

**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY  
REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B-11D OF  
THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE  
SEE [HTTPS://WWW.JUSTICE.GOV.TZ/FAMILY/ABOUT/RESTRICTION-  
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**NOTE: EXTANT ORDER PROHIBITING PUBLICATION OF NAMES OR  
IDENTIFYING PARTICULARS OF THE PARTIES REMAINS IN FORCE:  
[2020] NZHC 3165.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 60/2022  
[2022] NZSC 112**

BETWEEN	D NEWTON First Applicant
	L NEWTON Second Applicant
AND	FAMILY COURT AT AUCKLAND First Respondent
	R F VON KEISENBERG Second Respondent
	B LAKE Third Respondent

**SC 62/2022**

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

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: D A T Chambers KC and J M McGuigan for D Newton and L Newton  
D L Harris for Family Court at Auckland  
V A Crawshaw KC and S M Wilson for R F Von Keisenberg  
K N Crooks for B Lake  
A Chan KC and B M McKenna for Attorney-General as Intervener  
A J Cooke as Lawyer for Children

Judgment: 27 September 2022

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## JUDGMENT OF THE COURT

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- A The application for leave to appeal is dismissed.**
- B The interim stay of the judgment of the Court of Appeal granted in [2022] NZSC 92 is discharged.**
- C Leave is reserved to file memoranda on costs before 4.00 pm 4 October 2022.**
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## REASONS

### Background

[1] In June 2017, the maternal grandmother of two children (referred to as Ms Lake) applied to the Family Court for a parenting order granting her regular contact with the children. The children's father and stepmother (referred to as Mr and Mrs Newton and the applicants in these proceedings) opposed the application.

[2] At an issues conference in November 2017, Judge de Jong ordered that a psychological report of the children be obtained under s 133 of the Care of Children Act 2004. Mr and Mrs Newton sought judicial review of the order and other related matters. This has resulted in a protracted series of litigation involving three High Court judgments,<sup>1</sup> a further issues conference in the District Court and a Court of Appeal judgment from which the present applicants have sought leave to

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<sup>1</sup> *AA v Family Court at Auckland* [2018] NZHC 1638, (2018) 31 FRNZ 729 [First HC judgment]; *DN v Family Court at Auckland* [2020] NZHC 210, (2020) 32 FRNZ 575 [Second HC judgment]; and *DN v Family Court at Auckland* [2020] NZHC 3165 [Third HC judgment] at [34].

appeal to this Court.<sup>2</sup> On 29 July 2022 this Court granted an interim stay of the judgment of the Court of Appeal until further order of this Court.<sup>3</sup>

### **Submissions**

[3] The applicants' key submission is that the Court of Appeal erred in finding that it is not necessary for children's views to be obtained before ordering a s 133 psychological report. They also challenge various findings on other matters.

### **Our assessment**

[4] As this is an appeal on an interlocutory matter, this Court cannot grant leave unless it is satisfied that it is necessary in the interests of justice to hear and determine the proposed appeal before the proceeding concerned is concluded.<sup>4</sup>

[5] We stress that the interests of the children must be the first and paramount consideration and that decisions affecting them should be made in a timely manner, within a time frame appropriate to a child's sense of time.<sup>5</sup> It has been five years since the children's grandmother applied for a parenting order. The substantive case has not yet been heard, with the interlocutory hearings and appeals causing significant delays. It is not in the interests of the children, and therefore not in the interests of justice, for this matter to be drawn out even further.

[6] Questions about when and how children's views should be taken into account under the Care of Children Act are arguably matters of general or public importance.<sup>6</sup> However, this is not an appropriate case for considering this issue.<sup>7</sup> This is because the Court of Appeal has already directed that the matter be referred back to the Family Court for fresh consideration.

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<sup>2</sup> *Newton v Family Court at Auckland* [2022] NZCA 207. This was an appeal from the Second HC judgment, above n 1, and the Third HC judgment, above n 1.

<sup>3</sup> *Newton v Family Court at Auckland* [2022] NZSC 92.

<sup>4</sup> Senior Courts Act 2016, s 74(4).

<sup>5</sup> Care of Children Act 2004, ss 4(1) and (2)(a)(i).

<sup>6</sup> Senior Courts Act, s 74(2)(a).

<sup>7</sup> Under s 74(1), this Court has a residual discretion to refuse an application for leave to appeal, even if one of the s 74(2) criteria is met, including where a case is not a suitable one for determining the legal issues: *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262 at [20]–[21].

[7] The various other grounds proposed by the applicants do not raise any issues of general or public importance.<sup>8</sup> Nor is there a risk that a substantial miscarriage of justice may occur.<sup>9</sup>

[8] In any event, none of the arguments raised by the applicants have sufficient prospects of success to warrant granting leave to appeal.

## **Result**

[9] The application for leave to appeal is dismissed.

[10] The interim stay of the judgment of the Court of Appeal is discharged.

[11] Leave is reserved to file memoranda on costs before 4.00 pm 4 October 2022.

### **Solicitors:**

Duncan Cotterill, Auckland for D Newton and L Newton

Crown Law Office, Wellington for Family Court at Auckland and Attorney-General as Intervener

Heimsath Alexander, Auckland for R F Von Keisenberg

Armstrong Barton, Whanganui for B Lake

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<sup>8</sup> Senior Courts Act, s 74(2)(a).

<sup>9</sup> Section 74(2)(c).