if, because of exceptional circumstances, a Judge directs that it is inappropriate for the lawyer to meet with the child or young person.

(4) A lawyer appointed to represent a child or young person in proceedings may—

(a) call any person as a witness in the proceedings:

(b) cross-examine witnesses called by any party to the proceedings or by the court.

Family Court (Supporting Children in Court) Legislation Act 2021

[34] The Family Court (Supporting Children in Court) Legislation Act 2021 is not yet in force. It will come into force on the earlier of a date appointed by Order in Council and the date two years after Royal Assent.[6] But we refer to it because it contains some helpful guidance on the purpose of s 6 of COCA. And we accept the submission of Ms Chambers QC for the Newtons that this Act confirms the "direction of travel" in relation to ascertaining children's views in proceedings that affect them.

[35] The Act will amend s 5 of COCA, which sets out principles relating to a child's welfare and best interests, by adding a new paragraph (g):

(g) a child must be given reasonable opportunities to participate in any decision affecting them.

[36] The Act will amend s 6 of COCA by inserting a new subsection (1AAA) as follows:

(1AAA) The purpose of this section is to implement in New Zealand Article 12 of the United Nations Convention on the Rights of the Child.

6 Family Court (Supporting Children in Court) Legislation Act 2021, s 2.

[37] The Act will also insert a new s 7AA:

> **7AA Lawyer appointed to represent child must explain proceedings to child**
>
> A lawyer appointed under section 7 to represent a child must, if it is reasonably practicable to do so having regard to the age and maturity of the child, explain the nature of the proceedings to the child in a manner that the child is most likely to understand.

Convention on the Rights of the Child

[38] The United Nations Convention on the Rights of the Child (CRC) entered into force in September 1990.[7] New Zealand ratified the CRC on 6 April 1993.

[39] Section 6 of COCA is intended to give effect to art 12 of the CRC, as the new s 6(1AAA) set out above confirms. Article 12 provides:

> **Article 12**
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The proceedings — an overview

Application for parenting order by maternal grandmother

[40] Paul was born in May 2008. Susan was born in January 2010. Their mother, whom we will refer to as Ms A Lake, was in a de facto relationship with Mr Newton. They lived together between June 2007 and August 2009. Susan was born after they had separated.

[41] The arrangements for the care of the children were the subject of considerable conflict between the father and the mother from 2010 to 2014. The Family Court was

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[7] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

called on to determine a range of issues in relation to those arrangements. The proceedings were case-managed by Judge de Jong. Reports were obtained from a psychologist under s 133 of COCA in 2011, and again in 2014, to inform the Court's determination of those proceedings. On 30 June 2014 a final parenting order was made which provided for shared care between Mr Newton and Ms A Lake.

[42] Ms A Lake died suddenly in January 2016. Following her death, Mr Newton and his wife Mrs Newton took on the role of primary caregivers of the children. Mrs Newton was appointed an additional guardian of the children in July 2016. The children live with Mr and Mrs Newton.

Application for parenting order by maternal grandmother

[43] In June 2017 the children's maternal grandmother, Ms B Lake, applied for a parenting order granting her regular contact with the children. The application was opposed by the Newtons.

[44] Mr and Mrs Newton requested that the parenting order application be dealt with by Judge de Jong, as he had case managed the earlier proceedings and was familiar with the family's background.

First s 133 order

[45] On 13 September 2017 Judge de Jong issued a memorandum and directions on the papers. Mr and Mrs Newton had suggested, in a supporting memorandum accompanying their notice of response to Ms B Lake's application, that no appointment of an LFC should be made due to the history of proceedings about the care of the children, their vulnerability, and concern about having another professional involved in the children's lives. The Judge noted that the difficulty with that submission was that the Court would be unable to make a decision without obtaining the views of the children. They had a right to be heard. And the evidence before the Court raised concerns about the children's wellbeing. For these reasons, and because the children had previously had a lawyer acting for them, the Judge reappointed Ms Cobcroft as LFC under s 7 of COCA and s 9B of the Family Court Act.

[46] The Judge directed that an issues conference be scheduled before him if possible. Rule 416X of the Family Court Rules 2002 provides that the "purpose of an issues conference is to enable a Judge, having seen and spoken with the parties to an application, to make any orders or give any directions the Judge thinks fit". Ms Cobcroft was directed to file a memorandum no later than seven days before the issues conference.

[47] The Judge's memorandum recorded that this might be a case where a psychological report should be obtained under s 133 of COCA.

[48] The conference took place before Judge de Jong on 27 November 2017. The LFC filed a memorandum dated 17 October 2017 in advance of the conference outlining the background to the proceedings and the steps she had taken up to that date. Neither of the parties filed a memorandum in advance of the conference.

[49] At the beginning of the conference, the LFC handed up a second memorandum. There was a pause of about one minute while the Judge read that memorandum. It recorded that the LFC had been unable to interview the children. She described difficulties she had encountered in arranging an interview, and sought a direction that she be authorised to interview them at school. The memorandum concluded:

> Consideration should be given at the issues conference as to whether a section 133 report is necessary. The previous report writer was Renuka Wali.

[50] Counsel for Ms B Lake then spoke. She supported the LFC's request for a direction that the LFC be able to see the children at school. She noted that the LFC "is also proposing that a section 133 report is appropriate here and my client's quite comfortable with that".

[51] Ms Chambers QC, who appeared for Mr and Mrs Newton, also handed up a memorandum. The Judge did not pause to read it, but asked Ms Chambers what her clients' position was. Ms Chambers advised the Judge that Mr and Mrs Newton accepted that Ms Cobcroft had to see the children, but had concerns about managing that process. She advised the Judge that her instructions in terms of a s 133 report were "simply unclear at the moment". There were factors pulling both ways.

One parent was saying yes, and one was not so sure. Ms Chambers suggested that their position be advised to the Court after Ms Cobcroft's report was filed. That could be dealt with by way of memorandum. Ms Chambers noted that Mr and Mrs Newton "are very protective … [and] concerned about this litigation causing major problems in regard to these children who are obviously extremely vulnerable".

[52] After Ms Chambers had completed her submissions, the transcript of the hearing records the Judge as saying:

> So, Ms Cobcroft, I am very concerned about what's happening and I think we need a 133 report straight away.

[53] Ms Cobcroft endorsed that view, submitting that a s 133 report should be commissioned as soon as possible as there were lengthy delays in getting people appointed. She said it would be preferable if Ms Wali was available again. For her part, she would file a report within 14 days.

[54] The Judge then observed:

> Well we are going to get the report anyway. The speed of your report matters little.

[55] We infer that the Judge was saying that the timing of Ms Cobcroft's report was not urgent because he would be directing that a s 133 report be obtained, which would take some time.

[56] The Judge went on to say that he intended to direct that a psychological report be obtained. He thought it was essential in this case given the dynamics on both sides. In relation to the brief for the psychologist the Judge said:

> In terms of the brief, probably we're asking the psychologist to ascertain the children's views about having a relationship with the maternal grandmother and identify what influences or external forces, if you like, are likely to have affected the children's views. I'd be looking at the psychologist assessing the children's relationship with each party, the relevance of that being the aftermath of losing their mother and how the children are affected by that and how that fits in with their relationships and the effect or likely effect on the children of having or not having a relationship with their maternal grandmother and the advantages and disadvantages for the children of the proposed contact options and then looking at what recommendations, if any, about therapeutic support or intervention. So I don't know if anybody has any

> other thoughts about the terms of reference but I think they cover the main things.

[57] Ms Cobcroft expressed agreement with the suggested terms of reference. No other counsel spoke in response to the Judge's inquiry about the terms of reference.

[58] In the context of the judicial review proceedings that resulted in the first High Court judgment, described in more detail below, the High Court requested Judge de Jong to provide a report about the issues conference. In a memorandum dated 1 June 2018 the Judge explained that he had been a touch typist since the age of 15 and is "very computer savvy". He had many templates on his computer that he had developed over the 12 years he had been a judge. One of the templates was an adapted psychologist's brief based on the brief prescribed by s 133. The Judge advised that he routinely utilises the template at directions conferences to personalise the psychologist's brief as required.

[59] In this case, the Judge completed the s 133 brief on his computer. There was a pause in the hearing of about two minutes while he did so. He then printed off copies for counsel on the printer in the courtroom. He dictated a minute which briefly described the proceedings, and went on to deal with the s 133 report, saying:

> I am satisfied that it is essential for the proper disposition of these proceedings that a s 133 psychological report is directed. The children have not been having contact with the maternal side of their family. I plan to make further directions once the psychological report is to hand. Renuka Wali has previously been engaged as the psychologist on this file and is therefore familiar with the children and they with her. It is appropriate that she is used for this purpose if available.

[60] The minute directed that a s 133 report should be prepared "as attached". The brief for the psychologist prepared by the Judge in the course of the hearing read as follows:

> 1. A s133(1) psychological report is directed to assess the following
>
> a) the children's views about having a relationship with their maternal grandmother
>
> b) identify what, if any, influences/external pressures are likely to have affected the children's views
>
> c) the children's relationship with each party

d) the effect or likely effect on the children of having, or not having, a relationship with their maternal grandmother

e) the advantages and disadvantages for the children of the proposed contact options

f) make recommendations about what, if any, therapeutic support or intervention is required for this family

[61] The Judge's minute was subsequently typed up and sent to the parties. It appears they received it in December 2017.

First judicial review proceeding

[62] In February 2018 Mr and Mrs Newton filed judicial review proceedings seeking an order setting aside the s 133 order made by Judge de Jong on 27 November 2017 (the first s 133 order). The first s 133 order was challenged on two grounds: pre-determination, and failure to take into account mandatory relevant considerations.

[63] The Newtons pleaded that in making the order:

(a) the Judge had arrived at the issues conference with a closed mind "as evidenced by his pre-prepared s 133 order that he pulled out and so ordered at the conference"; and

(b) as a result, the Judge failed to exercise the discretion required by s 133 of COCA before making his order. He "did not allow time for meaningful submissions by the parties on the issue before making up his mind".

[64] The Newtons also pleaded that the Judge failed to take into account the relevant considerations listed in s 133(6) and (7). Section 133(6) lists five matters in relation to which the court must be satisfied. The Newtons pleaded that the Judge addressed only one of these in his minute. And s 133(7) requires the court to have regard to the parties' wishes before deciding whether or not to order a report if the court knows the parties' wishes, or can speedily ascertain them. That criterion was not referred to in the Judge's minute.

[65] The Newtons sought an interim order that pending the determination of the judicial review application, no further steps be taken to implement the order directing a psychologist's report. There was no opposition to such an order being made. In those circumstances, and given implementation of the order directing a psychologist's report would render the application for judicial review nugatory, Fitzgerald J considered an interim order was appropriate. She made the interim order sought.[8]

First High Court judgment

[66] The first judicial review proceeding was heard by Courtney J on 15 June 2018. The application was successful. Courtney J found that a fair-minded lay observer would have concluded that the issue had been pre-determined (first High Court judgment).[9] Courtney J also considered that Judge de Jong had failed to address relevant mandatory considerations under s 133(6) and (7).[10] In particular, Courtney J considered that the views of the children should have been obtained before seeking the s 133 report. She expressed the view that this was required by s 133(7), which requires the views of the parties to be obtained where that can be done speedily.[11]

[67] The first High Court judgment is described in more detail below. For the purpose of explaining the chronology of these proceedings, however, the key point is that the order that a s 133 report be obtained was set aside and the matter remitted to the Family Court for further consideration.

Judge de Jong's October 2018 minute

[68] The matter came back before Judge de Jong at a directions conference held on 9 October 2018. The Judge noted that the directions conference followed on from the first High Court judgment setting aside the s 133 order for preparation of a psychological report. The Judge issued a minute following that conference (October 2018 minute).[12] In the October 2018 minute Judge de Jong described the

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8 *CB v Family Court at Auckland* HC Auckland CIV-2018-404-177, 1 May 2018.
9 *AA v Family Court at Auckland* [2018] NZHC 1638, [2018] NZAR 1101 [First High Court judgment] at [30].
10 At [31].
11 At [33].
12 *[Lake] v [Newton]* FC Auckland FAM-2010-004-1891, 9 October 2018 (October 2018 minute).

first High Court judgment as "extraordinary for a number of reasons I will refer to in a moment".[13]

[69] The October 2018 minute records that the Judge understood that the Newtons had filed complaints with the NZLS about the LFC and the lawyer for Ms B Lake. The minute continued:

> [4] Finally, the father and stepmother effectively want me to disqualify myself from dealing with this file. The effect of the High Court judgment is to attack my honesty and integrity as a Judge to the extent I should step aside and perhaps even resign as a Judge. For this reason I plan to disqualify myself from dealing with this file in the future and will now make some comments and directions to ensure this file is advanced.
>
> [5] First and foremost, I apologise to the young boy involved in this case, aged 10, and his sister, aged 8. Although I found a s 133 report was essential for the proper disposition of the proceedings I did not give full reasons for this. In the context of the November 2017 15 minute directions conference, the overall state of the proceedings, and what counsel told me at the time of the conference, I thought the file would speak for itself. Evidently it did not.
>
> [6] Courtney J found I predetermined the need for a 133 report, that I had likely pre-prepared the psychological brief, that I did not invite input from counsel about the brief, that I did not allow lawyer for child to speak, that I could not have been satisfied a s 133 report was necessary without knowing what the children's paediatrician had to say about them, and that I did not have the views of the children as required by s133(7).
>
> [7] It may be helpful to the future of this case if it is known what was actually in my mind and to briefly address each of the points raised by Courtney J especially as lawyer for the children was not involved in the High Court proceeding and, therefore, the views of the children were not available to Courtney J.

[70] Judge de Jong then set out the background to the proceedings, and to the November 2017 issues conference. He described in some detail what happened at that conference. He said that he had not decided in advance what orders he would make at that conference.[14]

[71] Judge de Jong recorded that he agreed with Courtney J that it would be usual to seek the views of children before seeking a s 133 report, but did not agree this was

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13 At [1].
14 At [13].

required by s 133(7) "because that subsection relates to parties, and the children are not parties".[15]

[72] Judge de Jong noted that the LFC and the maternal grandmother remained of the view that a s 133 report was essential for the proper disposition of the proceedings, but the Newtons were not convinced. It was not appropriate that he determine this issue because of the findings made by Courtney J "and the objection raised by the father and stepmother to my involvement".[16]

[73] Ms Cobcroft sought to withdraw as LFC.[17] The Judge granted her leave to do so. He directed that a new appointment of a senior LFC should be made as soon as possible.[18] He also directed that a one hour hearing be arranged urgently to determine whether a s 133 report is required, and to consider the future conduct of the proceedings.[19] The minute noted that the file should not be placed before him (or before another Judge who had disqualified herself from dealing with the matter).[20]

Recall application in relation to October 2018 minute

[74] The Newtons applied for recall of the October 2018 minute, expressing concern that it would "taint any future Judge". In December 2018 Judge Burns directed that the recall application be placed before Judge de Jong.

[75] It appears there was then a lengthy delay in the Family Court registry before the recall application was referred back to Judge de Jong. The Judge dealt with the application on the papers. He issued a memorandum dated 19 December 2019 (the recall decision) in which he accepted that "there may at least be a slight risk of future Judges being influenced by the contents of my minute".[21] He accepted that it was appropriate in the interests of justice to recall the minute and replace certain sentences.[22]

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15 At [17].
16 At [18].
17 At [19].
18 At [20].
19 At [22].
20 At [23].
21 *[Lake] v [Newton]* FC Auckland FAM-2010-004-1891, 19 December 2019 (Recall memorandum of Judge de Jong) at [8].
22 At [13].

[76] The Judge recorded that Mr and Mrs Newton had given evidence that they only wanted him to disqualify himself from determining the issue of whether or not a s 133 report was directed. The Judge accepted their position, but believed the effect of that position was that it was necessary for him to disqualify himself from any further involvement in the proceeding.[23]

[77] Another matter raised by the Newtons was the Judge's expression of concern in the October 2018 minute about the LFC being "blocked from seeing the children by the stepmother".[24] The Newtons deposed that this statement was wrong. The Judge recorded that he was very concerned about the ongoing adult conflict, the effect on the children of this conflict, and the extraordinary delay. He observed that it was evident from the Newton's evidence that there was at least some resistance to the LFC meeting the children.[25] But he was satisfied that it was in the interests of justice to recall the October 2018 minute and express this in more neutral terms.[26]

[78] The Judge made the following orders and directions:[27]

> a. My 9 October 2018 minute is recalled on the following terms
>
> i. the fourth sentence in paragraph [3] is replaced to read "A copy of a Law Society complaint against lawyer for child, and seeking her removal, is attached to a memorandum dated 17 September 2018 filed on behalf of the father and step mother."
>
> ii. the first sentence of paragraph [4] is replaced to read "The father and stepmother seek to disqualify me from determining whether a s133 report is directed but they are happy for me to continue dealing with substantive matters. For my part, I believe I am left in an untenable position."
>
> iii. the third sentence of paragraph [8] is replaced to read "I assume the High Court did not have all those files at the judicial review."
>
> iv. the third sentence of paragraph [17] is replaced to read "It was also relevant that I was concerned in November 2017 that lawyer for child was allegedly being blocked from seeing the children by the step mother and that efforts were being made

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23 At [14].
24 October 2018 minute, above n 12, at [17].
25 Recall memorandum of Judge de Jong, above n 21, at [18]
26 At [21].
27 At [22].

> to delay the proceedings. These allegations are denied and will no doubt be tested in due course."

[79] The October 2018 minute was re-released with those modifications (the re-released minute).

Second s 133 order

[80] The one hour hearing directed by Judge de Jong took place before Judge Burns on 3 December 2018. The parties were represented. Ms von Keisenberg, who had been appointed as LFC, also appeared.

[81] In advance of the hearing, on 11 November 2018, the LFC filed a memorandum which summarised the background to the application (the November 2018 LFC report). The report included summaries of discussions she had had with the children, with the head teacher at Susan's school, and with Dr Smith, the children's paediatrician. The LFC submitted that (contrary to the view expressed in the first High Court judgment) the Family Court was not required by s 133(7) to ascertain the views of the children with respect to obtaining a s 133 report. Section 133(7) did not apply to the children, as they were not parties to the application before the Court.

[82] The LFC filed supplementary submissions on 3 December 2018, the day of the hearing. She submitted that a s 133 report was essential to enable the court to resolve the contested application by Ms B Lake.

[83] At that hearing, Ms Chambers identified four issues for determination:[28]

> (a) to determine the application for recall and correction of the Court's directions of 9 October 2018;
>
> (b) to determine issues regarding the Lawyer for Children's report and the possible deletion of a number of paragraphs;
>
> (c) the ascertaining of the children's views regarding obtaining a s 133 report;
>
> (d) whether the proceedings should be adjourned until the procedural errors/corrections have been made. Therefore, adjourning the application for the Court to direct a s 133 report.

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[28] *[Lake] v [Newton]* [2018] NZFC 9614 [December 2018 FC judgment] at [4].

[84] As already mentioned, Judge Burns directed that the application for recall be determined by Judge de Jong.

[85] The Newtons sought the deletion of the paragraphs of the LFC's report relating to discussions with Susan's school and with Dr Smith on the basis that they contained incorrect evidence. The Judge considered the appropriate way forward in relation to the LFC's comments about her discussions with Dr Smith was to get the best evidence available to the Court from Dr Smith. He directed that the relevant paragraphs be deleted from the LFC's report, and that a medical report under s 133 be provided by Dr Smith in relation to the children "so the Court has the best medical evidence available to it on the impact of the children's ADHD and in the context of what impact (if any) it will have on the applications before the Court".[29] The Judge noted that affidavits had been filed by the Newtons from two teachers at the school, so there was direct evidence available to the Court. The Judge did not therefore consider that it was necessary for him to rule on deletion of the paragraphs in the LFC's report relating to the school.[30]

[86] Judge Burns then went on to consider whether the children's views should be ascertained before a s 133 psychologist's report could be commissioned. He considered that the legislation did not require the children's views to be ascertained on procedural directions, including whether a psychologist's report is obtained. He did not accept the submission by Ms Chambers that the High Court had directed that the children's views must be ascertained.[31] He analysed para [33] of the first High Court judgment to determine whether he was bound by it to seek the views of the children, saying:[32]

> …
>
> (f) I have read the decision of Justice Courtney in *AA v Family Court at Auckland*. I observe the paragraph [33] relied on by Lady Chambers that no Lawyer for the Child was appointed in the review proceedings. Therefore the High Court accepted that the children were not parties to the proceedings under the Care of Children Act. I also consider that paragraph [33] is an additional reason

29 At [6].
30 At [7].
31 At [11].
32 At [12]–[13].

added by Justice Courtney for the determination to remit the matter back to the Family Court for reconsideration and is not part of the ratio of the decision. I consider that paragraph [33] can properly fall within an obiter statement. Therefore, I do not accept the submission made by Lady Chambers that I am bound by that paragraph of the judgment. I do not think the issue was fully argued before the High Court and it could not have been because there was no representative appointed for the children in the proceedings to advocate on their behalf as to whether the Court was making a binding ruling to apply to all Family Court proceedings where a psychologist report was being considered.

(g) I also do not accept that paragraph [33] amounts to a direction to the Family Court to obtain the children's views.

…

This is in the context where Ms Cobcroft had not been able to see the children for a number of reasons and so she had not been able to interview them. The words themselves do not amount to a direction but an observation that it is usual to seek their views. I do not know where Justice Courtney got the information from that it is usual in the Family Court to seek children's views for the obtaining of a psychologist report but I am not aware of this being the Court's practice.

[87] The Judge proceeded to consider whether a s 133 report should be commissioned. He considered each of the factors identified in s 133(6) in some detail. He considered the parties' wishes in relation to the report. He concluded that a s 133 report was essential for the proper disposition of the case:[33]

> … I have reached the conclusion that the Court has no other choice but to obtain the expert assistance of a psychologist in this case because of the competing cases presented by the parties to the Court which [raise] significant and long-term psychological issues. The only person who can provide expert assistance to the Court is a registered psychologist and I am satisfied that a report is essential. [The LFC] supports the obtaining of a report.

[88] The Judge directed that a s 133 report be commissioned to assess the following:[34]

(a) The children's views about having contact with their maternal grandmother.

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33 At [24].
34 At [26].

(b) Identify what, (if any) influences/external pressures are likely to have affected the children's views.

(c) The children's relationship with each party.

(d) The effect or likely effect on the children of having or not having contact with their maternal grandmother at this time.

(e) The advantage and disadvantages of the children of the proposed contact options.

(f) Make recommendations about what, if any, therapeutic support or intervention is required for this family.

Second judicial review proceedings

[89] The Newtons then filed new judicial review proceedings seeking orders setting aside the s 133 order made by Judge Burns (second judicial review proceedings). They pleaded three causes of action.

[90] The first cause of action alleged that Judge Burns failed to take into account mandatory relevant considerations set out in s 133(6) and (7). In particular, the Judge was required to ascertain the children's wishes, and take them into account, because of the express direction of Courtney J to that effect in the first High Court judgment and s 6 of COCA. The s 133 order was made without due regard to the statutory criteria in ss 6 and 133 of COCA, art 12 of the CRC and was contrary to the express and binding direction of Courtney J.

[91] The second cause of action alleged that Judge Burns relied on an irrelevant consideration: the November 2018 LFC report, which they claimed was ultra vires. They pleaded that this report was contrary to the practice note issued by the Principal Family Court Judge in relation to the role of the LFC, guidelines for LFCs issued by the NZLS, and the CRC.

[92] The third cause of action alleged that Judge Burns breached the principles of natural justice by failing to deal first with the recall application of the minute issued by Judge de Jong on the court file. They also pleaded that the failure to deal with the recall application was a breach of the obligations imposed on the Judge by s 4 of COCA.

[93] The respondents named in the proceedings were the Family Court at Auckland, Ms von Keisenberg (the author of the November 2018 LFC report), and Ms B Lake.

[94] The NZLS was granted leave to intervene in the proceedings.[35] Because the Family Court did not take an active role in the proceedings, the High Court appointed counsel to assist the Court as contradictor in relation to the third cause of action.[36]

Second and third High Court judgments

[95] The judicial review application was allocated a one day fixture before Duffy J on 4 December 2019. There was insufficient time to hear from all the parties on all the issues raised in the second and third causes of action. On 19 February 2020 the Judge issued an interim judgment determining the first cause of action (second High Court judgment).[37] The second High Court judgment is described in more detail below.

[96] In short, Duffy J held that the Family Court was required to proceed in accordance with the directions given by Courtney J. It was not open to Judge Burns to decide that it was not necessary that the views of the children be ascertained before a s 133 report was commissioned. Nor was it open to Duffy J to reconsider that question: if any party wished to challenge the decision of Courtney J, the appropriate remedy was to appeal to the Court of Appeal.

[97] The order made by Judge Burns for the preparation of a s 133 report was set aside. The question whether a s 133 report should be ordered was referred back to the Family Court for reconsideration "in accordance with the reasoning of this judgment and the factual and legal findings in the judgment of Courtney J".[38] However Duffy J directed that the orders and directions she made for reconsideration of whether a s 133 report should be obtained should not be implemented until the outcome of the third cause of action was finally resolved.[39]

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35 *DN v Family Court at Auckland* [2019] NZHC 2028, [2019] NZFLR 150 at [20].
36 *DN v Family Court at Auckland* [2020] NZHC 210, [2020] NZFLR 15 [second High Court judgment] at [20].
37 Second High Court judgment, above n 36.
38 At [41].
39 At [42].

[98] The second and third causes of action were argued at a further hearing before Duffy J on 7 and 8 May 2020. On 1 December 2020 Duffy J delivered a judgment dismissing the second and third causes of action (third High Court judgment).[40] The third High Court judgment is also described in more detail below.

[99] Following delivery of the third High Court judgment the Newtons applied for a stay of the direction given in the second High Court judgment that the Family Court reconsider whether to order a s 133 report. The Newtons wanted to extend the interim orders made in the second High Court judgment until their appeal to this Court had been determined. There was no opposition to the grant of a stay. Duffy J was satisfied a stay should be granted. She directed that the order she had made in the second High Court judgment, deferring reconsideration of whether a s 133 report should be obtained, would remain in effect until the Newtons' appeal against the third High Court judgment and the Family Court's appeal against the first High Court judgment were determined by this Court.[41]

First High Court judgment

[100] As already mentioned, the first judicial review application came before Courtney J in June 2018. Ms Chambers appeared for the Newtons. The Family Court at Auckland, which was named as the first respondent, indicated that it would abide the decision of the Court. The second respondent, Ms B Lake, also indicated that she would abide the decision of the Court. In order to provide a contradictor, counsel to assist the Court was appointed.[42]

[101] The High Court had before it the audio recording of the Family Court issues conference held on 27 November 2017, and a transcript of that conference. The High Court also, as noted above, directed that a report be obtained from Judge de Jong for the purposes of the judicial review application. He provided his report in a memorandum dated 1 June 2018.

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40 *DN v Family Court at Auckland* [2020] NZHC 3165 [third High Court judgment].
41 *DN v Family Court at Auckland* [2021] NZHC 1116 at [45] and [49].
42 First High Court judgment, above n 9, at [1], n 1.

[102] Courtney J began by discussing the principles relevant to a challenge to a decision on the grounds of pre-determination. She noted that pre-determination is "generally regarded as conceptually different from bias, and the fair-minded lay observer test applicable to the latter" is "inapt". However "the cases usually cited in support of this approach involve administrative decision-makers". In cases involving judicial or quasi-judicial decision-makers, "the fair-minded lay observer test has been regarded as appropriate".[43]

[103] Courtney J considered that where the decision-maker is a judge or has a quasi-judicial function, asking whether he or she would have appeared to a fair-minded lay observer "to have pre-determined the matter is more appropriate than inquiring whether, as a matter of fact, that had happened".[44]

[104] Courtney J next addressed the statutory threshold for the exercise of the s 133 discretion. A psychological report may be directed "only if" the criteria specified by s 133(6) have been met. She considered that the relevant criteria were those in paras (a) and (b) of s 133(6):[45]

> (a) the court is satisfied that the information that the psychological report will provide is essential for the proper disposition of the application; and
>
> (b) the court is satisfied that the psychological report is the best source of the information, having regard to the quality, timeliness, and cost of other sources …

[105] The Judge recorded that she had reviewed the transcript of the directions conference and listened to the audio recording. The hearing took about 15 minutes. A further approximately 10 minutes was spent while the Judge prepared his minute.[46] The Judge described the directions conference, and the memoranda that were handed up, in some detail. She noted that there was a pause while the Judge read the

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43 At [2].
44 At [4].
45 At [5].
46 At [12]. From the audio recording, to which we have also listened, it appears that the hearing took about 15 minutes, as Courtney J noted. There was then a pause of approximately two minutes while the Judge typed the brief for the psychologist. He then dictated his minute, which took about 5 minutes. Towards the end of dictating that brief he asked the court taker to distribute to counsel copies of the brief, which the Judge had printed on the courtroom printer.

memorandum handed up by the LFC.[47] She considered it was doubtful that Judge de Jong read Ms Chambers' memorandum, as there was no pause as there had been after counsel for the child had handed up her memorandum. However Ms Chambers had addressed the issues in her memorandum orally.[48]

[106] Courtney J recorded that there was "a long pause, about 10 minutes, before the Judge could be heard either reading out or dictating a minute".[49] She noted that it seemed likely from the report provided by the Judge that he typed the minute himself.[50]

[107] Courtney J said that the "Judge did not refer to the brief for the s 133 report writer and, unlike the minute, there was no audio of the Judge reading that out". She observed that the brief was attached to the minute and it seemed likely that it was provided at the same time.[51] (We note that this was not in fact the case. It is apparent from the audio recording and from the report provided by Judge de Jong that the brief for the psychologist was discussed with counsel, and then typed by the Judge. The brief was printed off and handed out to counsel at the hearing. The Judge did not type his minute at the hearing. Rather, it was dictated in order to be typed up subsequently. It appears the parties did not receive the minute until some time after the hearing, in December 2017.)

[108] Courtney J said that two aspects of the hearing led her to the conclusion that the Judge had reached his decision before hearing from counsel and did not properly consider counsel's submissions.[52]

[109] First, at the outset of the conference "no party was seeking a direction for a s 133 report". The LFC had "merely flagged that a s 133 report should be considered". Ms B Lake had not sought a s 133 report, though her counsel expressed support for

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47 At [13].
48 At [19].
49 At [24]. The reference to a pause of about 10 minutes may be a typographical error: as noted above, the pause was about two minutes.
50 At [24].
51 At [25].
52 At [28].

the idea orally.[53] Ms Chambers, counsel for the Newtons, sought to have a s 133 report considered after the LFC had spoken to the children and reported. Courtney J said:

> [29] Having heard (but not responded to) Ms Chambers and without having heard from Ms Cobcroft at all on the issue, the Judge expressed the view that he was "very concerned about what's happening" and considered that "we need a s 133 report straightaway". These statements do suggest a view that had already been formed. It was only after the Judge had made these statements that Ms Cobcroft said, contrary to her second memorandum (but understandably, given the Judge's strong indication), that she also thought a section 133 report should be obtained.

[110] Second, "having made it clear that he intended to order a s 133 report, the Judge paused for a short time and then gave a detailed, apparently extempore, description of the brief that would be required for the s 133 report". Courtney J said:[54]

> … The relatively complex language of the brief he subsequently produced closely mirrored the oral description. I consider it more likely than not that the Judge had already prepared the brief and that his oral description reflected the brief, rather than the brief being prepared following the decision to make the order. In other words, I am satisfied that the brief to the s 133 report writer had already been prepared. That, in itself, does not indicate pre-determination. But coupled with the way the issue was dealt with in the course of the hearing, it would, in my view, have led a fair-minded lay observer to conclude that this was the case. I should add, out of caution, that this would have been my conclusion even under the higher test of whether, as a matter of fact, the issue had been pre-determined.

[111] Courtney J went on to say that a third factor provided additional support for her conclusion, as well as being the alternative ground for the application: the submission that the Judge had failed to address the relevant mandatory considerations under s 133(6) and (7). Ms Chambers' submission was that until the LFC had spoken to both the children's doctor and to the children themselves, it was premature to direct a s 133 report. Courtney J considered that Dr Smith represented a significant, possibly even the best, source of information about the children and their current state of mind, taking into account the effect of their medication and their progress to date.[55] She said:

> [32] In these circumstances, it is difficult to see how the Court could have been satisfied that a psychological report was essential for the proper disposition of the application without knowing what Dr Smith had to say.

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53 At [28].
54 At [30].
55 At [31].

> For example, Dr Smith's input might indicate that it is not in the children's best interests to be interviewed at this stage and that further time is desirable or that the brief for the psychological report writer should be different to that directed by the Judge, or it might provide sufficient information to conclude that a report is not necessary. Either way, an important source of information existed and, until the Judge knew more about the information that Dr Smith had to offer, the statutory threshold was not met.
>
> [33] Nor have the views of the children been taken into account in making the decision that a s 133 report was required, as required by s 133(7). The children are of an age where it would be usual to seek their views and incorporate those views into the decision-making process. That is a task that fell to lawyer for the children and could be obtained prior to a decision being made about a s 133 report.

[112] The application for judicial review was allowed. The order that a s 133 report be obtained was set aside, and the matter remitted to the Family Court for further consideration.[56]

Second High Court judgment

[113] The second High Court judgment determined the first cause of action in the Newtons' second judicial review application: the challenge to the second s 133 order made by Judge Burns on the grounds that Judge Burns failed to take into account mandatory relevant considerations in s 133(6) and (7), in particular the views of the children. In doing so, the Newtons pleaded, he acted contrary to the express and binding direction of Courtney J.

[114] As Duffy J noted, a distinguishing feature of the judicial review application before her was "that Judge Burns' decision to order a s 133 report was made in circumstances where Courtney J in [the High Court] had already made factual and legal findings on the earlier order of Judge de Jong to obtain a s 133 report". "The findings Courtney J made on the pre-determination grounds of review related solely to Judge de Jong's decision". But the findings Courtney J made on the alternative grounds of review, which related to relevant considerations under s 133(6) and (7), were relevant to how the reconsideration in the Family Court was to be undertaken.[57]

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56 At [34].
57 Second High Court judgment, above n 36, at [21].

[115] Duffy J summarised the relevant findings as follows:

> [22] Courtney J had found that in the circumstances of these children in this case, Judge de Jong could not be satisfied a s 133 report was essential without first knowing what Dr [Smith] had to say about obtaining a s 133 report. Until his views were known the statutory threshold in s 133(6) was not met. Courtney J also found that in this case s 133(7) required the lawyer for the children to obtain the children's views before a s 133 report was obtained …

[116] There was nothing to suggest, Duffy J said, that there had been "any material change in the children's circumstances following the delivery of Courtney J's judgment". No one who was a party to the judicial review before Courtney J had appealed against her judgment. So the first question was the extent to which Judge Burns, as the Family Court Judge who was reconsidering whether to order a s 133 report, was bound to follow the directions and reasoning of Courtney J.[58]

[117] As Duffy J explained, where a decision is remitted to the original decision-maker the matter must be considered de novo, as if the first decision had not been made. However in undertaking this reconsideration the decision-maker must have regard to the reviewing court's reasons and to any directions provided by that court.[59] The decision-maker must adhere to the reasoning of the court that remitted the decision.[60]

[118] It followed, Duffy J said:[61]

> … that Judge Burns was required to act consistently with the reasoning of Courtney J and in accordance with her findings on fact and law. It was not open to Judge Burns to disregard the reasoning of Courtney J on the need to obtain the views of the children and Dr [Smith] before a s 133 report was ordered.

Duffy J did not accept the view expressed by Judge Burns that the reasoning of Courtney J was merely obiter. It was necessary to dispose of the second cause of action. It formed part of the ratio decidendi of Courtney J's judgment.

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58 At [23].
59 At [24], citing the Judicial Review Procedure Act 2016, s 17(6)(c).
60 At [24].
61 At [26].

The Family Court was bound "by the findings of both fact and law on which that reasoning rest[ed]".[62]

[119] The respondents argued that the doctrine of precedent must "[yield] to the welfare and best interests of the children". Section 4 of COCA provides that their welfare and best interests are the paramount consideration. Thus, they argued, "Judge Burns was free to apply his own interpretation of s 133".[63] Duffy J did not accept that submission. She considered that s 4 could not: [64]

> … trump fundamental constitutional principles relevant to judicial process. The doctrine of precedent is one such principle … Adherence to it is one of the means by which the rule of law is observed. Conversely, when a court of lesser jurisdiction ignores the binding decisions of a senior court this threatens adherence to the rule of law.

[120] She added that the "right of access to [the High Court] to engage" the supervisory jurisdiction of judicial review of the Family Court reflects "another fundamental constitutional principle. Where a decision-maker under review ignores the decision of [the High Court] in exercising its supervisory function that also threatens the rule of law".[65]

[121] Duffy J considered that these fundamental principles trumped s 4 of COCA or, put another way, adherence to fundamental constitutional principles would always be something that is in the children's best interests. For the Family Court to do otherwise can never be in the best interests of children. So, Duffy J said, there is no conflict between s 4 and the requirement for Judge Burns to comply with the findings of fact and law made by Courtney J.[66]

[122] Duffy J acknowledged that leave had been granted to the NZLS to intervene and be heard on the more general question of "the appropriateness of seeking a child's view as to whether a s 133 report is necessary and on the practical implications for the role and practice of lawyer for the child if that is required".[67] However the conclusion

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62 At [26].
63 At [27].
64 At [28] (footnotes omitted).
65 At [29].
66 At [29].
67 At [31], citing *DN v Family Court at Auckland*, above n 35, at [7].

Duffy J had reached on the first cause of action meant she was precluded from considering whether it is appropriate for children's views to be obtained before a s 133 report is ordered. Duffy J could not give what would amount to no more than general declarations on general questions of law, as the issue of whether the children's views should be obtained before directing a s 133 report in the present proceeding had already been decided. Further, Duffy J said, insofar as her views on this legal question might depart from those of Courtney J it would be wrong for her "to express them, and so by a side wind contradict her judgment. Absent appeal, Courtney J's decision must stand in relation to the parties."[68] An appeal from Courtney J's decision was the appropriate remedy for any party who wanted to question that judgment.[69] Although the Family Court had not been an active participant in the judicial review before Courtney J, it was possible for the Court to seek to pursue an appeal through the intervention of the Attorney-General. There had been an available remedy for either the grandmother or the Family Court, had they wished to challenge the judgment of Courtney J.[70]

[123] Duffy J was satisfied that the decision of Judge Burns to order a s 133 report should be set aside. The Family Court would need to reconsider whether to make a s 133 order in accordance with the reasons set out in the second High Court judgment and the factual and legal findings made by Courtney J.[71] Thus before any s 133 order was made, the Family Court judge who considered the matter was required to: [72]

> (a) be provided with an opinion from Dr [Smith] on the advisability of obtaining a s 133 report on the children; and
>
> (b) be provided by the [LFC] with a report, following interview of the children, that informs the Family Court Judge of the children's views on whether a s 133 report on them should be obtained.

[124] We pause to note that there was no appeal by any party from the second High Court judgment. That is not surprising. As Duffy J explained, there was no proper basis on which the Family Court could depart from the reasoning of the High Court in the first High Court judgment and adopt an approach inconsistent with

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68 At [31].
69 At [32].
70 At [33].
71 At [34].
72 At [41].

the findings in that judgment. It did not matter that Judge Burns had a different view about what s 133 required: the Family Court was not free to disregard the High Court judgment.

[125] We will however need to revisit the directions given to the Family Court in relation to reconsideration of whether a s 133 report should be obtained, in light of our answers to the issues before this Court.

Third High Court judgment

[126] The third High Court judgment determined the second and third causes of action in the second judicial review proceeding.[73]

Second cause of action: LFC report ultra vires

[127] In the second cause of action the Newtons challenged the report of the LFC and the s 133 order made by Judge Burns. They contended that Judge Burns' decision was "made in error of law" because it was made in reliance on the report of the LFC, which they alleged was ultra vires.[74]

[128] The practice note issued by the Principal Family Court Judge provides that a report from the LFC "should be short, factual and informative", "should be couched in neutral terms and should not introduce any material that ought to come to the court's knowledge only by way of evidence".[75] Here, the applicants contended, the report of the LFC on which Judge Burns relied recorded "ultra vires" hearsay evidence and opinions by the LFC. It contained hearsay evidence from teachers at the children's school and from Dr Smith.[76] It expressed the view that a s 133 report should be ordered without first obtaining the views of the children, despite the findings made by Courtney J in the first High Court judgment.[77]

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73 Third High Court judgment, above n 40, at [1].
74 At [2].
75 At [2], referring to *Family Court Practice Note: Lawyer for the Child — Selection, Appointment and other matters* [2020] NZFC 3346.
76 At [3].
77 At [6].

[129] The applicants alleged that Judge Burns directly relied upon the LFC's report. Reliance on an ultra vires report constituted an error of law on his part.[78] The applicants sought: [79]

> … a declaration that the actions of the [LFC] were ultra vires; an order removing or in the alternative redacting the report of the [LFC] from the Family Court file; and an order setting aside the decision of Judge Burns.

[130] Duffy J was:[80]

> … satisfied that insofar as the [LFC] made submissions in her report to the effect that Judge Burns was not bound by Courtney J's findings and was free to decide the question of a s 133 report afresh, those submissions were wrong in law.

That was the issue that Duffy J had decided in the second High Court judgment. It "was not open to the [LFC] to contend before Judge Burns that it was open to him to order a s 133 report without first obtaining and paying regard to the wishes of the children".[81]

[131] Thus, Duffy J said, "to the extent the [LFC's] submissions were adopted by Judge Burns they caused him to go wrong in law". Errors of law on the part of the LFC "either caused or contributed to Judge Burns erring in law". But that did not mean "that the legally incorrect submissions or the conduct of [LFC] in making those submissions were amenable to judicial review".[82]

[132] The role of LFC involves a statutory function, which Duffy J considered may in principle render it amenable to judicial review.[83] When the LFC performs their statutory function under s 9B of the Family Court Act, "there may be occasions when this performance has a direct effect that renders any unlawful performance amenable to review".[84]

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78 At [7].
79 At [8].
80 At [10].
81 At [10].
82 At [10].
83 At [12].
84 At [13].

[133] However, Duffy J held, the presentation of a report to the Family Court has no direct effect on the child or anyone else. It is open to the Family Court Judge who receives the report to determine to what extent it is persuasive:[85]

> … When a report of [an LFC] misstates or misapplies the law, as happened in the present case, the Family Court Judge will either recognise the errors and put those aspects of the report to the side or the Judge will fail to realise there are errors, which is what happened here. In the latter case the erroneous influence of the report will leave the judgment vulnerable to being set aside on either appeal or judicial review, the latter of which happened here. In such circumstances I consider the correct approach is for this Court to grant relief in the form of setting aside the judgment rather than by a declaration the report of the [LFC] … is ultra vires because it contains errors of law, which is essentially the relief the applicants seek. This is another reason why I consider the applicants cannot obtain a declaration that the report of the [LFC] is ultra vires.

[134] Duffy J also did not accept the argument that the report of the LFC amounted to an irrelevant consideration that Judge Burns should not have taken into account. In principle, the report of an LFC will be a relevant consideration which a Family Court judge is obliged to consider. But that does not mean the report must be followed or applied. All that is required is that it is properly considered. Duffy J did not consider that the general character of the report — a relevant consideration for the Judge — could "be transformed into being an irrelevant consideration simply by the poor quality of the report's content".[86]

[135] Thus the applicants could not obtain relief that directly affects the report of the LFC. The second cause of action had not been made out.

Third cause of action: breach of natural justice

[136] Duffy J then went on to consider the third cause of action. The pleading of this cause of action had been amended following the recall decision by Judge de Jong. As amended, the Newtons' pleading alleged that the re-released minute and the recall decision "did not go far enough to address their concerns about the presence of inaccurate and prejudicial material on the Family Court file".[87] They alleged that the October 2018 minute of Judge de Jong, the re-released minute and the recall decision

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85 At [13] (footnote omitted).
86 At [14].
87 At [22].

(the challenged documents) should also be removed from the Family Court file. There was a risk, they claimed, that if the challenged documents remained on the file they may be read by future judges in the Family Court proceeding, creating a risk of a reasonable appearance of bias on the part of those judges and depriving the Newtons of their right to a fair hearing.[88]

[137] Duffy J noted that the third ground of review was forward-looking: the claim was that for so long as the challenged documents remained on the court file, future Family Court judges "who hear the proceeding would do so under a cloak of apparent bias". The Newtons claimed that a fair-minded lay observer might reasonably apprehend, for so long as those documents remained available on the court file, that there was a real possibility that future judges might not bring an impartial mind to the question each was required to decide. Hence the relief the Newtons sought in the form of an order requiring the removal of the challenged documents from the court file.[89]

[138] Duffy J was satisfied that the challenged documents and the conduct of Judge de Jong would lead a fair-minded lay observer to conclude apparent bias was present. His conduct was "not typical of first instance judges who find their decisions overturned on appeal or set aside" in judicial review proceedings. To this extent, Duffy J said, she could understand the concerns of the Newtons. However Judge de Jong had disqualified himself from making any further determinations on the question of whether to order a s 133 report, so any issue regarding apparent bias on his part was now of historic interest only. Any apparent bias on the part of Judge de Jong did not mean future judges would "follow in his footsteps".[90]

[139] Duffy J did not consider that the presence of the challenged documents on the court file could found concerns about apparent bias on the part of future Family Court judges dealing with the proceeding. A fair-minded lay observer would not consider that there was a logical connection between the presence of those documents on the court file and the risk of apparent bias on the part of future judges, for five main reasons.[91]

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88 At [23].
89 At [39].
90 At [46].
91 At [51].

[140] First, the challenged documents would be viewed by the fair-minded lay observer in their overall context, including the decisions of the High Court in the two judicial review proceedings: [92]

> Those decisions clearly indicated the factual and legal findings made by [the High Court], and how future Family Court judges should approach the question of whether the children's views should be sought before a decision is made on whether to order further psychologists' reports …

[141] Second, Duffy J said:[93]

> the fair-minded lay observer would be aware of the hierarchy of [courts] and the general expectations as to how first instance judges will respond when their decisions are set aside by senior courts … These events are not cause for judicial comment by the first instance judge. The fair-minded lay observer's awareness of these expectations would logically lead to [them] placing a greater emphasis on the directions of [the High Court] in the two judicial review decisions rather than what had been outlined in the [challenged] documents …

[142] In particular, regarding the decision still to be made on ordering a s 133 report, the fair-minded lay observer would expect that a future judge would approach the matter with an open mind and on the basis of the decisions of the High Court in the judicial review proceedings.[94]

[143] Third, Duffy J held: [95]

> the fair-minded lay observer would understand the expectations relating to the conduct of [judges] (independence in decision-making, observance of their judicial oath and their obligations to sit on any case to which they are allocated unless there is reason for recusal). Those expectations would outweigh any influence the challenged documents might have on future [judges] involved in the [proceedings].

[144] Fourth, she said: [96]

> the fair-minded lay observer would be reasonably informed of the workings of the judicial system and therefore would understand that a future [judge] who is responsible for dealing with a matter in the … Family Court proceeding will concentrate on reading the relevant material provided by the parties and the [LFC], as well as hearing from them in [court], rather than reviewing

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92 At [52].
93 At [53].
94 At [53].
95 At [54] (footnote omitted).
96 At [55] (footnote omitted).

> historic material on the [court] file … the views of judges who have been engaged in earlier aspects of a proceeding are not typically relevant to subsequent steps in that proceeding. Judges are obliged to reach their own views on the facts … and law relevant to the issues to be determined. The parties are entitled to have a [judge] assess their respective cases based on the views that [judge] has formed, and not by reference to the thoughts of other judges who may have had some earlier involvement in their cases.

[145] The fair-minded lay observer would, Duffy J said, be expected to be aware of these matters.

[146] Finally, Duffy J considered that a fair-minded lay observer would conclude there is no useful purpose in a future judge reading the challenged documents and therefore there would be little, if any, expectation of this happening. The documents would not assist the judge who comes to make the s 133 determination in the future.[97]

[147] Thus, Duffy J found, the test for apparent bias was not satisfied. The third cause of action had not been made out.[98] There was no basis for Duffy J to order the challenged documents to be removed from the court file.[99]

[148] Duffy J went on to note that there was a separate question as to whether the High Court could order the removal of a court document from a court file. "The Family Court is a court of record and, as such, it is required to keep a permanent record of all essential steps in proceedings". This is a common law obligation that is reflected in s 17 of the Public Records Act 2005. It was unclear to Duffy J whether the High Court could exercise powers that intrude on the management of Family Court files. However it was not necessary for her to resolve that issue.[100]

[149] The second and third causes of action were therefore dismissed.[101]

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97 At [56].
98 At [57].
99 At [58].
100 At [58].
101 At [59]–[60].

The appeals before this Court

The Newtons' appeal against the third High Court judgment

[150] In January 2021 the Newtons filed an appeal to this Court against the third High Court judgment. Their grounds of appeal included that:

(a) Duffy J erred in failing to separately consider the relief they sought in relation to the report of the LFC, declaring that it was ultra vires and requiring it to be removed from the court file or in the alternative redacted; and

(b) Duffy J erred in declining to order that the challenged documents be removed from the Family Court file. The third cause of action was not limited to apparent bias. Duffy J erred in finding there was no useful purpose in a future judge reading those documents and that there would be little if any expectation by a fair-minded lay observer of this happening.

[151] The Newtons sought a judgment from this Court:

(a) setting aside the third High Court judgment;

(b) declaring the report of the LFC filed on 5 November 2018 ultra vires;

(c) removing, or in the alternative, redacting, that report from the Family Court proceedings file; and

(d) directing the Family Court to remove from its file the challenged documents.

[152] Counsel for the LFC gave notice of intention to support the third High Court judgment on other grounds. Those additional grounds were that:

(a) the role of LFC is not amenable to judicial review; and

(b) the LFC at all times performed her role appropriately and within the scope of her statutory role.

[153] Leave was granted to the NZLS to intervene in this appeal.[102]

Family Court appeal from first High Court judgment

[154] After the Newtons filed their appeal from the third High Court judgment, the Family Court applied for an extension of time to appeal against the first High Court judgment. This Court granted an extension of time, and directed that the appeal be heard together with the appeal against the third High Court judgment.[103] Leave was granted to the Attorney-General to intervene in the appeal.[104] It is not normally appropriate for a lower court to play an active role in judicial review proceedings before the High Court or on appeal. This Court considered that it would be more appropriate for the Attorney-General to take responsibility for prosecuting the appeal.[105]

[155] The grounds of appeal against the first High Court judgment included that the High Court had erred in:

(a) finding that s 133 of COCA requires a child's views to be taken into account when deciding whether a psychological report is required;

(b) failing to take into consideration the role of the LFC, and specifically the discretion to be exercised by LFC as to whether a child's views might be obtained prior to a decision being made about a s 133 psychological report; and

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102 *DN v Family Court at Auckland* CA19/2021, 22 April 2021 (Minute No 2 of Goddard J).
103 *Family Court v AA* [2021] NZCA 189 at [29]–[30].
104 At [31].
105 At [22].

(c) finding that Judge de Jong had pre-determined the requirement for a s 133 psychological report.

[156] The grounds of appeal also included a claim that the use of the Judicial Review Procedure Act 2016 to challenge interlocutory rulings of the Family Court in proceedings under COCA is tantamount to an abuse of the processes of the High Court.

[157] The Newtons gave notice of their intention to support the first High Court judgment on other grounds. Those other grounds were, in summary, that COCA requires that the views of the children who are the subject of proceedings must be ascertained and considered before a s 133 report is obtained.

[158] Leave was granted to the NZLS to intervene in this appeal in relation to the operation of s 133 of COCA, and whether the views of the children should have been sought before directing a psychological report under s 133.[106]

[159] This Court appointed Mr Cooke as LFC in connection with both appeals. He had been appointed as the LFC in the Family Court, following the appointment of Ms von Keisenberg as a Family Court judge.

Issues on appeal

[160] The Attorney-General and the Newtons identified the following issues that arise in the appeal from the first High Court judgment:

(a) whether Courtney J erred in law in finding that a child's views must be taken into account under s 133(7) of COCA;

(b) whether s 6 of COCA requires the Family Court to take a child's views into account before ordering a s 133 report;

(c) whether s 133(6) requires the Family Court to take a child's views into account before ordering a s 133 report;

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106 At [26].

(d) whether in finding that the Family Court must take a child's views into account before ordering a s 133 report, Courtney J erred in law by failing to take into consideration that the LFC has a discretion as to whether or not to ascertain a child's views;

(e) whether the use of the Judicial Review Procedure Act to challenge interlocutory rulings of the Family Court in COCA proceedings is an abuse of the process of the High Court;

(f) whether Courtney J erred in law in finding that Judge de Jong had pre-determined the requirement for a s 133 report; and

(g) whether Courtney J erred in law in disregarding a report filed by Judge de Jong in which he explained how he prepared the brief, and by disregarding the function of the court in preparing a brief by reference to the definition of psychological report in s 133(1), and s 133(5)(b)(ii) of COCA.

[161] We consider that the first four of these issues can be grouped together. They are all aspects of the question whether a child's views must be taken into account by the Family Court before ordering a s 133 report.

[162] The sixth and seventh issues can also be addressed together. We will address the relevance of the report prepared by Judge de Jong when we consider whether Courtney J erred in finding that Judge de Jong had pre-determined his decision in relation to the s 133 report.

[163] The appeal from the third High Court judgment raises issues in relation to:

(a) the extent to which judicial review may be sought in respect of a report prepared by the LFC in Family Court proceedings; and

(b) the circumstances (if any) in which the High Court can direct that documents be removed from a Family Court file.

[164] We will address the issues raised by the two appeals under five headings:

(a) the appropriateness of judicial review of s 133 orders;

(b) ascertaining children's views in relation to s 133 orders;

(c) pre-determination;

(d) reviewability of an LFC report; and

(e) removal of documents from a Family Court file.

[165] Before we do so, however, we will summarise the relevant evidence, and in particular the expert evidence, that was before the High Court and this Court.

The evidence before the High Court and this Court

[166] The Newtons filed affidavits in support of each of their judicial review applications, setting out the background to the Family Court proceedings and explaining their concerns in relation to the making of the s 133 orders.

[167] As already mentioned, in the first judicial review proceeding the Court had before it by way of evidence the transcript of the hearing before Judge de Jong on 27 November 2017, the audio recording of that conference, and the report from Judge de Jong to the High Court dated 1 June 2018.

[168] In the second judicial review proceeding the High Court also had before it a report from the Children's Commissioner, and affidavits filed by the NZLS from Professor Seymour, an experienced clinical psychologist.

Report from Children's Commissioner

[169] The Children's Commissioner provided a report to the High Court under s 12(1)(g)(ii) of the Children's Commissioner Act 2003. The report was provided at the request of Ms Chambers. Ms Crawshaw QC, counsel for the LFC, endorsed the request for a report.

[170] The report, which was provided in October 2019, addressed the question:

> Should children be consulted and have an opportunity to express their view as to whether a s133 psychologist's report is essential in proceedings under the Care of Children Act 2004?

[171] The Commissioner emphasised in his report that children's participation in decisions that affect them is a fundamental right set out in the CRC. In his view, that right is not widely recognised or sufficiently valued in New Zealand.

[172] The Commissioner said he considers that courts should take a child-centred and rights-based approach to decision making. That would go beyond simply giving children the opportunity to put forward their views, to actively supporting them through the process in a way that is responsive to their age and stage of development, cultural background, abilities and needs. He emphasised that his opinion is that it is critical that children's views are sought, listened to and considered in all decisions affecting them, including procedural issues. "They are after all, experts in their own lives".

[173] The Commissioner summarised his views in relation to the participation of children in the ordering of a s 133 report as follows:

> 31. A child-centred and rights-based approach to decision making about the ordering of a s133 psychological report could look like this:
>
> a) The Lawyer for Child checks to see if the children involved have previously expressed views that are relevant to their participation in a psychology report. Relevant information on prior views, such as if the children have refused to participate previously or if the children have found involvement in other reports traumatic, should be shared with the Judge for consideration. This information is important but should not preclude the child from being asked their views at the present stage.
>
> b) The parents and/or guardians of the children and/or the Lawyer for Child and/or an appropriate person, guides the children through the judicial process including explaining, in a way that is understandable to the children, what a s133 psychological report is, why it is used and how it is usually conducted (ie where it takes place, duration, format, likely questions to be asked).
>
> c) Children then have the time and space to express their views about participating in the s133 psychological report process if

> they wish to. These views should be listened to, recorded and shared, if the children want them to be, with the Judge for consideration. Children have the right to not share their views on this matter and should be supported to understand the process so that they can make that decision and share their views freely. The children should be supported to speak directly with the Judge to share their views if they wish.
>
> d) The Judge considers the children's views alongside other evidence and information in making a decision in the children's best interests about the essentiality of the ordering of a s133 psychological report.
>
> e) The Lawyer for Child then reports back to the children about how their views were considered in the decision-making process and the nature of the Judge's decision.

Evidence of Professor Seymour

[174] Professor Seymour is an emeritus professor at the University of Auckland. He has extensive experience both in practice as a clinical psychologist and in teaching and clinical supervision of students training as clinical psychologists. He has published widely in the field. Professor Seymour was asked to provide expert evidence from a psychologist's perspective on the appropriateness (or otherwise) of seeking a child's view as to whether a s 133 report is necessary in any circumstances.

[175] Professor Seymour described the standard brief for a s 133 report, and the way in which a psychologist will go about preparing their report in answer to such a brief by drawing on multiple sources of evidence:

> 30. The [legislation] … defines a 'standard brief' for psychological reports in the following terms:
>
> (a) how current arrangements for the child are working for the child;
>
> (b) the child's relationship with each party, including if appropriate, the child's attachment to each party;
>
> (c) the child's relationship with other significant person's in the child's life;
>
> (d) the effect or likely effect on the child of each party's parenting skills;
>
> (e) the effect or likely effect on the child of the parties' ability or otherwise to co-operate in the parenting of the child;

(f) the advantages and disadvantages for the child of the options for the care of the child;

(g) any matter that the court specifies under subsection (5)(b)(ii).

31. Frequently added to the standard brief is the direction to ascertain and comment on the views of the child in relation to care arrangements. This typically includes investigation of the reasons for the particular views expressed by the child, such as parent pressure.

32. Psychological reports rely on multiple sources of evidence and the triangulation of this data. Typically the psychologist's report will be compiled from interviews with the children who are the subject of the report, interviews with parents/caregivers, observation of interaction between parent/caregivers and children, interviews with collateral parties such as extended family members, teachers, other professionals involved with the children, and consideration of written documents such as previous psychologist's reports, previous judgments, reports of lawyer for child, and affidavits produced by the parties.

33. Assessing concerns about the safety of a child requires consideration of parenting skills and behaviour. Affidavit evidence and interviews with parties may raise issues of child safety because of parental histories of violence, substance abuse, or mental health difficulties, all of which could pose a risk to a child, depending on their context, recency and severity.

34. Issues such as a child's attachment to a parent and parents' and other caregivers' parenting skills are now part of the standard brief. The parents' history in their own family of origin is often relevant to understanding attachment issues in relation to their own children.

[176] The affidavit identified some of the reasons for differences in content between reports prepared by the LFC and a psychologist:

40. Other differences between lawyer for child's and psychologist's reports may occur as a consequence of the wider brief that is typical in directions given to psychologists. The report of lawyer for child is typically a direct representation of the child's statements, in the manner of taking instructions from a client. The assessment of a child's views in a psychologists' report may include direct verbatim report of the children's statements, but also include detailed consideration of the weight to be given to these views as a consequence of factors such as attachment relationships, any history of child maltreatment, disruption to living arrangements, exposure to parental conflict, and direct parent influence in the form of coaching and indirect influence in the form of a lack of support for the child's relationship with the other parent.

[177] Professor Seymour described psychologists' practice in relation to the assessment of children's views as follows:

> 41. As discussed already, children have a legal right to participate in decisions affecting them and for their views to be considered. Furthermore, a child may actually want to make their views known. It is also recognised that children have the right not to express views.
>
> 42. It is typical of psychologists' practice that children are not directly asked for their wishes, preferences or views, but rather, are engaged in an open conversation that elicits such information. Some children may spontaneously express their views. The guidelines for psychologists includes the following statement: "Do not ask children of any age directly for their preferences or wishes in respect of living arrangements. Instead, get them talking to you, and their wishes and preferences will naturally be discussed." Children may also provide information indirectly and non-verbally, for example, by exhibiting distressed behaviour in relation to certain matters.
>
> 43. Children's views are considered within the broader context of their maturity. A child's expressed view may reflect poor understanding of issues and may be based on insufficient information.
>
> 44. Children's views are also subject to external influence. Parental influence is particularly relevant in the circumstances of a child being exposed to parental conflict and where there are abuse allegations. Children are vulnerable to parents' manipulation and may fear further exposure to conflict and consequences from their taking part in interviews.
>
> 45. Psychologists assist the child to be at ease. Psychologists conduct the interview in such a way as to minimise a potential impact on a child that burdens them with a sense of responsibility for decision-making or that puts them at emotional risk. This includes consideration of the interview setting. The neutrality of venue and lack of physical proximity to parents/caregivers may be relevant to what children may decide to divulge to an interviewer. Children are not interviewed in the presence of parents, caregivers, or siblings. Similarly, interviews should not take place where adults can overhear children, or the child may think that adults can overhear them. Schools are considered appropriate settings in which to interview children due to being a neutral but familiar setting away from parental presence.
>
> (Footnote omitted).

[178] Professor Seymour explained that as a matter of professional ethics a psychologist is required to obtain informed consent from a child:

> 47. In keeping with the principles of informed consent, children are typically informed in appropriate language that a report will be provided to the court, and that lawyers and their parents may see this. That is, children are not given an impression that what they tell the

> psychologist will be kept secret. This is set out in the psychologists' guidelines as follows: "Principles of informed consent require that the child be explained your role, and who will get to read your report in age-appropriate language. Encourage the child to express himself/herself freely but also inform them that they should not feel any pressure to answer questions that he/she might not want to or be able to answer."
>
> (Footnote omitted)

[179] Professor Seymour said that he was not aware of any instance other than the present case where the question about whether or not there should be a psychologist's report being put to children had been raised. He considered that to decline a s 133 report on the basis of a child's objection would impede the accumulation of evidence required for appropriate decision making. Most often in the Family Court context children's views are ascertained in relation to their care arrangements, rather than aspects of the court's processes such as the involvement of experts.

[180] Professor Seymour's conclusion was that asking children about participation in a s 133 report is both unnecessary and inappropriate:

> 59. The factors that are commonly taken into consideration when deciding whether to directly ascertain children's views about their care arrangements include:
>
> (a) the child's age and/or cognitive development which influence their capacity to understand and communicate;
>
> (b) the child's willingness to have such involvement;
>
> (c) the child's exposure to conflict such that the views they express are subject to parental pressure thereby exposing them to the risk of further emotional harm.
>
> 60. With respect to the ability to understand and communicate, it is unlikely that a younger child has the capacity to understand what a s 133 report entails, and even an older child may struggle to comprehend its purpose and process. A full explanation of the process of a s 133 report is most appropriately provided by the psychologist.
>
> 61. With respect to children's willingness to have involvement in a s 133 report it is relevant to note that psychologists are obliged to gain informed consent to any interviews with children. It is at this point that the extent of a child's involvement in the process is most appropriately managed. In this process of engagement children's best interests are uppermost. Psychologists are skilled in conducting interviews with children, they are sensitive to the need to protect children from any further harm, and they use their discretion in the

questions they ask and how they report the outcomes of their contact with the children.

62. With respect to children's exposure to conflict, it is relevant to observe that exposure to parental conflict is one of the major influences on children's post separation adjustment; perhaps the most relevant factor. Family Court cases for which a s 133 report is being considered are invariably those where there is a high, if not extreme, level of conflict. In the circumstances of there being high conflict, children and young people are best protected from the conflict in so far as possible. Seeking their views as to how a court case is to be managed – as would be the case when they are asked to express their views about a s 133 report – risks drawing them further into parental conflict. The consequences of this would be to place them at even greater jeopardy of harm. For example, a parent may attempt to influence their views on this matter, as they may have done on issues of care arrangements and feelings for the other parent. Or, having expressed approval of a psychologist's involvement, the child or young person may feel responsible or to blame for the outcome of that report and/or the eventual Court decision.

63. Accordingly, it is my opinion that asking children about participation in a s 133 report is both unnecessary and inappropriate.

(Footnote omitted).

[181] After he had provided his first affidavit, Professor Seymour was sent a copy of the Children's Commissioner report referred to above. Having read that report, he provided supplementary comments including the following:

5. It is in this regard that I consider that participation of children in the decision about whether to obtain a s133 report is inappropriate. My opinion rests in large part on the reality that s133 reports are sought for a small minority of the total applications before the Family Court that are characterised by high levels of inter-parent conflict and typically contain allegations concerning child safety as a result of child abuse and/or significantly impaired parenting ability.

6. To require, or even to invite, children's participation on whether to obtain a s 133 report runs the strong risk of further exposure to conflict, to the detriment of their welfare. This is because a parent who considers they may be disadvantaged by a s 133 report may seek to influence a child against supporting a report whereas the other parent may seek to encourage the child to support a report. Furthermore, such discussion about the report may also heighten a child's sense of responsibility for the outcomes that result from subsequent court proceedings.

…

9. A consequence that appears not to have been considered in the Commissioner's recommended steps arises where the child is asked about participation in a s133 report and adopts an opposing position

only to find at a later date that the report is going ahead anyway. This is likely to lead to the child feeling their opinion did not matter. It may also have consequences for their effective engagement with the process once they do meet with the psychologist.

10. With respect to broader welfare considerations, the Family Court requires access to the best information about the child in order to make the most appropriate decisions for their future care. This is particularly the case with the subset of cases before the court for which a judge is likely to consider there is need for a specialist report.

…

12. After consideration of the Commissioner's report, I remain of the view that a full explanation of the process of a s133 report is most appropriately provided by the psychologist, and that informed consent to participate is most appropriately obtained by the psychologist at first meeting with the child (see my previous paragraphs 62 and 63).

13. Accordingly, it remains my opinion that asking children about participation in a s 133 report is both unnecessary and inappropriate.

Joint memorandum on Family Court practice

[182] The Family Court applied for leave to adduce further evidence on appeal in relation to current practice regarding obtaining children's views prior to commissioning a s 133 report. That application was opposed. The issue was ultimately resolved by the parties agreeing to provide, by way of memorandum of counsel, certain background information. The memorandum of counsel records that:

> Since the implementation of the Care of Children Act 2004 (**COCA**), s 6(2) COCA has almost invariably been interpreted as meaning that children's views are ascertained in relation to matters such as who they should live with or what school they should attend. Children's views about whether a specialist report should be directed have not in practice generally been obtained.
>
> Lawyer for the child is always appointed in COCA proceedings where a specialist report is sought. This appointment is made pursuant to s 7 of the COCA and s 9B Family Court Act 1980. The role requires the lawyer to act in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person. Each child is an individual. In accordance with s 4 of COCA, the consideration of the child's welfare and best interests must be tailored to their "particular circumstances". Lawyer for child is required to meet with the children they represent and as a matter of practice do so.

[183] The memorandum sets out background information provided by the Principal Family Court Judge in relation to the work of the Family Court. Approximately 60,000 applications are filed each year. At any given time, there are

approximately 28,000 applications on hand. Proceedings under COCA constitute the Court's main area of work: some 53.2 per cent of the total Family Court case load and some 71.5 per cent of the total defended case load. In the Auckland metropolitan region, the time frame from when the Court directs a s 133 psychological report to the time the report is received by the Court is about 12 months. A case is then set down for hearing, with a further six months' delay. So on average 18 months passes from the time a judge determines the report is essential to the date of determination of the relevant application.

[184] The memorandum provides helpful background in relation to the way in which s 133 orders are usually considered and made:

> 5. The decision whether to direct a report pursuant to s 133 is usually made at a directions conference under r 416Z of the Family Court Rules 2002. The judge has a wide discretion to make any orders and directions set out in r 175D. The purpose of the directions conference is to enable the judge to make the orders and directions necessary to "ensure that the hearing takes place as early as possible and will enable the determination of the issues in dispute between the parties".
>
> 6. Each directions conference is scheduled for a 15-minute duration. Judges can preside over up to 21 conferences per day.
>
> 7. The Principal Family Court Judge has indicated that if counsel, including lawyer for child, seek a direction for a s 133 psychological report, they do so either in a memorandum or orally. Sometimes counsel, including lawyer for child, are aware before a directions conference that submissions will be required on the issue of a s 133 report, and sometimes they are not. Lawyer for child's submissions and/or recommendations hold significant weight with the Court, as a central part of their role is to advocate independently for the child's best interest and welfare.
>
> 8. In ordering a psychological report, Family Court judges use what is known as a "standard brief", which sets out those matters that may be included in the psychological report under s 133(1). The judges customise this brief as appropriate depending on the requirements of the particular case.

"Evidence" on interpretation of COCA

[185] In the second judicial review proceeding the Newtons also filed an affidavit of Professor Mark Henaghan, an academic lawyer specialising in family law. In that affidavit Professor Henaghan states that he knows the wording of COCA and the various interpretations of key sections, and can offer an objective opinion on how it

should be interpreted when it comes to children's right to express their views. Professor Henaghan records that he was asked to give expert evidence on the question of whether or not it is appropriate to seek a child's view as to whether a s 133 report is essential in proceedings under COCA. Professor Henaghan's affidavit then goes on to analyse COCA, and express his views on its interpretation.

[186] It is elementary that the purpose of evidence is to establish *facts* relevant to the proceeding before a court. As s 25(1) of the Evidence Act 2006 makes plain, expert opinion evidence is admissible if the *fact-finder* is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any *fact* that is of consequence to the determination of the proceeding. Even on the broadest of approaches, expert evidence about New Zealand law is not admissible in any proceedings. It simply is not evidence. It cannot assist a fact-finder.

[187] We are conscious that s 12A(4) of the Family Court Act provides for a relaxation of the rules of evidence in proceedings before the Family Court:

> **12A Evidence**
>
> …
>
> (4) The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

[188] However any evidence that the Family Court receives under this provision must still be "evidence": that is, it must relate to facts, and must assist the fact-finder to establish relevant facts.[107]

[189] We do not doubt the Professor's expertise in this field of law. However, the practice of filing expert evidence on questions of New Zealand law, which this Court has encountered from time to time, is wholly inappropriate. It seeks to clothe submissions on the law made by a party with additional authority because those submissions are supported by an expert commentator. This adds nothing to the

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[107] See also Evidence Act 2006, s 6(a).

proceedings: anything the "expert" says could be advanced by counsel as a submission, and evaluated by the judge on its merits. Not only does it add nothing, it risks wasting significant time and money. How are other parties supposed to respond to "evidence" of this kind? Should they file affidavits on the law in response? If they do not, will their submissions carry less weight? Should a party that disagrees with a proposition advanced in the "evidence" require the expert to attend and be cross-examined about the law? That would duplicate time spent on submissions, and would do so in a particularly unhelpful and unproductive manner.

[190] In *Penny v Commissioner of Inland Revenue* the Supreme Court had this to say about the filing of affidavits expressing views on legal issues:[108]

> [32] For his part, the Commissioner objects to portions of Mr Shewan's evidence in which Mr Shewan expressed his views on some of the legal issues in the case. It seems to us that the Court of Appeal dealt correctly with this objection. Randerson J said that this material had no place in the evidence of an expert witness and should more properly have come from counsel. To that extent, the Court of Appeal put Mr Shewan's evidence to one side. So do we. But of course this Court did hear the same arguments canvassed by Mr Harley in his submissions. So there is no practical consequence of the upholding of the objection. It should, however, be observed that *it is undesirable and wasteful of time and effort of both parties when such material appears in expert briefs of evidence. The practice of including it should stop.* If it persists, courts should require amended briefs to be filed.

[191] As the Supreme Court said more than 10 years ago, the practice of including material of this kind in evidence should stop. Lawyers should know better than to permit affidavits of this kind to be filed. If they are filed, they should not be read. An award of costs may be made in favour of a party put to the trouble of objecting to such affidavits.

Issue one: appropriateness of judicial review of s 133 orders

The issue

[192] As a matter of logic, the first issue that needs to be considered is whether the applications for judicial review of Family Court orders under s 133 of COCA amounted to an abuse of process, as the Attorney-General submits.

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[108] *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433 (emphasis added and footnote omitted).

Submissions

[193] Ms Chan QC, counsel for the Attorney-General, submits that s 143(3A)(b)(iii) of COCA provides that no appeal may be made to the High Court in respect of certain decisions, including a decision under s 133 to obtain a psychological report. Leave is required to bring any appeal from the Family Court to the High Court in respect of an interlocutory decision under COCA.[109] But in relation to certain decisions specified in s 143(3A), including s 133 orders, even the ability to seek leave to appeal is excluded. The underlying policy rationale, Ms Chan submits, is to prevent Family Court proceedings being unduly protracted, consistent with the principle in s 4(2)(a) of COCA that decisions affecting a child should be made and implemented within a time frame that is appropriate to the child's sense of time.[110] A party should not be permitted to use judicial review proceedings to achieve an outcome which would not be available under COCA. It is impermissible "to accomplish via a back door that which the statute expressly prohibits if entry is attempted via the front door".[111] It is an abuse of process to seek to do so.

[194] For the Newtons, Ms Chambers submits that s 143 of COCA does not oust the High Court's jurisdiction to perform its constitutionally essential task of ensuring that statutory powers are exercised only within their true limits. The courts approach privative clauses cautiously. Here, there is no ouster clause that attempts to exclude or limit the availability of judicial review. In the absence of clear statutory language, Parliament cannot be taken to have intended to limit parties' access to judicial review.

[195] For the children, Mr Cooke agreed with the submissions made by the Attorney-General that use of the Judicial Review Procedure Act to challenge interlocutory rulings of the Family Court in care of children proceedings is an abuse of process.

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109 Care of Children Act, s 143(3).

110 *Malone v Auckland Family Court* [2014] NZHC 1290 at [28], quoting *T v E* FC Auckland FAM-2007-004-2481, 2 July 2008 at [4]; and *Rose v Family Court at Christchurch* [2015] NZHC 1597, (2015) 30 FRNZ 293 at [24], quoting *BLH v MNL* [2014] NZHC 194 at [25].

111 *Norfolk Flats Ltd v Wellington City Council* [1980] 2 NZLR 614 (HC) at 623.

Discussion

[196] The Family Court is a statutory court. Family Court judges exercise statutory powers. Those powers are necessarily subject to judicial review before the High Court. We accept Ms Chambers' submission that it is clear that judicial review by the High Court is available in relation to decisions made by Family Court judges under COCA.

[197] However the purpose of the judicial review jurisdiction is to ensure that powers are exercised lawfully and in a manner consistent with the statutory scheme under which the decision-maker operates. That requires consideration of the relevant legislation as a whole.

[198] It is well established that the High Court's judicial review jurisdiction in respect of interlocutory decisions made by judges of the Family Court is to be exercised sparingly, in light of the statutory scheme.[112]

[199] The importance of timely decision-making in the context of applications under COCA is underscored by s 4(2)(a)(i), which requires any person considering the welfare and best interests of a child — the paramount consideration under COCA — to take into account the principle that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child's sense of time. Consistent with the need to make decisions in a timely manner, s 143(3) of COCA permits appeals from interlocutory and interim orders only with the leave of the Family Court. Even that limited ability to appeal with leave is excluded by subs (3A) in relation to certain decisions, including decisions to obtain a psychological report under s 133.

[200] In *Malone v Auckland Family Court* the applicant sought judicial review of a Family Court decision declining leave to appeal under s 143(3). Ellis J observed that "except in a very clear-cut case of fundamental error", there was a risk that the grant of an application for review of a decision made under s 143(3) would undermine the

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112 *Rose v Family Court at Christchurch*, above n 110, at [11]; and *Malone v Auckland Family Court*, above n 110, at [53].

policy objectives that underlie that provision.[113] We agree. The risk that the policy objectives that underlie s 143(3A) will be undermined by an application for judicial review of a decision to which that subsection applies is even starker.

[201] In her oral submissions Ms Chambers emphasised the additional criteria for obtaining a psychological report inserted in s 133 by the Care of Children Amendment Act (No 2) 2013. Her argument was, in effect, that it was necessary for the High Court to ensure, by means of judicial review, compliance with the mandatory requirements Parliament had specified in s 133(6) and (7). However the same 2013 legislation inserted subs (3A) in s 143. Plainly it was not Parliament's intention that orders made under s 133 should be able to be challenged by way of appeal, even with leave. Parliament could have permitted a limited right of appeal on a question of law. But it did not do so. Reading the legislation as a whole, we consider that it would be inconsistent with the statutory scheme for relief to be granted in judicial review proceedings in respect of a decision under s 133 except in a very clear-cut case of fundamental error. And even then, the Court should be cautious about permitting judicial review proceedings to be used to circumvent the clear statutory intention that applications under COCA should not be delayed by satellite litigation about interlocutory orders.

[202] In particular, we do not consider that an order under s 133 may be set aside in judicial review proceedings merely because the High Court judge considers that the criteria set out in s 133(6) were not met. It is difficult to envisage circumstances in which judicial review would be granted of a s 133 order made by a specialist judge, who can be expected to be very familiar with the provision. It will usually be implicit in the making of an order for a s 133 report that the criteria have been considered by the judge, and the judge is satisfied that the criteria are met. It would be a most unusual case in which it could be established that the criteria were not considered: it is not necessary for the judge to recite the criteria, let alone analyse each one separately. And it would be a most unusual case in which it could be said that it was not open to the judge to be satisfied that the criteria were met — that is, to form the view that the

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113 *Malone v Auckland Family Court*, above n 110, at [53].

criteria were met.[114] A High Court judge would need to be persuaded that it was not open to the Family Court judge to form that view.

[203] In this case, the possibility that relevant information about the children might be obtained from another source — the children's paediatrician — did not mean that it was not open to Judge de Jong to form the view that a psychological report would provide information that was essential for the proper disposition of the application. We consider that it was well open to Judge de Jong to form that view. That was the question for the High Court judge; not whether the High Court judge considered that the statutory threshold was met.

[204] We add that the mere fact that a party has applied for judicial review of an order made under s 133 does not operate as a stay of the s 133 order, and should not delay the process of obtaining a report directed under s 133 unless interim relief is sought and obtained. The High Court should be slow to grant interim relief preventing implementation of a s 133 order, having regard to the statutory scheme. If interim relief had been opposed in the present case, it would have been difficult to justify the making of interim orders preventing the psychologist appointed under s 133 from beginning preparation of a report. At most, an interview of the children might have been deferred for a short period to enable the judicial review proceedings to be heard as a matter of urgency. But we cannot see any reason to delay other aspects of the psychologist's work, such as interviews with the relevant adults and other medical professionals, and consideration of existing written reports.[115]

[205] Courtney J does not appear to have had the benefit of submissions from counsel on the appropriateness of intervening by way of judicial review in respect of s 133 orders. There is no reference in the first High Court judgment to s 143(3A) of COCA, or to the authorities on the need for circumspection in judicial review proceedings in respect of interlocutory decisions under COCA. The Judge was invited to form her own view on whether the statutory threshold for making a s 133 order was met, rather than asking whether it was open to Judge de Jong to form that view.[116] Nor does

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114 *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 12 TCLR 194 at [97].

115 For the various sources that a psychologist draws on to prepare a s 133 report, see the evidence of Professor Seymour at [32], set out at [175] above.

116 First High Court judgment, above n 9, at [32].

Courtney J appear to have had the benefit of submissions on the wide range of sources that a psychologist would draw on in preparing their report, in addition to interviewing the children, or on the ways in which a psychologist seeking to interview the children would first seek to ensure their informed consent to the interview.

[206] In summary, for the reasons set out above we consider that it will only be appropriate for the High Court to exercise its jurisdiction to review a decision under s 133 in very rare circumstances where:

(a) Something fundamental has gone wrong with the decision. That threshold is not met merely because the High Court judge considers that the criteria in s 133(6) and (7) are not satisfied. It would be met if for example the decision was affected by apparent bias, and possibly also where the decision had been pre-determined. We return to the question of pre-determination at [244] to [268] below.

(b) It is necessary to do so in order to avoid adverse consequences that cannot be remedied by waiting for a final decision and exercising rights of appeal at that time. We would have thought it would be rare for the preparation of a psychologist's report to fall into this category, bearing in mind that conducting an interview with the child in question is only one part of the psychologist's task, and that the psychologist can be expected to approach that element of the task using their professional skill and care and in a manner consistent with their ethical responsibilities.

Issue two: ascertaining children's views in relation to obtaining s 133 report

The issue

[207] Is it necessary for a child's views to be obtained before the Family Court directs that a s 133 psychologist's report is obtained? Is this required by s 133(7), or by s 6 of COCA?

Submissions for the Newtons

[208] Ms Chambers supported the result reached in the first High Court judgment. She submitted that it is always necessary for a child's views to be obtained before the Family Court directs that a s 133 psychologist's report is obtained. This, she said, flows from s 133(7): the reference to ascertaining the "parties'" views must, in light of the scheme of COCA, be read as including the views of the child who is the subject of the report. In addition, she said, this necessarily flows from s 6 of COCA read in light of art 12 of the CRC.

[209] Ms Chambers emphasised the "direction of travel" reflected in the Family Court (Supporting Children in Court) Legislation Act, and the report of the Independent Panel that prompted those reforms.[117] As the Independent Panel observed, children "want to be better heard and have more opportunities to express their views".[118]

[210] Ms Chambers submitted that the court should not be "frog-marching" children off to see a psychologist, for an extended interview of many hours, without first seeking their views. The views expressed by Professor Seymour were paternalistic, and out of step with the direction of travel in this field, and the increasing emphasis placed on effective participation by children in decisions that affect them. It is too late, she submitted, for a psychologist to obtain the children's views after being appointed.

Submissions of other parties

[211] For the Attorney-General, Ms Chan submitted that Courtney J was wrong to find the children's views should have been taken into account by the Family Court before ordering a psychologist's report under s 133 as:

(a) this is not required by s 133(7), as children are not parties to proceedings under COCA;

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117 Ministry of Justice *Te Korowai Ture ā-Whānau*: *The final report of the Independent Panel examining the 2014 family justice reforms* (May 2019).

118 At [34].

(b) it is not required under s 6 of COCA, based on the text and legislative history of that provision, a proper interpretation of art 12 of the CRC, and the welfare and best interests of the child;

(c) section 133(6) does not impose this requirement; and

(d) the LFC has a discretion as to whether a child's views are obtained prior to a s 133 report being ordered.

[212] Ms Chan emphasised the wide range of decisions that may need to be made in any case concerning the care of a child, including:

(a) appointment of an LFC, and settling the brief of that lawyer;

(b) requesting a report from Oranga Tamariki;

(c) requesting a cultural report;

(d) costs decisions;

(e) adjournment of hearings;

(f) making discovery orders; and

(g) imposing sanctions on a parent for breach of a parenting order.

[213] She submitted that requiring a child's views to be sought with respect to every procedural decision of this kind is not in the child's best interests: that should be the touchstone for decision-making under COCA.

[214] Ms Chan agreed with the submissions made by Mr Cooke that a child should be supported to participate in most substantive decisions. But even then, she submitted, this is not appropriate in respect of all substantive decisions: for example, interim protection orders where there is a risk of imminent danger.

[215] Ms Chan submitted that the delays that would result from imposing a requirement that children be consulted in respect of every decision made by a Family Court judge would make it impossible to decide applications under COCA within the child's sense of time, as required by s 4(2)(a)(i). It would have a significant adverse impact on Family Court processes.

[216] Ms Chan noted that s 9B(2) of the Family Court Act refers to the LFC meeting with the child or young person and ascertaining the child's views on matters affecting the child *if it is appropriate to do so*. That provision expressly contemplates that there will be circumstances in which it is not appropriate to ascertain a child's views on some matters.

[217] Ms Chan also emphasised the expert view of Professor Seymour about the appropriateness of seeking a child's views on whether a s 133 report should be obtained. She emphasised his view that to require, or even invite, children's participation on procedural issues of this kind runs the strong risk of further exposure to conflict, to the detriment of the child's welfare. Discussion about the report may heighten the child's sense of responsibility for the outcomes that result from subsequent court proceedings. It may cause further distress to the child. It might cause loss of confidence in the judicial process, if an order is made contrary to their expressed views. A parent may seek to influence the child against the report, while the other parent may seek to encourage the child to support it. It would be difficult for the court to assess whether there had been such influence without a psychologist's report, resulting in an essentially circular process. Declining a s 133 report on the basis of a child's objection would impede the accumulation of evidence required for appropriate decision-making. And, as Professor Seymour said, a full explanation of the process of a s 133 report is most appropriately provided to the child by the psychologist. The child's involvement in the process is best managed at the point where the psychologist, who is skilled in conducting interviews with children while sensitive to the need to protect them from harm, gains informed consent.

[218] In response to Ms Chambers' argument that it is too late to seek the children's views once a psychologist has been appointed, Ms Chan submitted that it is always open to a psychologist to report to the court that the children were not willing to meet

with them, or to discuss certain issues. It is the psychologist, drawing on their professional expertise, who is best placed to explore such matters with a child.

[219] In response to questions from the Court, Ms Chan accepted that there is no hard and fast rule that a child's views should not be ascertained in relation to procedural decisions. Rather, she submitted, both the LFC and the judge have a discretion to seek a child's views in a particular case if they consider that it is appropriate to do so. But that will depend on context. It is not required in every case.

[220] Mr Cooke, for the children, emphasised the need for a nuanced approach by the LFC and by the courts. He submitted that the views of children should be sought on matters that affect them, that they need to know about, and may want to express a view on. That will depend on the issue, the age of the child, and other circumstances.

[221] Mr Cooke submitted that the children are not parties, so s 133(7) does not apply. Section 6(2) of COCA does apply. But it does not necessarily mean that the court must hear from the child. The LFC will need to exercise judgement, depending on the issue and the child, as to whether to obtain a child's views on a particular issue and place those views before the court. Where the LFC does so, the court is required to take those views into account. The court could also specifically require the children's views to be ascertained by the LFC. But primarily, Mr Cooke submitted, this is a matter for the judgement of the LFC. There is a balance to be struck by the LFC between involving the child enough and involving them too much, as that also can be damaging.

[222] Mr Cooke emphasised that lawyers who are appointed as LFCs under COCA are very experienced, and are required to exercise judgment in many respects in performing their functions.

[223] Ms Fisher QC, who appeared for the NZLS as intervener, submitted that in nearly all circumstances it will not be appropriate to obtain a child's views on whether a s 133 report should be obtained:

(a) This is not a matter affecting a child any more than the appointment of LFC, obtaining a social worker's report or a cultural report. These are procedural steps to gather information to enable the court to make decisions affecting the child, rather than decisions that affect the child in and of themselves.

(b) The LFC is not the best person to discuss a potential s 133 report with the child. Rather, the psychologist appointed to prepare the report is the appropriate person, for the reasons explained by Professor Seymour. There may be some cases where the LFC can properly raise the question of willingness to participate in an interview with a psychologist with a child, but that cannot be a mandatory requirement.

(c) Section 133 reports are used in high conflict situations, often involving vulnerable children. It is rare to seek their views on obtaining a s 133 report in such circumstances.

Discussion

[224] The United Nations Committee on the Rights of the Child has identified the right of all children to be heard and taken seriously as one of the fundamental values of the CRC. Article 12, which addresses that right, is one of the general principles underpinning the CRC. It establishes not only a right in itself, but should be considered in the interpretation and implementation of all other rights.[119] The Committee also emphasises how art 12 is complemented by art 3, which provides that the best interests of the child are a primary consideration in all actions undertaken concerning children. Article 3 establishes the objective of achieving the best interests of the child, and art 12 provides the methodology for reaching that goal by hearing the child:[120]

> In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

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119 United Nations Committee on the Rights of the Child *General comment No. 12 (2009): the right of the child to be heard* UN Doc CRC/C/GC/12 (20 July 2009) at [2].

120 At [74].

[225] Section 6 of COCA gives effect to art 12 of the CRC in the context of proceedings under COCA, as the 2021 amendment makes explicit.[121] In proceedings in relation to care for or contact with a child, the child *must* be given reasonable opportunities to express views on matters affecting that child. Any views the child expresses must be taken into account.

[226] Section 4(4) makes it clear that child's the right to a reasonable opportunity to express views under s 6 is not limited by the requirement in s 4(1) that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in proceedings under COCA. It is not open to a court or other decision-maker to decide that a child should not be given a reasonable opportunity to express their views because that would not be consistent with their welfare and best interests.

[227] However the requirement in s 6(2) is that the child be provided with *reasonable opportunities* to express their views on matters that affect them. In determining what opportunities ought reasonably to be provided, the welfare and best interests of the child will be a paramount consideration.

[228] The importance of ascertaining the views of a child on matters that affect them is also reflected in the best practice guidelines for LFCs issued by the NZLS. The guidelines provide that:[122]

> A child must be given reasonable opportunities to be heard (either directly or indirectly) in any judicial and administrative proceedings affecting them as provided for by section 6(2)(a) of COCA, section 5(d) of the CYPTF Act and Articles 9.2 and 12.2 of UNCROC.

[229] It would be difficult to overstate the importance in the scheme of COCA of the child's right to express their own, authentic views on matters that affect them, and to have the views they express taken into account. Ensuring that children are supported to exercise that right is an essential corollary of treating their welfare and best interests as a paramount consideration.

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121 Family Court (Supporting Children in Court) Legislation Act, s 6.

122 New Zealand Law Society *Lawyer for the Child Best Practice Guidelines*, cl 4.2.

[230] But we accept the submission of the Attorney-General, the NZLS, and Mr Cooke, that this does not translate into a blanket requirement that a child's views must be sought on any procedural step in proceedings under COCA. Where a decision will have a material effect on the child, they must be given a reasonable opportunity to express a view on the matters to which the decision relates. Different decisions will affect a child to a greater or lesser degree. What amounts to a reasonable opportunity to express views will turn on the significance of the decision for the child, the timeframe within which the decision is to be made, the age and maturity of the child and all their other circumstances, and the practical realities of seeking their views in a timely way. So for example it will not usually be necessary to seek a child's views before deciding to appoint a lawyer to represent the child under s 7 of COCA. This is a procedural decision that is usually taken at an early stage. Its effect is, among other things, to facilitate the future expression of views by the child. It would be difficult to seek the child's authentic views on such a step, and it would cause unnecessary and avoidable delays to do so.

[231] That is not to say that the child's views would not be relevant if, for example, the relationship between the child and the person appointed as LFC were to break down irretrievably. A judge would need to consider whether to make an alternative appointment in those circumstances, taking into account the child's views. But for initial, essentially routine, LFC appointments the child's views need not be sought in advance.

[232] Nor is it always necessary to seek a child's views before making urgent interim orders to ensure the child's safety. If the child's views about their circumstances and about possible interim arrangements are known to the court, those views must be taken into account. But if there is real urgency then it would not be reasonable — and would be inconsistent with s 4 — to delay taking action to protect the child. Once they are safe, their views about what comes next can be ascertained.

[233] It is neither possible nor appropriate to draw a bright line between substantive decisions, in respect of which a child must have an opportunity to express their views, and procedural matters, where that is not required. We accept the submission of Mr Cooke that a more nuanced approach is required which involves the exercise of

judgment by a lawyer appointed to represent a child and by the court. Some procedural decisions may have a significant effect on a child, and it will be appropriate for the child to be informed about the issue and given an opportunity to express views on it.

[234] The need for an LFC to exercise judgement about the matters on which a child's view is sought is reflected in s 9B of the Family Court Act. The LFC must meet with the child. And, as s 9B(2) expressly provides, the LFC must ascertain the child's views on matters affecting the child relevant to the proceedings *if it is appropriate to do so*. That judgement must of course be exercised having regard to the strong direction in s 6 of COCA, and art 12 of the CRC.

[235] What, then, of decisions to obtain a psychological report under s 133 of COCA?

[236] Section 133(7) requires the court to have regard to the "parties'" wishes before deciding whether or not to obtain a psychological report, if the court knows the parties' wishes or can speedily ascertain them. It is in our view quite clear that a child who is the subject of an application for a parenting order is not a party to that application. COCA consistently distinguishes between the parties and the child who is the subject of the application.[123] We do not consider that s 6 requires the term "parties" in s 133(7) to be given an extended meaning, as Ms Chambers submitted. Rather, we consider that the general approach to s 6 that we have described above applies equally in the s 133 report context.

[237] A person appointed as LFC must exercise judgement about whether it is appropriate for them to seek the views of the child about the possibility that a psychological report will be obtained. They might do so in general terms. Or they might ask whether the child is comfortable speaking with a particular psychologist, if that psychologist has previously met with the child. They might also inquire about the child's willingness to discuss particular topics with a psychologist. But all of that is a matter for the judgement of the LFC, depending on the circumstances of the case. It is not mandatory for them to do so in all cases.

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[123] See for example Care of Children Act, ss 134(1), and 143(2) and (3).

[238] Before a judge makes an order under s 133(5) the judge should consider whether the views of the child are known. If their views are known, which would usually be because those views have been ascertained by the LFC, those views must be taken into account.[124] But they are not of course decisive. If the child's views are not yet known to the court, the judge will need to consider whether it would be appropriate to obtain the views of the child on matters such as whether a report should be sought, or who should prepare one. Family Court judges are appointed for their expertise in matters of this kind. That expertise, and the experience they have in dealing with many COCA cases on a regular basis, mean that they are particularly well placed to exercise judgment about such matters.

[239] It seems likely that in many cases a judge will consider it is not necessary to seek a child's views on whether a s 133 report should be obtained before directing the preparation of such a report. Such a report draws on many sources other than interviews with the child: the preparation of a report based on those sources does not have any direct effect on the child. The impact on the child of directing a s 133 report turns largely on whether the psychologist will conduct an extended interview with the child, and on the topics that will be explored with the child. It seems to us that there will often be a practical difficulty in obtaining the child's views on those matters in advance of the meeting with the psychologist. It is difficult to see how the court could assess the risk that those views have been influenced by a party without the assistance of a psychologist's report. And it is difficult to see who could be better placed than a psychologist to explore the child's willingness to discuss sensitive topics. The process risks becoming more than a little circular if the children's views on speaking to a psychologist must be obtained before the court directs that a s 133 report should be prepared. That circularity may mean, in many cases, that it is not reasonable to provide an opportunity for a child to express a view on their willingness to be interviewed by a psychologist before the psychologist is appointed.

[240] Another factor that bears on the reasonableness of seeking the child's views pre-appointment is that the making of a s 133 order does not oblige the child to participate in an interview, and does not require the psychologist to persist in

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124 Section 6(2)(b).

interviewing a child who is reluctant to participate. If the child does not want to meet with the psychologist, the psychologist can seek directions from the court under s 133(9). Issues of this kind can be dealt with following appointment: confirmation of the child's willingness to be interviewed is not a precondition for a direction that a s 133 report be prepared.

[241] In any event, it is in our view very clear that if a Family Court judge makes an order under s 133 that a psychological report be prepared there is no right of appeal from that decision, even with leave. It is extremely difficult to envisage circumstances in which such an order could successfully be challenged in judicial review proceedings, as explained above. Parliament has made it clear that once an order is made under s 133, the determination of the substantive proceedings should not be delayed by ancillary litigation about the appropriateness of such an order.

[242] In summary, with the benefit of the extensive submissions we have received from the parties, the LFC and the interveners we have reached a view that differs from that expressed by Courtney J in the first High Court judgment at [33]. Section 133(7) did not require the views of the children to be taken into account before ordering a s 133 report. Nor was this a mandatory requirement for making a s 133 order by reference to the scheme of COCA more generally. And even if we had considered that it would have been preferable to seek the views of the children in this case — a matter on which we need not express a view — that would not be a basis on which to set aside the s 133 order in judicial review proceedings.

[243] However this was not the main basis on which Courtney J's decision proceeded. The focus of the first High Court judgment was the pre-determination argument. We turn to consider that issue.

Issue three: pre-determination

The issue

[244] The third issue is whether Judge de Jong had pre-determined the making of the first s 133 order, as Courtney J held in the first High Court judgment.[125]

Attorney-General's submissions

[245] Ms Chan submitted that the test for pre-determination is whether the decision-maker's mind was closed, so that the decision was approached with a mind "already made up". A "blank mind" is not required. The question is whether a fair-minded observer would consider that the judge pre-determined the matter. Pre-determination is not lightly found.[126]

[246] Ms Chan submitted that nothing in the exchange between Judge de Jong and counsel was indicative of pre-determination. Nothing suggested the Judge approached matters with a closed mind. By the time of the 27 November 2017 directions conference, Judge de Jong was well aware of the history of fraught relations between the parties, and the sensitivities regarding the children's mental state. As he confirmed in his report, he had read the parties' affidavits in advance of the hearing. Advance knowledge of a file, or "com[ing] to the hearing with a view" is not indicative of pre-determination: this is permissible, provided a decision-maker is open to hearing submissions and changing their mind.[127]

[247] Ms Chan submitted that Courtney J was wrong to place emphasis on the fact that at the outset of the hearing no counsel was actively seeking a direction for a s 133 report.[128] The LFC did not explicitly seek a s 133 report, but had stated in her memorandum that consideration should be given to whether such a report was necessary. The intensity of conflict between the parties was evident from the LFC's memorandum, and the wider history of the file. Also apparent from her memorandum were the concerns regarding the children's vulnerability and anxiety and

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125 First High Court judgment, above n 9, at [28]–[30].

126 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 179 per Cooke J, 193–194 per Richardson J and 214 per McMullin J.

127 *Wilson v New Zealand Parole Board* HC Christchurch CIV-2010-409-2933, 20 May 2011 at [15].

128 First High Court judgment, above n 9, at [28].

behavioural issues. The Judge's expression of concern about "what's happening" and his statement that "I think we need a 133 report straight away" did not suggest a view that had already been formed. Rather, they reflected views being formed in the course of the hearing. As this Court noted in *Re Royal Commission on Thomas Case* there is "no reason why [a tribunal] should not express tentative views. That is done every day in the Courts".[129] The Judge went on to say he thought a s 133 report was "very essential in this case given the dynamics on both sides". He listed the matters he thought the psychologist should address and invited other thoughts from the parties as to terms of reference. None were offered. He then prepared the brief and delivered his minute. It was only once he had heard the views of the parties and the LFC that he decided to order a report, and settled the terms of the psychologist's brief. This would not suggest pre-determination to a fair-minded lay observer.

[248] Ms Chan also submitted that Courtney J was wrong to find that the ability of the Judge to prepare the brief during the hearing indicated it was "more likely than not that the Judge had already prepared the brief, and that his oral description reflected the brief, rather than the brief being prepared following the decision to make the order".[130] That finding did not have regard to the terms of s 133, or the standard practice of the Family Court as explained by Judge de Jong in his report. That standard practice was also described in the joint memorandum of counsel. Rather than being an indicator of pre-determination, Judge de Jong's modification of his standard s 133 brief in the course of the hearing was an entirely appropriate and efficient use of time and resources by an experienced Family Court judge.

Submissions for the Newtons

[249] Ms Chambers submitted that Courtney J was right to find that Judge de Jong failed to exercise his discretion pursuant to s 133, and pre-determined the issue of whether to order a psychological report. He was not open to persuasion, but rather had a "closed mind" and a set view that a report was essential.

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129 *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 279.
130 First High Court judgment, above n 9, at [30].

[250] Ms Chambers accepted in the course of argument that it is legitimate for a decision-maker to have a preliminary or "in principle" view on a matter which must be decided. That does not amount to pre-determination. However when they come to make the actual decision, they must do so with a mind open to other alternatives. An open mind means that the decision-maker is "amenable to persuasion and do[es] not commit to a particular outcome in an individual cases".[131]

[251] Ms Chambers submitted that Judge de Jong's "one-track" focus was evident from the start. In his September 2017 memorandum Judge de Jong suggested that "[t]his might also be a case where a court appointed psychologist is required pursuant to s 133 COCA". The Judge did not pause to read the memorandum handed up on behalf of the Newtons, and did not engage with the submission that ordering a s 133 report could have a negative impact on the children and that their views should be taken into account. Nor did he address the submission that the matter should be stood down pending the LFC meeting with the children and their paediatrician, and that all parties should have the opportunity to review the LFC's report (which would include the children's views) before providing submissions on the issue of whether a s 133 report ought to be obtained.

[252] Nor, Ms Chambers submitted, did the Judge have regard to the mandatory considerations set out in s 133(6), and factors such as the existence of historic reports, the availability of the paediatrician to produce a report or at least provide views, delay, and the fact that a psychological report could not be ordered to obtain the children's views. The comments made by the Judge during the issues conference did not suggest a preference, or even a pre-disposition. Rather, she submitted, they showed a closed mind.

Discussion

[253] As Courtney J noted in the first High Court judgment, the cases concerning pre-determination on the part of administrative decision-makers establish that a

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131 *Save Chamberlain Park Inc v Auckland Council* [2018] NZHC 1462 at [178], quoting Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [25.5.5]. See also *Financial Services Complaints Ltd v Chief Ombudsman* [2021] NZHC 307, [2021] 2 NZLR 475 at [81]–[87].

challenge on the basis of pre-determination must generally show actual pre-determination, not merely the appearance of pre-determination.[132] However the cases involving judicial or quasi-judicial decision-makers have treated the "fair-minded lay observer" test as appropriate. That was the approach adopted by Mallon J in *Wilson v New Zealand Parole Board*.[133]

[254] We agree with Courtney J that the appropriate test, where it is claimed that a judicial decision-maker has pre-determined a decision, is the fair-minded lay observer test. That aligns the test for pre-determination with the test for bias, giving effect to the requirement that justice should both be done and be seen to be done. As Blanchard J observed in the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, this requirement reflects the fundamental importance of the principle that the tribunal be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it, and in the judiciary who serve in it.[134]

[255] However the fair-minded lay observer is presumed to be intelligent and to view matters objectively. They are neither unduly sensitive or suspicious nor complacent about what may influence a judge's decision. They must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or of pre-determination.[135]

[256] The fair-minded observer's appreciation of how the justice system works must also in our view include some knowledge of how directions conferences, such as the one in issue in the present case, are conducted; and an understanding that an experienced judge who is properly prepared for a directions conference will often have a good sense of the directions that are likely to be needed to progress a proceeding at such a conference. These are matters that arise frequently. Indeed the making of a

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132 First High Court judgment, above n 9, at [2], referring to Philip Joseph *Constitutional and Administrative Law in New Zealand*, (4th ed, Thomson Reuters, Wellington, 2014) at [25.5.5].

133 *Wilson v New Zealand Parole Board*, above n 127, at [22]. See also *Sisson v Canterbury District Law Society* [2011] NZCA 55, [2011] NZAR 340 at [20]–[21].

134 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

135 At [5].

s 133 order is one of the matters that must be considered at any directions conference convened under r 416Z of the Family Court Rules.[136]

[257] It was appropriate, indeed desirable, that Judge de Jong prepared for the conference by reviewing the file and by considering what orders might be needed. It was equally appropriate that Judge de Jong had template documents for various orders on his computer, and was able to prepare directions and briefs in a hearing in real time. Similarly, the fair-minded observer would understand that in busy courts where judges conduct a number of short hearings in one day, decisions need to be made promptly, and need to be recorded efficiently and concisely. Efficient Family Court judges hearing a number of directions conferences in quick succession cannot be expected to reserve routine decisions and deliver lengthy written decisions at a later date. To the contrary, it would be counterproductive for them to do so.

[258] We also remind ourselves that "the rule of disqualification by reason of pre-determination must be applied with the utmost caution".[137] It is important not to confuse experience and efficiency with pre-determination.

[259] Applying the approach outlined above, we have reached a view that differs from that reached by Courtney J. We do not consider that any significance should be attributed to the fact that no party actively sought a s 133 report before the directions conference. This was plainly an issue that needed to be considered at an early stage of the proceedings, as the Family Court Rules recognise. Judge de Jong had identified the possibility that such a report would be needed in his September 2017 memorandum. The possibility of such an order was also anticipated by the memorandum that the LFC handed up at that conference.

[260] It seems to us that s 133(7) anticipates that the question of a psychological report might arise in the course of a directions conference, rather than as a result of a formal application by one party. That is why that subsection requires the judge to take into account the parties' wishes *if they are known or can be speedily ascertained*.

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136 See Family Court Rules, rr 416Z and 416ZA(2)(e).

137 *CREEDNZ Inc v Governor*-General, above n 126, at 193 per Richardson P, quoting *English v Bay of Islands Licensing Committee* [1921] NZLR 127 at 135 per Salmond J.

The background assumption is that such an order may be made without the need for a formal application and notice of opposition. We also note that s 133(7) implicitly precludes an argument that natural justice requires that each party have a full opportunity to respond to a proposal that a s 133 report be obtained. Having regard to the nature and purpose of such reports, and the scheme of s 133, we think it is reasonably clear that this is an issue that is expected to be dealt with at an early stage of a proceeding as a question of case management, often relatively informally.

[261] It is therefore unsurprising that the possibility of a s 133 report was anticipated by Judge de Jong in September 2017, and unsurprising that it was dealt with at the directions conference in the absence of any formal application.

[262] It is also unsurprising that a very experienced Family Court judge who was familiar with the history of conflict in relation to these children, and the sudden and doubtless traumatic loss of their mother, might consider that he would be assisted by an up-to-date psychological report. We have reviewed the transcript of the hearing, and listened to the audio recording. We also have the benefit of the report from Judge de Jong to the High Court. These materials do not suggest to us that the Judge came into the hearing having decided that a s 133 report should be obtained, or that he had a closed mind in relation to the desirability of such a report and its content.

[263] Rather, the issue was raised early in the hearing by the LFC and counsel for the applicant grandmother. The Judge knew that s 133 reports had previously been provided by Ms Wali. But these were now significantly out of date — they preceded the death of the children's mother and the altered living arrangements that followed this traumatic event. It appears to us that as the hearing proceeded the Judge formed the view that an updated s 133 report was essential. With a view to making progress towards determining the vigorously contested parenting order application, the Judge proceeded to get a s 133 report underway. The Judge would have been conscious of the long delays in obtaining such reports noted in the joint memorandum referred to at [182]–[183] above: further delay would have raised justifiable concerns in terms of s 4(2) of COCA. The fact that the Judge did not accept the submission that he should defer directing a s 133 report until other steps had been taken did not indicate that he had a closed mind. It simply indicated that having heard from Ms Chambers, he was

not persuaded by the arguments she had advanced for deferring the making of such an order.

[264] We add that there is nothing in the submission that the Judge did not pause to read Ms Chambers' memorandum. That was not a realistic expectation in the context of a 15-minute directions conference. The Judge invited Ms Chambers to summarise her clients' position orally. She conveyed very clearly and effectively the reasons for her submission that a s 133 order should not be made at that conference. She explained why she considered that a decision should be deferred, acknowledging that her clients' had different views about whether such a report should be obtained, with one parent in favour and the other "not so sure". The Judge heard her. But he was not convinced. That does not indicate pre-determination.

[265] Nor is there anything in the fact that the brief for the psychologist was prepared at the hearing. It is clear from the audio recording, and confirmed by the Judge's report, that the brief had not been prepared in advance. A fair-minded lay observer would have seen the exchange between the Judge and counsel about the content of the brief for the psychologist, including an opportunity to comment on its proposed terms, and would then have seen the Judge type for some minutes before printing off the brief. They would have understood that it was prepared at the hearing, probably on the basis of a template. Any concern they might have had on that score would have been allayed by the Judge's report.

[266] Nor do we consider that the fact that the Judge did not work systematically through each of the criteria in s 133(6) and (7) indicates pre-determination. The Judge would have been well familiar with these criteria. It is unrealistic to expect a Judge making an order of this kind to refer expressly to each limb of the relevant provisions orally at the hearing or in a written decision. If any counsel wished to raise a concern about whether any of these criteria was met, they had an opportunity to do so. Ms Chambers did just that. But as we have already said, the Judge was not persuaded. We add that failure to consider a relevant factor would not necessarily indicate pre-determination, in any event. A judge with an open mind may omit to consider a relevant factor: such an omission does not indicate that the judge had a closed mind.

Having listened to the audio recording of the hearing, we consider that the Judge's careful approach was beyond reproach.

[267] It follows from this conclusion, and our earlier conclusion in relation to the circumstances in which judicial review might be available in respect of a s 133 order, that the first s 133 order should not have been set aside. The appeal from the first High Court judgment must be allowed.

[268] However given the amount of time that has passed, and the subsequent steps that have been taken, it would be inappropriate to simply restore the s 133 order made by Judge de Jong. We return to the question of relief after considering the issues raised in the appeal from the third High Court judgment.

Issue four: reviewability of LFC report

The issue

[269] The Newtons' appeal from the dismissal of their second cause of action in the second judicial review proceeding raises issues about the availability of judicial review in relation to a report by an LFC. Can the High Court intervene by way of judicial review if an LFC's report is wrong in law, or contains material that it ought not to contain? If there are defects of that kind in an LFC report, does that taint any decision made by a Family Court judge in reliance on the LFC report, with the result that that decision also is liable to be set aside in judicial review proceedings?

Submissions on appeal

[270] Ms Chambers submitted that LFCs are appointed under s 7 of COCA and s 9B of the Family Court Act. They perform a statutory role. In performing that role, they have a duty and responsibility to inquire into the matters raised in their brief, and to file a report that is consistent with the LFC's obligations.

[271] In this case, Ms Chambers said, the LFC should have filed a report that was consistent with the first High Court judgment and with ss 6 and 7 of COCA. Her report should also have complied with the Principal Family Court Judge's practice note, and the NZLS best practice guidelines for LFCs.

[272] Ms Chambers submitted that the process adopted by the LFC, and her report, failed to comply with her statutory obligations by a wide margin in a number of material respects:

(a) the LFC did not obtain either the children's, or their paediatrician's, views as to whether a s 133 report ought to be obtained;

(b) the LFC report contained unnecessarily prejudicial material; and

(c) the LFC report contained extensive evidence (including hearsay) in breach of s 9B(4) of the Family Court Act, the practice note issued by the Principal Family Court Judge and the NZLS best practice guidelines for LFCs. It contained highly prejudicial and irrelevant material, while failing to identify and promote the children's views on the matter affecting them.

[273] Ms Chambers submitted that the third High Court judgment was wrong in proceeding on the basis that the Newtons were not entitled to relief in judicial review proceedings because their rights were not affected. She emphasised the findings of the High Court in *Zhao v New Zealand Law Society* that the conduct of the NZLS interviewers in fitness-for-practice examinations was amenable to review because the interviewers' investigative and recommendatory powers involved the exercise of a statutory power; the recommendations are given considerable weight by the NZLS; and even at a preliminary stage, a power to investigate and recommend may "go off the rails" such that it is necessary that a court quash the decision.[138] Judicial review is the only cause of action available to ensure a check on the LFC's role. And where substantive grounds for relief are made out, there is a strong remedial presumption that wrongs should be righted.[139] She submitted that the Newtons are entitled to a declaration that the LFC report is ultra vires as a formal vindication of their rights, recognition of the breach, and to assist with ensuring future compliance by LFCs.

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138 *Zhao v New Zealand Law Society* [2012] NZHC 2169, [2012] NZAR 894 at [66].
139 See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61].

[274] We need not separately summarise the submissions of the other parties, which are reflected in our discussion below.

Discussion

[275] The Newtons' attempt to seek judicial review of the LFC report is in our view wholly misconceived. The LFC is appointed under statutory provisions. But the inquiries that an LFC carries out and the reports they prepare are not amenable to judicial review.

[276] The legislation does not confer on the LFC a power or right to prepare a report. A report by an LFC to the Family Court is simply a submission made by the LFC on behalf of the children they have been appointed to represent, having regard to the views expressed by the child and the LFC's own views about the welfare and best interests of the child. The LFC's submissions may address questions of fact and questions of law. Those submissions are then considered by the court, along with all other submissions. The submissions of the LFC, like other counsel's submissions, are contributions to the court's decision-making. It is for the court to determine whether they are assisted, or persuaded, by the content of an LFC report.

[277] Nor does an LFC have any special statutory powers to carry out inquiries. The inquiries that an LFC carries out in order to perform their role are simply the ordinary inquiries carried out by any lawyer on behalf of their client. No one is compelled to respond to their inquiries. And the product of those inquiries, though it is often referred to as a "report", is in truth — as explained above — simply a submission by the LFC to the court.

[278] An LFC does not exercise any statutory power of decision as defined in the Judicial Review Procedure Act, for the simple reason that an LFC does not decide anything: that is the role of the court, after hearing from the parties and from the LFC.[140]

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[140] Judicial Review Procedure Act, s 4.

[279] Nor does an LFC exercise any other form of statutory power as that term is defined in s 5 of the Judicial Review Procedure Act:

> **5 Meaning of statutory power**
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> (1) In this Act, **statutory power** means a power or right to do any thing that is specified in subsection (2) and that is conferred by or under—
>
> (a) any Act; or
>
> (b) the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.
>
> (2) The things referred to in subsection (1) are—
>
> (a) to make any secondary legislation; or
>
> (b) to exercise a statutory power of decision; or
>
> (c) to require any person to do or refrain from doing anything that, but for such requirement, the person would not be required by law to do or refrain from doing; or
>
> (d) to do anything that would, but for such power or right, be a breach of the legal rights of any person; or
>
> (e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

[280] None of these limbs applies in relation to an LFC. The LFC does not have a power or right conferred by any Act to make an investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person for the purposes of s 5(2)(e) of the Judicial Review Procedure Act. As explained above, the inquiries made by an LFC have no special statutory backing. And plainly the preparation of a report by the LFC does not come within any of the other limbs of s 5(2).

[281] Nor is there any common law basis for judicial review of a report prepared by an LFC. The LFC's functions do not involve the exercise of any public power of the kind that is supervised by the High Court in the exercise of its judicial review jurisdiction.

[282] Nor, at the risk of stating the obvious, does an LFC act unlawfully merely because their submissions to the Family Court contain incorrect legal propositions, or material that should not form part of their report. An LFC report does not have any

special status. Of itself, it has no effect on anything or anyone. Other parties have an opportunity to make submissions in response to any such report. The judge will take the report into account, just as the judge will take all counsel's submissions into account. But ultimately, any decision must be made by the judge. If, for example, the LFC report contains legal propositions that are wrong, and those propositions are not accepted by the judge, they have no effect. If the judge accepts those incorrect propositions, and decides an issue on the basis of those propositions, it is the judge's decision that is wrong in law. And it is the judge's decision that has an effect on the parties and the child. COCA prescribes the manner in which such decisions may be challenged on appeal on the ground that they are wrong.

[283] *Zhao* is clearly distinguishable: the LFC is not exercising a statutory power, and the LFC's report has no special weight in the hearing by the Family Court. If the LFC goes "off the rails" there are many other ways of addressing that concern, and getting matters back on the rails. Judicial review is neither necessary nor appropriate. Ms Crawshaw identified a number of other forms of redress that are available if concerns arise in relation to an LFC report:

(a) The judge can be invited by any party to disregard any inappropriate, or incorrect, propositions in an LFC report.

(b) The LFC is an officer of the court, under the control of the court. The Family Court can give directions and guidance to the LFC in the course of the Family Court proceedings.

(c) The court has relevant powers under the Family Court Rules and its general case management powers. For example, it can require the LFC to provide a supplementary report, or a replacement report, if an initial report is unsatisfactory.

(d) There is a well-established procedure for dealing with complaints regarding LFCs, set out in the practice note issued by the Principal Family Court Judge[141]. That procedure was settled in consultation with the Ministry of Justice and the Family Law Section of the NZLS. Complaints can also be made to the NZLS.

(e) Redress may also be available in the form of an appeal from, or judicial review of, the decision of a judge made in reliance on a flawed LFC report.

[284] We do not consider that judicial review is available in respect of an LFC report. The appropriate response to errors of law in an LFC report is for other parties to make submissions that the propositions of law are incorrect, and persuade the judge not to adopt them. If the judge does adopt them, then the appropriate course is to challenge the judge's decision by exercising appeal rights under the relevant legislation, or seeking judicial review in exceptional cases. Similarly, the appropriate response to the inclusion in an LFC report of material that ought not to be included — for example, factual information that ought to be provided by way of evidence, or inaccurate information — is by way of submission to the judge, inviting the court to disregard that material. There is no principled legal basis for judicial review of an LFC report on the grounds that it includes such material.

[285] Duffy J was prepared to contemplate the possibility that there may be occasions when the LFC performs their statutory function in a manner that has a direct effect, rendering any unlawful performance amenable to review.[142] We have not identified any context in which that might be the case. But even accepting that there might be cases we have not anticipated where judicial review of the actions of an LFC would be available and appropriate, it is in our view very plain that this is not such a case.

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141 *Family Court Practice Note: Lawyer for the Child – Selection, Appointment and other matters*, above n 75, cl 12.

142 Third High Court judgment, above n 40, at [13].

[286] We therefore agree with Duffy J that, for the reasons she gave and the additional reasons set out above, the Newtons cannot obtain a declaration that the report of the LFC is ultra vires.

[287] This conclusion means that we do not need to consider the criticisms made by Ms Chambers of the LFC's report. But in fairness to the LFC we should record that there was nothing improper in her seeking to persuade the Judge that it was open to him to proceed on the basis that the children's views need not be sought before directing that a s 133 report be obtained. She drew the Judge's attention to the contrary view expressed by Courtney J in the first High Court judgment. The LFC cannot be criticised for making the submission that it was open to Judge Burns to adopt the approach that the LFC considered was preferable as a matter of statutory interpretation and good practice (an approach that we have concluded was correct), even if that submission was wrong in law.

[288] The attempt by the Newtons to challenge the third High Court judgment on the basis that the LFC report was an irrelevant consideration was equally misconceived. If a judge is persuaded by an incorrect proposition of law in the submissions of an LFC or any other counsel, the problem is not that the judge has had regard to an irrelevant consideration: the problem is that the judge has made an error of law. The appropriate remedy for such an error will depend on the nature of that error, and the nature of the decision made. In this case, there is no right of appeal even on questions of law from s 133 orders. That prohibition on appeals cannot be circumvented by an indirect challenge by way of judicial review.

[289] The Newtons' appeal from the dismissal of the second cause of action in the third High Court judgment must therefore fail.

Issue five: claim for removal of documents from the court file

The issue

[290] The Newtons sought orders that Judge de Jong's October 2018 minute, re-released minute and recall decision (which we described above as "the challenged documents") be removed from the Family Court file. They said the challenged

documents were issued by Judge de Jong without hearing from the parties, in breach of the requirements of natural justice. They risk prejudicing future judges against the Newtons. As the Newtons said in their joint affidavit, it seemed to them that Judge de Jong "had taken a negative view of us and our approach to the case and had recorded that on the file for all future decision-makers to see". The minor edits that Judge de Jong made in response to their recall application did not resolve their concerns.

[291] This argument was rejected by Duffy J in the third High Court judgment.[143] The Newtons argue on appeal that she was wrong to do so.

Submissions on appeal

[292] Ms Chambers submitted that the Newtons' third cause of action was not confined to an allegation of apparent bias, which is how Duffy J had approached it. Rather, they alleged that the challenged documents breached natural justice, including the right to a fair hearing, the right to the appearance of an impartial decision-maker, and risked the appearance of partial decision-makers in future hearings in the proceeding. The Newtons said that for each of those reasons the documents ought to be removed from the Family Court file.

[293] Ms Chambers noted that no advance warning was given to the parties that the matters canvassed in Judge de Jong's October 2018 minute were to be the subject of judicial comment. She submitted that the Judge's comments in that minute were intemperate, and failed to give effect to the Judge's obligation to take care to avoid unnecessary criticism in the exercise of the judicial function.[144] Judgments should stand without further clarification or explanation: it was inappropriate for Judge de Jong to enter into a lengthy explanation of why he made the decision to order a s 133 report, why Courtney J's reasoning was wrong, and why he had not pre-determined the issue. Duffy J was right to find that the re-released minute "does little to remedy any of the concerns the applicants raised with the original minute".[145]

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143 Third High Court judgment, above n 40, at [51]–[57].
144 *Guidelines for Judicial Conduct 2019* at [43].
145 Third High Court judgment, above n 40, at [32].

[294] Taken overall, the Newtons say, the minute contained inaccurate and highly prejudicial material which portrayed them in a poor light, and deprived them of the right to a fair and impartial decision-maker. The decision ought to be expunged from the record for the duration of the underlying proceeding.

[295] Ms Chambers submitted that Duffy J was right to find that a reasonable observer would conclude that apparent bias was present on the face of Judge de Jong's minutes and memoranda. And contrary to the view expressed by Duffy J, there was a logical connection between Judge de Jong's apparent bias and the risk that future judges could be influenced by the documents. That was after all the purpose of the minute: the Judge described it as designed to "ensure this file is advanced" and because "it may be helpful to the future of this case if it is known what was actually in my mind and to briefly address each of the points raised by Courtney J". Judge de Jong expressly accepted in his memorandum that there was "at least a slight risk" of future judges being influenced by the contents of his October 2018 minute.

[296] Ms Chambers submitted that Duffy J was wrong to find that the fair-minded lay observer would not consider that future judges would be influenced by these documents against the Newtons.

Discussion

[297] We accept Ms Chambers' submission that the minute issued by Judge de Jong was inappropriate. It is not appropriate for a first instance judge to respond to an appellate court, or to the High Court exercising its judicial review jurisdiction, by issuing a minute challenging the views expressed and conclusions reached by the High Court. As Duffy J said, the outcome of an appeal and the setting aside of a first instance decision "are not cause for judicial comment by the first instance Judge".[146]

[298] If a Family Court judge considers that a High Court decision in judicial review proceedings is wrong in law, and that the error may cause systemic difficulties beyond the particular case in question, that concern can be raised with the Principal Family Court Judge. As this case illustrates, it is possible for the Family Court to pursue an

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146 At [53].

appeal in an appropriate case. But issuing a minute responding to the High Court decision, with a view to influencing the future course of a case, is wholly inappropriate.

[299] It was even more inappropriate to issue such a minute without hearing from the parties on whether that course should be adopted. We accept Ms Chambers' submission that this was inconsistent with the requirements of natural justice.

[300] We agree with Duffy J that the challenged documents and the conduct of Judge de Jong would lead a fair-minded lay observer to conclude apparent bias was present, in the sense that a fair-minded lay observer would apprehend that Judge de Jong would come to future matters in this proceeding with a pre-disposition against the Newtons. But as Duffy J said, Judge de Jong has disqualified himself from making any further determinations in this proceeding. So any issue regarding apparent bias on his part is now of historical interest only.[147]

[301] We understand the concern expressed by the Newtons about the potential for these documents to have some intangible influence on future decision-makers. After all, that is what they appear on their face to be intended to achieve.

[302] However we agree with Duffy J that there is no real risk of such an outcome. If future judges read the challenged documents, they will do so in light of the findings of the High Court and of this Court. It was made quite clear in the High Court, and we agree, that there were significant defects in both the process by which the October 2018 minute was produced and its content. We now make it plain that no regard whatsoever should be had to it by any future decision-maker in this proceeding.

[303] A fair-minded lay observer would understand that the observations made by the High Court and this Court are sufficient to dissuade any future Family Court judge from being influenced by the challenged documents. There is no need to remove documents from the Family Court file, or redact documents, in order to avoid improper influence on future decision-makers. That is not how the court record operates. A decision that forms part of the record remains on that record even if it is

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147 At [46].

subsequently reversed. It does not matter how severe the criticisms may be of the earlier decision by the superior court that reverses it: it must nonetheless be retained on the record. But it will be read in light of the decisions of superior courts, and subject to them.[148] That is how the legal system works. A fair-minded lay observer would understand that.

[304] The Newtons' appeal from the dismissal of their third cause of action must therefore be dismissed.

[305] We add that the Family Court may of course give directions that certain material on the court file should not be provided to future report writers, including where that material is superseded or inaccurate. It would be inappropriate and undesirable for any of the challenged documents to be provided to any psychologist who may be instructed to prepare a s 133 report in the future. That material could not assist the report writer, and could lead them off course.

[306] The Principal Family Court Judge may also wish to take into account the history of this matter when allocating judicial resources to this file, to ensure that any risk of apparent influence on future judges by Judge de Jong's October 2018 minute and the other challenged documents is avoided.

Relief

[307] Drawing together the threads of this lengthy decision, the position we have arrived at is that the first s 133 order should not have been set aside. However it was set aside by the first High Court judgment. It was then superseded by the second s 133 order. That too was set aside, this time by the second High Court judgment.

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148 A court of record has an inherent power to direct that offensive and objectionable material be removed from the record. Such a power is a corollary of the court's need to act effectively and uphold the administration of justice: see *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114]; and *Siemer v Hodgson* [2008] NZCA 255 at [20]–[26]. So, for example, intemperate attacks on a judge contained in a document filed by a party, which could have been rejected for filing by the Registrar but was inadvertently received, may be removed: see *District Court at Christchurch v McDonald* [2021] NZCA 353, [2021] 3 NZLR 585 at [31]. But that power does not extend to judgments, or other judicial decisions.

[308] This Court has now reversed the findings of the High Court in the first High Court judgment in relation to the need to ascertain the views of the children before a s 133 order is made. The direction given by Duffy J in the second High Court judgment that the Family Court must reconsider whether to make a s 133 order remains appropriate. But the directions at [41] of the second High Court judgment in relation to how that reconsideration is to take place have been overtaken by the outcome of the appeal from the first High Court judgment. Rather, that question must be reconsidered in light of the reasoning in this judgment. That will require, among other things, that the LFC exercise judgement about whether the views of the children should be sought, and if so, on what topics. It will also require the judge deciding whether to make a s 133 order to consider whether they need to be informed about the wishes of the children on any aspect of the orders they propose to make, before they proceed to determine that question. But we emphasise that is a matter for the judge, as explained above.

[309] The stay granted by the High Court in respect of the reconsideration expires on the determination of this appeal, on its own terms. We need not make any order in respect of that stay.

Costs

[310] The appeal by the Newtons from the third High Court judgment has been dismissed. Costs should follow the event in the ordinary way. The Newtons must pay costs for a standard appeal on a band A basis, with usual disbursements, to the second and third respondents. The Attorney-General is not entitled to seek costs, pursuant to the terms on which leave was granted to intervene.[149] Similarly, the NZLS is not entitled to seek costs in respect of its intervention in that appeal.[150]

[311] The appeal by the Family Court from the first High Court judgment has succeeded. But the Family Court, which did not play an active role, is not entitled to an award of costs. Nor are the interveners. There is therefore no award of costs in respect of that appeal.

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149 *Family Court v AA*, above n 103, at [22(c)].
150 At [26(d)].

Result

CA19/2021

[312] The appeal is dismissed.

[313] The appellants must pay costs to each of the second and third respondents for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

CA50/2021

[314] The appeal is allowed.

[315] The proceeding is remitted back to the Family Court to determine whether, in the current circumstances, a psychological report should be obtained under s 133 of COCA. In making that determination the Family Court must have regard to this judgment.

[316] Costs in respect of this appeal are to lie where they fall.

[317] We have used fictitious names to protect the privacy of the children and the parties. Section 139 of the Care of Children Act 2004 and ss 11B to 11D of the Family Court Act 1980 apply to any report of this judgment. And there is an order in force made in the High Court prohibiting publication of names or identifying particulars of the parties.[151] We make an order in each of the appeals before us that this Court's file may not be searched by any person without the leave of a judge, which must be sought by written application on notice to the parties.

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151 Second High Court judgment, above n 36, at [62].