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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
[2023] NZSC 23**

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 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: 21 March 2023

JUDGMENT OF THE COURT

- A The applicants must pay the Attorney-General costs of \$7,500.**
- B The applicants must pay Ms Von Keisenberg costs of \$2,500.**
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REASONS

[1] This judgment deals with costs issues arising out of our judgment of 27 September 2022.¹

Background

[2] In June 2017, Ms Lake applied to the Family Court for a parenting order granting her regular contact with her two grandchildren. The children's father and stepmother, Mr and Ms Newton, opposed the application.²

[3] 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 Ms Newton sought judicial review of this order and other related matters. This has resulted in a protracted series of litigation involving

¹ *Newton v Family Court at Auckland* [2022] NZSC 112 (Glazebrook, O'Regan and Ellen France JJ) [SC leave judgment].

² Ms Lake and Mr and Ms Newton are not the parties' real names.

three High Court judgments,³ a further issues conference in the District Court and a Court of Appeal judgment.⁴

[4] In that judgment the Court of Appeal dealt with two appeals: CA 19/2021, an appeal by Mr and Ms Newton, and CA 50/2021, an appeal by the Family Court. The Court of Appeal dismissed CA 19/2021 and allowed CA 50/2021, remitting the proceeding back to the Family Court for fresh consideration.

[5] On 22 June 2022, Mr and Ms Newton applied for leave to appeal against the Court of Appeal judgment to this Court (SC 60/2022 and SC 62/2022). Three days later, they applied for a stay of execution of the Court of Appeal's judgment. On 13 July 2022, the Family Court filed submissions opposing the stay. Over a month after filing the stay application, Mr and Ms Newton applied for an interim stay. This Court granted an interim stay on 29 July 2022.⁵

[6] Mr and Ms Newton's key submission in their leave application was 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.

[7] On 27 September 2022, this Court dismissed the application for leave to appeal, discharged the interim stay and reserved leave for the parties to file memoranda on costs.⁶ As a result of the Court's decision to dismiss the leave application, the original application for a stay was necessarily dismissed.

[8] The Attorney-General was granted leave to intervene in both the Court of Appeal and this Court so that the Family Court did not have to take an active role. In the Court of Appeal, leave to intervene was granted on the condition that the

³ *AA v Family Court at Auckland* [2018] NZHC 1638, (2018) 31 FRNZ 729 (Courtney J) [First HC judgment]; *DN v Family Court at Auckland* [2020] NZHC 210, (2020) 32 FRNZ 575 (Duffy J) [Second HC judgment]; and *DN v Family Court at Auckland* [2020] NZHC 3165 (Duffy J) [Third HC judgment].

⁴ *Newton v Family Court at Auckland* [2022] NZCA 207 (Cooper, Collins and Goddard JJ). This was an appeal from the Second HC judgment, above n 3, and the Third HC judgment, above n 3.

⁵ *Newton v Family Court at Auckland* [2022] NZSC 92 (Glazebrook, O'Regan and Ellen France JJ).

⁶ SC leave judgment, above n 1.

Attorney-General would not be entitled to costs.⁷ This was because of the Family Court's delay in bringing the appeal.⁸

Submissions

Attorney-General

[9] The Attorney-General seeks costs of \$2,500 in respect of each of SC 60/2022, SC 62/2022 and the stay application, totalling \$7,500. In his submission, the reason that no costs were to be awarded in the Court of Appeal does not apply in this Court. He submits that the stay application and the leave applications were without merit and that costs should therefore be awarded in his favour.

Ms Von Keisenberg

[10] Ms Von Keisenberg seeks \$3,800 in costs against Mr and Ms Newton in relation to SC 60/2022. Ms Von Keisenberg recognises that the standard practice in this Court is to award successful respondents in a leave application \$2,500 in costs. However, she submits that the appropriate rate should be fixed at \$3,800 as a reflection of increases to the High Court scale rates since 2005.⁹

Mr and Ms Newton

[11] Mr and Ms Newton oppose the Attorney-General's costs application. They submit that there is no reason to depart from the approach to costs in the Court of Appeal (costs to lie where they fall). They emphasise that, in declining leave to appeal, this Court recognised that their application involved some element of general or public importance but that it was not an appropriate case to consider the issue given the passage of time and the fact the underlying proceeding has not yet been determined. Further, the Attorney-General was not a party and the issues arising in the proposed appeal were of benefit to the Family Court. In addition, an interim stay was granted.

⁷ *Family Court v AA* [2021] NZCA 189 (French and Goddard JJ) at [22].

⁸ At [18].

⁹ High Court Rules 2016, sch 2.

[12] They accept that Ms Von Keisenberg is entitled to costs but submit that \$2,500 is appropriate, particularly in light of the narrow issue involved.

Our assessment

[13] The Attorney-General was put to the cost of responding to two failed leave applications and to the application for stay.¹⁰ Nothing raised by Mr and Ms Newton suggests that the costs order sought by the Attorney-General should not be made.¹¹

[14] As to Ms Von Keisenberg, the Court's practice is to award \$2,500 for costs applications and we see no reason to depart from that practice in this case.

Result

[15] Mr and Ms Newton are to pay to the Attorney-General costs of \$2,500 for SC 60/2022, SC 62/2022 and the stay application respectively, resulting in a total award of \$7,500.

[16] Mr and Ms Newton are to pay costs of \$2,500 to Ms Von Keisenberg.

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

¹⁰ The stay application was ultimately unsuccessful.

¹¹ Mr and Ms Newton accept costs can be made against non-parties: Senior Courts Act 2016, s 178.