EMBARGO ON PUBLICATION OF THIS JUDGMENT: SEE PARA [125]

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2007-419-97

	BETWEEN	KAY HALTON SKELTON Plaintiff
	AND	THE FAMILY COURT AT HAMILTON Defendant

Hearing: 31 January 2007

Counsel: B J Hart, D R F Gardiner and A J Trenwith for Ms Skelton
V Sim for Family Court (abiding decision)
Solicitor-General (D B Collins QC) for Attorney-General (Intervenor)
B D Gray QC for APN Holdings New Zealand Ltd (Intervenor)
T Stevens for Fairfax NZ Ltd (Intervenor)

Judgment: 4 April 2007

JUDGMENT (NO. 2) OF HEATH J

Solicitors:
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The issues

[1] Section 139(1) of the Care of Children Act 2004 (the Act) entitles any person to publish a report of proceedings in the Family Court as long as nothing published is likely to lead to the identification of (in particular) the parties to the proceeding or a child who was the subject of it. Where it is intended to publish a report that goes beyond the confines of s 139(1), the Family Court's permission is needed: s 139(2). Permission may be granted on such conditions as the Court thinks fit: s 139(3).

[2] In this proceeding, decisions to publish judgments delivered in a Family Court proceeding were taken by four different Judges of that Court. The critical decision, for present purposes, was made by the Principal Family Court Judge on 24 January 2007. That decision was made without prior notice to the parties to the Family Court proceeding.

[3] Ms Skelton, the child's mother, seeks judicial review of the decision to permit publication. Interim relief is sought. The issues are:

a) Did the Family Court have jurisdiction to make orders permitting publication of its own motion? and

b) If jurisdiction existed, ought the orders to have been made by the Family Court without first hearing from those parties?

Introduction

[4] Jayden Headley was born on 12 May 2000. He is nearly seven years old. For almost all of his short life he has been the subject of acrimonious proceedings in the Family Court at Hamilton. Jayden is presently under the guardianship of the Family Court, an order to that effect having been made on 27 September 2005. Questions of day to day care and contact remain in issue.

[5] Until August 2006, Ms Skelton was responsible for Jayden's day to day care. Mr Jones, his father, had defined contact. Those care arrangements changed as a result of orders made by Judge Brown on 23 June 2006. Following allegations made by Ms Skelton that questioned paternity, Mr Jones was given day to day care of Jayden, while Ms Skelton was to have defined contact.

[6] On 18 August 2006, Jayden was abducted from the Hamilton Public Library, during a period of contact in which he was in the care of his mother. A Police investigation followed. By mid-October 2006, Jayden had not been located.

[7] Mr Jones applied to this Court for a writ of *habeas corpus* directing that Jayden be returned. An order was made on 18 October 2006. Mr Skelton and her father (Mr Dick Headley) were two of five people to whom the order was directed. On 25 October 2006, Ms Skelton was imprisoned for being in contempt of the Court's order requiring Jayden's return. Mr Headley could not be located. He was reliably believed to be with Jayden.

[8] Jayden was returned to Hamilton Police Station on the morning of 23 January 2007. Later that morning, Ms Skelton was released from custody. Ms Skelton and her father have been charged with kidnapping. Each denies the charge. A preliminary hearing is yet to be held.

[9] By 24 January 2007, many details of the parents' disputes were already within the public domain, as a result of publicity given to the abduction of their child in August 2006. Before making decisions to permit publication of the judgments, no opportunity was afforded to the parents or the lawyer appointed to represent the child in the Family Court to make submissions on whether publication was appropriate.

[10] On 24 January 2007, the day after Jayden's return, the Principal Family Court Judge issued a press release which confirmed that decisions had been made to permit publication of five of the Family Court decisions and to post copies of them on the Family Court website.[1]

[11] On 26 January 2007, Ms Skelton applied to this Court for orders declaring the decision to release Family Court judgments to be unreasonable or unlawful. She sought orders:

a) For immediate removal of the judgments from the Family Court website.

b) Directing the Family Court not to release further information from the proceedings.

c) Prohibiting any further publication of the judgments released.

[12] Following an urgent hearing on the late afternoon of 26 January 2007,[2] I declined to make any interim orders. I was satisfied, however, that there was a serious question to be tried: namely, whether the Family Court was entitled to release the judgments without first giving the parties to the Family Court proceeding an opportunity to be heard. I said:

> [2] Ms Skelton complains that she was not given notice of the Family Court's intention to publish the judgments. In short, her position is that the order made by the Family Court to release the information intrudes upon her privacy interests and may prejudice her right to a fair trial on a kidnapping charge in relation to Jayden that is currently pending before the District Court at Hamilton.

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[1] The press release is set out in full at para [36] below.
[2] *Skelton v The Family Court at Hamilton* (High Court Hamilton, CIV 2007-419-97, 26 January 2007)

> [3] Mr Hart has advanced two principal grounds on which he seeks to impugn the Family Court's decision. The first is that s 139 of the Care of Children Act 2004 does not confer jurisdiction on the Family Court to make an order of its own motion to publish a report of proceedings before that Court. Alternatively, he submits that the Court ought not to have made orders without first seeking submissions from the parties to the proceedings, including the lawyer appointed to represent the child.
>
> …
>
> [7] The Solicitor-General, Mr Collins QC, who has been heard on short notice today, advises that he will convey to the Principal Judge my indication that no further documents from the Family Court proceeding ought to be released for public consideration, whether on the Internet or any other publicly accessible media pending further order of the Court. Understandably, the Solicitor-General was not able to give an undertaking to the Court in respect of a judicial officer. Nor was he able, at this early stage, to concede whether a seriously arguable case existed.
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> [8] Leaving to one side the jurisdictional issue, I am satisfied that it is seriously arguable that notice ought to have been given to the parties to the Family Court proceeding before any order permitting publication was made by the Family Court.
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> [9] As to balance of convenience and interests of justice issues, I am satisfied that it is sufficient for this Court to say that no further information or documents from the Family Court file ought to be published on a publicly accessible database or in the news media pending further order of the Court.
>
> [10] It is unlikely to be possible to remove any prejudice that may have occurred (without accepting that any has at this stage) by removing all judgments from the internet or by forbidding further publication of those judgments. The judgments have already received wide publicity, particularly in the area that any trial on the kidnapping charge may take place. I am not prepared to make any interim order in that regard.

[13] I directed that the proceedings be served on Mr Jones, Ms Gunn, Television New Zealand, TV3, APN Holdings New Zealand Ltd (publishers of the New Zealand Herald), Fairfax New Zealand Ltd (publishers of the Waikato Times) and Radio New Zealand so that any of those parties could be heard, if they wished, on the application.

[14] I directed that Mr Jones and Ms Gunn be served because of Mr Jones' and Jayden's private interests in relation to release of the judgments. I directed that various media be served because of the important open justice and free speech issues that arise. Neither Mr Jones nor Ms Gunn asked to be heard on the present application. Each abides the decision of the Court.

[15] Mr Hart, for Ms Skelton, submits that interim relief is required to preserve her right to a fair trial and to protect her privacy interests.

The parties to the interim application

[16] At the hearing in Hamilton, Ms Sim appeared on behalf of the Family Court to abide the decision of this Court. That approach is consistent with established practice, discussed in cases such as *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) at 695-696. The Solicitor-General sought leave to intervene on behalf of the Attorney-General to present argument to support the Family Court's decisions. Given the importance of the points raised, the public interest in the issue, the desirability of dealing with the issues on a contested basis and the absence of opposition, I granted leave to intervene.

[17] Two media organisations, APN Holdings NZ Ltd and Fairfax NZ Ltd, sought leave to intervene to present argument supporting release of the judgments based on the right to receive information guaranteed by s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and the principles of open justice. APN is the publisher of *The New Zealand Herald*. Fairfax is the publisher of *The Waikato Times*. The two newspapers have published extensively on issues surrounding Jayden's abduction and have considerable readership in the areas from which the pool of jurors will be drawn if Ms Skelton and Mr Headley are committed for trial on the kidnapping charge. Without opposition, I granted leave for both publishers to intervene.

[18] I express gratitude for the submissions made by all counsel. I also express appreciation to the two newspaper publishers for supplying, after reservation of judgment (at the Court's request), complete sets of the articles published in *The New Zealand Herald* and *The Waikato Times* that are relevant to fair trial issues.

Events preceding release of the Family Court judgments

[19] A newspaper report in *The Weekend Herald* on 20 August 2006 put into the public domain that Jayden's disappearance from the Hamilton Public Library on 18 August 2006 may have been linked to a custody battle between his parents.

[20] On 25 August 2006, Ms Skelton was arrested and charged with the kidnapping of her son. A warrant for the arrest of Mr Headley was issued on 31 August 2006. By that time, Jayden was believed to be with Mr Headley, possibly in Northland. A report to that effect appeared in *The New Zealand Herald* on 31 August 2006. The same article reported that a woman had been arrested the previous week on a charge of kidnapping and an interim name suppression order had been made when she had first appeared in the District Court at Hamilton.

[21] On 17 October 2006, Mr Jones filed the *habeas corpus* application. I heard that application, on an urgent basis, on 18 October 2006. In an oral judgment, I issued an order for *habeas corpus* directed to Ms Skelton, other members of her immediate family and a friend (Ms Taylor) who had been seen in close proximity to Jayden (on video surveillance tapes) when he was taken from the public library.[3]

[22] My order required Jayden to be brought before the Court at 10.00am on 25 October 2006. I also made orders requiring affidavits to be filed if any person could not bring Jayden before the Court, so that any issue arising from non-compliance with the *habeas corpus* order could be addressed on the basis of affidavit evidence filed by the relevant parties.

[23] Ms Taylor appealed against the *habeas corpus* and related orders and a stay was issued pending her appeal to the Court of Appeal. Ms Skelton also filed an appeal against the order, but her appeal was subsequently abandoned.

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[3] *Jones v Skelton & Ors* (High Court, Hamilton, CIV 2006-419-1489, 18 October 2006)

[24] On 25 October 2006, Keane J ordered that Ms Skelton be imprisoned until such time as Jayden was returned.[4] Nothing further was done in respect of other family members to whom the order had been directed. The position of Ms Taylor was deferred to await the outcome of her appeal.

[25] The Court of Appeal, on 10 November 2006, dismissed Ms Taylor's appeal but varied some of the orders I had made.[5]

[26] On 9 November 2006 Television New Zealand received an envelope addressed to the presenter of its *Close Up* programme, Ms Susan Wood. She was away when the envelope was received and did not open it until 13 November 2006. When opened, a video-tape (showing Jayden) was located, together with a letter from Mr Headley, none of which had been solicited.

[27] Following an indication from TVNZ that it wished to screen several portions of the video-tape on its *Close Up* programme, Mr Jones sought an injunction to prevent that from occurring. That application was heard and determined by Lang J on 15 November 2006. For reasons given on 21 November 2006,[6] the Judge restrained TVNZ from screening video-taped footage of Jayden but allowed it to broadcast up to "eight still shots extracted from the videotape" so that "those who live near to where Jayden [was being held] … might recognise him and contact the authorities".[7]

[28] On 6 December 2006, Ms Taylor sought leave to appeal to the Supreme Court against the Court of Appeal's decision. Ms Skelton also sought leave to appeal directly to the Supreme Court against my original *habeas corpus* order, notwithstanding the abandonment of her earlier appeal to the Court of Appeal.

[29] The Supreme Court granted leave for Ms Taylor to appeal and allowed her appeal.[8] The Supreme Court took the view that a finding of fact I had made in my

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[4] *Jones v Skelton & Ors* (CIV 2006-419-1489, 25 October 2006, Keane J)
[5] *T v Jones* (CA230/06, Reasons for judgment given on 18 November 2006)
[6] *Jones v Television New Zealand Ltd* (High Court Hamilton, CIV 2006-419-1616, 15 and 21 November 2006, Lang J)
[7] Ibid at paras [2] and [53]
[8] *Taylor v Jones* [2006] NZSC 104

judgment of 18 October meant that Ms Taylor was not amenable to the *habeas corpus* jurisdiction.[9] The Supreme Court granted Ms Skelton's application for leave to appeal but dismissed the appeal itself. The Supreme Court observed that Ms Skelton had not appealed against the contempt order made by Keane J.

[30] On 19 December 2006, Keane J was asked to discharge Ms Skelton from custody. Oral evidence was given by Ms Skelton and she was questioned by *Amicus Curiae* (Mr Gudsell) appointed by this Court. Keane J declined to release Ms Skelton from custody. He directed that she be brought back before the Court on 30 January 2007, for questions of detention to be reconsidered.[10]

[31] There was extensive media reporting of the events that followed the *habeas corpus* order made on 18 October 2006. On my count, no less than 22 articles appeared in *The New Zealand Herald* or its associated publications between 18 October 2006 and Jayden's return on 23 January 2007. Over the same period *The Waikato Times* also published extensively and in more detail; understandably, given that Jayden was abducted from the Hamilton Public Library. And, there was television coverage of the type to which I have referred.

[32] So far as publication issues were concerned, a distinction was drawn in this Court between the *habeas corpus* and contempt proceedings. I permitted publication of my judgment of 18 October 2006 in full, subject only to suppression of Ms Taylor's name.[11] However, because the contempt proceedings were criminal in nature, Keane J took the view that fair trial issues and the interests of Jayden required suppression of the reasons for his decisions, the submissions and evidence adduced, while allowing the result to be published.

[33] Jayden was returned by Mr Headley to the Hamilton Central Police Station on 23 January 2007. That day, I made an order discharging Ms Skelton from custody and required the lawyer appointed for Jayden in the Family Court (Ms

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[9] Reasons for the Supreme Court judgment were delivered on 19 December 2006: *Taylor v Jones* [2006] NZSC 113

[10] *Jones v Skelton* (High Court Hamilton, CIV 2006-419-1489, 19 December 2006, Keane J)

[11] That suppression order was lifted on 6 December 2006 following the hearing in the Supreme Court.

Gunn) to have Jayden taken to the Family Court for an urgent hearing in respect of his future care.[12]

[34] My intention was to ensure that Jayden was seen by the psychologist who had been involved in his case to assess the extent of emotional harm that may have been caused to him during the period since his abduction and to enable the Family Court to determine immediate arrangements for primary care and contact.

[35] A hearing took place in the Family Court later that day. Mr Jones was given day to day care of Jayden. Contact for Ms Skelton and her immediate family was suspended.[13] Judge Riddell suppressed publication of details about views attributed to Jayden because she did not consider it to be in his best interests for that information to go into the public domain. She also suppressed publication of submissions concerning the criminal charge brought against both Ms Skelton and her father. The Judge permitted publication of the balance of her decision on the grounds that she was satisfied that publication was both in Jayden's best interests and the public interest. Judge Riddell considered that both Ms Skelton and Mr Jones had waived any privacy rights by airing the Family Court issues in public.

[36] Against that background, the Principal Family Court Judge (Judge Boshier) issued a press release on 24 January 2007 in the following terms:

> The Principal Family Court Judge Peter Boshier says Judges McAloon and Brown have agreed that their respective decisions in the case of *Jones v Skelton* can be published.
>
> Judge Boshier says the case has achieved a high degree of public prominence and because of the issues it invokes the judges involved in the earlier proceedings in the Family Court have decided to allow full publication of those proceedings. This is in compliance with the provisions of the Care of Children Act that permit publication as of right of proceedings (anonymised) in the Family Court. The Act also permits publication of details that identify the parties if the judge believes that it is in the public interest to do so.
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> Judge Boshier says the decisions of Judge McAloon and Judge Brown will be posted today on the Family Court website: www.justice.govt.nz/family

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[12] *Jones v Skelton* (High Court Hamilton, CIV 2006-419-1489, 23 January 2007, Heath J)
[13] *Jones* v *Skelton* (Family Court Hamilton, FAM 2001-019-1413, 23 January 2007, Judge Riddell)

> A chronology of the case will accompany the decisions. He says the decision by Judge Riddell of 23 January will also be published on the website.
>
> Judge Boshier says the judges' decision to allow publication reflects the openness of the Family Court. However he also says it is not appropriate for him or the other judges to comment on the decisions, particularly in the light of further proceedings that are pending.
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> Judge Boshier says he hopes the media avail themselves of the opportunity to become informed in a more detailed way about the background of a case that has attracted considerable media and public attention.

By what process were the Family Court judgments released?

[37] Following the initial hearing on 26 January 2007, I invited the Solicitor-General to provide a report to the Court setting out the process followed when the decisions to permit publication of the judgments were made. Five decisions were published, together with a chronology of relevant events. The chronology records most, but not all, of the steps taken in the Family Court proceeding. The chronology is capable of being used to reconstruct the nature of the disputes that have arisen over Jayden's care.

[38] In his report, the Solicitor-General said:

> 4. The Care of Children Act 2004 brought about greater openness of Court proceedings. Coincidentally with this development and in an effort to increase public understanding of, and confidence in the Family Court, the Principal Family Court Judge has adopted a policy of placing decisions of significance on the Ministry of Justice website. Where the decisions are anonymised this does not require the leave of the Court (refer s 139(1) Care of Children Act 2004)
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> 5. The decisions to publish the five judgments on the Ministry of Justice's website evolved over the course of five months. As early as 22 September 2006 Judge D R Brown gave leave to publish his judgments in the Family Court proceedings. That decision was reaffirmed by His Honour on 19 January 2007.
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> 6. The paramount consideration that the Judges took into account was the was the (sic) welfare and best interests of Jayden. They also took into account the following factors when they made their respective decisions:
>
> 6.1 The public interest in knowing the details of the judgments.

6.2 The extent to which any criminal trials might be compromised.

6.3 The privacy of the parties.

….

7. Leave to publish all five decisions in full (i.e. naming the parties) was granted by each of the Family Court Judges who delivered the decisions in question. That is to say:

7.1 Leave to publish the reserved decision of Judge A E McAloon dated 27 September 2005 was granted by Her Honour, on 19 January 2007. She reconfirmed her decision to publish on 24 January 2007.

7.2 Leave to publish the decision of Judge D R Brown dated 2 June 2006 was granted by His Honour, on 22 September, and reconfirmed by His Honour on 19 January 2007.

7.3 Leave to publish the reasons for *ex parte* orders issued by Judge D R Brown on 23 June 2006 was granted by His Honour, on 22 September and reconfirmed by His Honour on 19 January 2007.

7.4 Leave to publish the decision of Judge D R Brown dated 4 August 2006 was granted by His Honour on 22 September and reconfirmed by His Honour on 19 January 2007.

7.5 Leave to publish the decision of Judge R H Riddell dated 23 January 2007 was granted by Her Honour on 23 January 2007.

….

[39] The role played by the Principal Family Court Judge was specifically addressed by the Solicitor-General as follows:

8. The Principal Family Court Judge became seized (sic) of this matter on or about 22 September 2006 when Judge Brown wrote to the Principal Family Court Judge authorising him to publish Judge Brown's judgments if the Principal Family Court Judge thought it was prudent to do so.

9. On or about 22 September the Principal Family Court Judge read 13 oral and reserved judgments that had been delivered in the Family Court proceedings. The Principal Family Court Judge resolved to carefully monitor media coverage of the case before deciding whether or not it was appropriate to place any of the judgments on the Ministry of Justice's website. The Principal Family Court Judge was primarily concerned about the welfare and best interests of Jayden when he made this decision.

10. The Principal Family Court Judge was kept regularly informed of media statements and commentaries about the case by Mr Neil Billington, the senior judicial communications officer.

11. On or about 19 January 2007 the Principal Family Court Judge reconsidered whether or not it was in Jayden's best interests for some key judgments in the Family Court proceedings to be made publicly available in a way which named the parties. His Honour also considered whether it might be in the public interest for key judgments to be published in full. The two factors which weighed uppermost in the Principal Family Court Judge's mind were:

    11.1 Jayden had still not been located. His Honour was becoming increasingly concerned about Jayden's welfare and considered it might assist in locating Jayden if the key judgments were published in full.

    11.2 Members of Ms Skelton's family were making public remarks which undermined the public confidence in the Family Court process. In particular, on 9 January 2007 Mr Headley is said to have complained that his daughter had been the victim of a "serious miscarriage of justice" in the Family Court (or words to that effect).

    His Honour also considered whether any criminal proceedings might be compromised if the judgments were released in full. His Honour also reached the view that any issues concerning privacy had been overtaken by the parties' frequent public comments on the Family Court proceedings.

12. The Principal Family Court Judge continued to reflect on the appropriateness of publishing the judgments in full (by this stage both Judges Brown and McAloon had given leave to publish their judgments).

13. On 23 January 2007 after Jayden had been surrendered, the Principal Family Court Judge continued to reflect on the appropriateness of releasing the three judgments from Judge Brown and the judgment of Judge McAloon. Factors which the Principal Family Court Judge took into account included:

    13.1 No harm was now likely to occur to Jayden if the judgments were published in full.

    13.2 It was in Jayden's best interests that an accurate and transparent record of the Family Court proceedings be available for public scrutiny.

    13.3 Ms Skelton and members of her family were continuing to present only their side of the dispute to the media.

    13.4 Public confidence in the Family Court required the media to be given the opportunity to publish (if they so wished) all of the details of the Family Court judgments.

13.5 His Honour's view that it was highly unlikely any criminal trial would be compromised.

13.6 That the parties had waived any right to privacy they may have had.

[40] The sequence of events to which the Solicitor-General's report referred is confirmed by an affidavit sworn by Mr Neil Billington, Senior Judicial Communications Advisor. He deposed:

2. Since the abduction of Jayden Headley last year I have kept the Principal Family Court Judge regularly informed of media reports and commentaries about the case. This is consistent with my role as senior judicial communications adviser and reflects also the closely co-ordinated professional relationship I have with the Principal Family Court Judge…

3. Towards the end of the week ending Friday, 19 January 2007 the Principal Family Court Judge discussed with me his concern about the selective nature of the material that was appearing in the media and about the criticisms of the Family Court that were being made by Ms Skelton and Mr Headley. He was concerned that this could impact on public confidence in the Family Court.

4. I am aware that on or about that day, the Principal Family Court Judge discussed his concerns with the judges involved in the case (Judges Brown and McAloon) and invited them to consider whether leave should be granted to publish their key decisions in the case and that such leave was given by both Judges.

5. On the morning of 23 January 2007 it was reported that Jayden had been returned. There was a further hearing in the Family Court that day before Judge Riddell. Judge Riddell considered whether leave should be given to publish her judgment and decided that such leave should be given subject to the withholding of some material, the publication of which was either not in Jayden's best interests or relevant to the pending criminal charges.

6. The Principal Family Court Judge reviewed the question of whether there was still a need to publish the Court's judgments on the Ministry of Justice's website in light of Jayden's return. As a result of that further consideration, on 24 January 2007 he invited me to make the necessary arrangements with the Ministry of Justice.

[41] While the Solicitor-General's report discloses that both Judge Brown and Judge McAloon considered whether publication of certain decisions was warranted on the basis of facts that existed prior to compliance with the *habeas corpus* order on 23 January 2007, the Principal Family Court Judge's decision to permit publication was not made until after Jayden had been returned. Following Jayden's return the

factors relevant to a publication decision changed, at least in one vital respect. An order permitting publication of the judgments after 23 January 2007 could no longer be justified on the ground that it might assist in securing Jayden's release from detention.

[42] On 12 March 2007, I sought a supplementary report from the Solicitor-General on the following points: (a) whether notice was given to Mr Jones, Ms Skelton or the lawyer for Jayden before Judge Brown and Judge McAloon made their respective decisions to permit publication and (b) whether those decisions were communicated to the parties at any time prior to the Solicitor-General's initial report.

[43] The Solicitor-General has confirmed that neither Judge Brown nor Judge McAloon gave notice to the parties or to the lawyer for the child of their intention to grant leave to publish their decisions, though Judge Brown did raise the possibility of publication of his decisions at a hearing in June 2006. Although the point is not directly addressed in the Solicitor-General's supplementary report, I infer that the decisions made by Judge Brown and Judge McAloon were not communicated to Mr Jones, Ms Skelton or the lawyer for Jayden at any time before the Solicitor-General's initial report in this proceeding.

Publication of reports of Family Court proceedings involving children

[44] The Family Court was established in 1980.[14] Its processes were designed to be conducted in private, with limited ability for the Court to permit publication of reports of its proceedings.[15] The purpose of a private forum was to protect the privacy of individuals who found themselves involved in disputes that affected their personal lives in a profound manner. The need for privacy is more acute in proceedings about the care of children. In such cases, the paramount consideration is the need to protect the welfare and best interests of children who, innocently, are the subject of proceedings before the Court.

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[14] Family Courts Act 1980, s 4

[15] For example, Family Proceedings Act 1980, s 159(2), Guardianship Act 1968, s 27 and Property (Relationships) Act 1976, s 35. See also Adoption Act 1955, s 22, Children Young Persons and Their Families Act 1989, ss 166 and 329 and Domestic Violence Act 1995, s 83.

[45] The private nature of the forum contrasts starkly with early decisions that developed the open justice principle to promote transparency in Court processes; in particular, the lurid accounts of divorce proceedings regularly published in New Zealand until the late 1970s. Ironically, the two leading Commonwealth decisions on the open justice principle arose out of divorce proceedings.[16]

[46] In a report[17] published in March 2004, the Law Commission considered the justification for the continuation of private and confidential processes in the Family Court. The report referred to a current public debate about the degree of transparency attaching to proceedings in the Family Court. A result of that debate was the enactment of s 139 of the Act. That section applies to all proceedings under that Act (except criminal proceedings) in the Family Court.

[47] Before s 139 of the Act was passed, questions of publication were governed by s 27A of the Guardianship Act 1968. Section 27A(1) prohibited publication of any report of proceedings under that Act (except criminal proceedings) unless the Court which heard the proceeding gave leave to publish. An exception was made for publications in a *bona fide* professional journal: s 27A(4).

[48] In *Newspapers Publishers Association of New Zealand (Inc) v Family Court*[18], Panckhurst and Chisholm JJ considered s 27A in the context of the rights to free speech and to impart information guaranteed by s 14 of the Bill of Rights. They said[19]:

> Accepting that s 14 of the New Zealand Bill of Rights Act must be brought to account, it follows that any suppression order should be tailored to intrude only to the extent necessary to ensure that Liam's welfare is protected as a first and paramount consideration. In this context we have found certain of the English cases in the wardship jurisdiction, where restrictions on publicity were reviewed, of considerable assistance. It is sufficient to refer to one, *Re W (a minor)* [1992] 1 All ER 794, a decision of the Court of Appeal. That case concerned a local authority's placement of an adolescent boy with male foster parents considered by a newspaper to be unsuitable on account of their sexual orientation. An injunction to restrain publication of an intended article was granted. The newspaper appealed. Neill LJ, in delivering the judgment of the Court referred to a number of recent cases of a like nature from which

[16] *Scott v Scott* [1913] AC 417 (HL) and *McPherson v McPherson* [1936] AC 177 (PC)
[17] *Delivering Justice For All* (NZLC, R 85, March 2004); see, in particular, 306-307.
[18] [1999] 2 NZLR 344 (HC)
[19] Ibid, at 351-352

> he extracted certain guidelines. We shall not set them out in full, but rather summarise them in a manner appropriate for New Zealand conditions, also bearing in mind that the welfare of the child is the first and paramount consideration.

[49] The *Newspapers Publishers* case involved a young boy (Liam Williams) who was suffering from cancer. He had been made a ward of the Court when his parents, who were opposed to the use of chemotherapy, did not present him for hospital treatment. At the time the wardship order was made, the parents and the child were in hiding.

[50] The Family Court approved a news release containing considerable detail in an endeavour to locate the child. Subsequently, counsel appointed to represent Liam took the view that the earlier decision to release information had been counter-productive. An order suppressing that information was sought. The Family Court made an order to that effect. The Association sought judicial review of that decision.

[51] In the *Newspapers Publishers* case[20], five factors were identified as relevant to the exercise of the s 27A(1) discretion:

a) Where the media is involved, great importance should be attached to safeguarding the freedom of the press because the media are effectively the eyes and ears of the general public.

b) Media freedom is not absolute. In cases involving children, it must bend to the extent necessary to ensure protection of a child.

c) In imposing a restriction upon publication in order to protect a child who is a ward of Court, the Court must carry out a balancing exercise.

d) An important factor will be the nature and extent of public interest in the particular subject matter. A distinction must be drawn between cases of mere curiosity and those in which the media seeks to publish information or comment about a matter of genuine public interest.

[20] Ibid, at 352

e) The purpose behind the restraint must govern the extent of the restriction. Frequently, the aim will be to protect the child and those responsible for his or her care from the risk of harassment. Any such restriction should be in clear terms, but no wider than necessary to achieve the purpose for which it is imposed.

[52] The Full Court also emphasised[21] the need to tailor publication to reflect the facts of the particular case. As in this case, the identity of the child, his parents and a sibling were already in the public domain. The Court accepted that account could be taken of those circumstances.

[53] Similar issues arose, in relation to an unborn child, in *Chief Social Worker v "Nikki"*[22]. This was the case in which the Chief Social Worker sought Court intervention to prevent a woman from allowing the birth of her child to be filmed for a pornographic movie in which she was "starring". In that case, I took the view that there were circumstances justifying reporting of the proceeding, though I declined to permit in-Court cameras to be present.[23]

[54] There is little jurisprudence under the Act to assist me on the proper approach to the exercise of the s 139(2) discretion. In a thoughtful judgment, in *PD v RCO*,[24] Judge Murfitt considered circumstances in which the discretion might be exercised. Adopting the observations of the Full Court in *Newspapers Publishers*, Judge Murfitt opined that, while freedom of the press and the right to freedom of expression set out in s 14 of the Bill of Rights were important considerations, "they bend to the extent necessary to ensure the protection of a child".[25]

[55] In relation to s 139, Judge Murfitt said:

> [11] The importance of protecting the parties, and children from the harm that may ensure (sic) from publication of private information about them is underscored by the fact that the section twice specifically prohibits the publication of the name of the parties or a child involved in the proceedings, in sub section (1) and in sub section (6). The primary position then under

[21] Ibid, at 352
[22] (2002) 16 PRNZ 801
[23] *"Nikki"* at paras [26] and [27]
[24] Family Court, New Plymouth, FAM 1999-043-00621 7 April 2006
[25] Ibid, at para [10]

> s139 is that publication of any report of proceedings may not include any details which lead to the identification of the parties or the child (or a witness or other person associated with a party to the proceedings).
>
> [12] The power to depart from this primary rule, which is created by the general provision of s139(2) should only be exercised where there are circumstances in the case such that the benefit of publication of the names of the individual outweigh the harm that might arise through publication.
>
> [13] Circumstances which might well justify the publication of names of parties in Family Court proceedings will inevitably arise, and I would not seek to define exclusively those cases where leave should be granted. In situations where the family dispute is already in the public eye it may, for example, be necessary in helping to identify the location of an abducted child. It may be necessary to ensure a balanced view of the family situation where previous publicity has focussed either on a fragment of the circumstances, or on a very partial presentation of the facts, in such a fashion that publication of more of the circumstances creates a more balanced view of the family's history, and thus enhances the welfare of the child. It may be that publication of names is warranted to inform and foster public debate on issues of principle raised in cases where the names of the parties have already had prominent publicity. There is certainly benefit by better informing the public of how the Family Court deals with the many precarious dilemmas it faces each day.

[56] I agree with Judge Murfitt that one ought not to attempt to particularise the circumstances in which leave should be granted under s 139(2). However, the reference to abduction cases[26] is apposite. A similar approach has been taken by the Family Court of Australia.[27]

The approach to interim relief

[57] I remind myself that this is an application for interim relief, not the substantive hearing of a judicial review proceeding. The approach to be taken on an interim application is governed by s 8 of the Judicature Amendment Act 1972, as explained in *Carlton & United Breweries Ltd v Minister of Customs*.[28]

[58] Section 8 empowers the Court to make an interim order if it were satisfied that "it is necessary to do so for the purpose of preserving the position of the applicant". Cooke J did not consider that the power conferred by s 8 should be

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[26] *Jelicich v Jelicich* (Family Court Waitakere, FAM 2004-090-2218, 2 May 2005, Judge Fleming), to which may be added *Re Wolthers* (High Court Rotorua, CIV 2005-463-00525, 18 August 2005)
[27] *In Marriage of Lowe* (1995) 121 FLR 421 at 424 (Nicholson CJ)
[28] [1986] 1 NZLR 423 (CA)

restricted by formulations adopted in interim injunction cases. Rather, the Court should focus on the need for it to be satisfied any order was reasonably necessary to preserve the applicant's position.[29] Richardson J thought that s 8 did not mandate any particular approach, the legal answer to the question whether interim relief should be granted will depend on an assessment by the Judge of all relevant circumstances.[30] Somers J considered it wrong to add any gloss to the word "necessary" or to attempt to define it in some other way. His Honour said it was for the Court to determine whether the necessity to preserve an applicant's position had been established and, if so, whether an interim order of some type should be made.[31] Neither McMullin J nor Casey J expressed views on the threshold test.

[59] In the present case, the jurisdictional issue is one of law, capable of being answered on an interim relief application. If there were no disputed facts, the natural justice point may also be capable of resolution on the information currently available to the Court. Having determined the force of the arguments, it will be necessary to stand back to consider whether, in terms of s 8, it is necessary to make any interim order to preserve Ms Skelton's position pending final resolution of the proceeding.

The jurisdictional point

[60] Section 139(1), (2) and (3) provide:

> **139 Publication of reports of proceedings**
>
> (1) A person may publish a report of proceedings (other than criminal proceedings) under this Act if the report does not include any name or particulars likely to lead to the identification of any of the following:
>
> (a) a child who is the subject of the proceedings:
>
> (b) the parties to the proceedings:
>
> (c) a person who is related to, or associated with, a party to the proceedings, or who is, or may be, in any other way concerned in the matter to which the proceedings relate (for example, a support person for the party):

[29] Ibid at 430
[30] Ibid at 430-431
[31] Ibid at 433

> (d) a witness in the proceedings or a person the Court agrees to hear under section 136.
>
> (2) A person may also publish a report of proceedings under this Act (other than criminal proceedings) with the leave of the Court that heard the proceedings.
>
> (3) The Court may grant leave under subsection (2) subject to conditions the Court determines.
>
> ….

The exception dealing with publication in a professional or technical journal was retained: s 139(4).

[61] Section 139 of the Act differs from s 27A in one material respect. Leave of the Family Court is not required if a person publishes a report of non-criminal proceedings under the Act which preserves anonymity for the people mentioned in s 139(1). Leave is only required if anonymity were not to be preserved: s 139(2).

[62] Whether the Family Court can make an order under s 139(2) of its own motion is the narrow question on the jurisdictional point. Mr Hart's point is that the Family Court has no jurisdiction to give leave to publish a report not falling within s 139(1) unless a specific application is made to it, whether by a party or some other person.

[63] The Solicitor-General submitted that, when read against the purposes of the Act, the Family Court must be entitled to grant leave under s 139(2) of its own motion, if necessary subject to conditions in terms of s 139(3). In making that submission the Solicitor emphasised the importance of s 4(1) of the Act. That section makes it clear that "the welfare and best interests" of the child must be the first and paramount consideration when powers are exercised under the Act.

[64] The media intervenors chose not to make submissions on the jurisdictional point.

[65] The jurisdictional point is a question of statutory construction. What is the nature and extent of the power of the Family Court to authorise publication of a report which does not retain anonymity for, particularly, the parties and the child?

[66] In determining the scope of the Family Court's jurisdiction to permit publication of a report of proceedings under the Act, it is necessary to have regard both to the reason for the changes made when s 139 was enacted and the purposes and principles of the Act.

[67] In considering the differences between s 139 and ss 27 and 27A of the Guardianship Act 1968, the new regime governing the ability of accredited reporters to attend hearings of proceedings under the Act is relevant. Contrary to the position that pertained under the Guardianship Act 1968, an accredited news media reporter may now attend non-criminal proceedings under the Act. However, the reporter may be required, by the Judge, during the course of the hearing to leave the courtroom: s 137(1)(g) and (4)(d).

[68] No criteria are identified against which a Judge makes his or her decision to require an accredited news media reporter to leave a courtroom while the hearing is in progress. Section 137(6) makes it clear that nothing in s 137 limits any other power of the Family Court to hear proceedings in private.

[69] On the topic of media presence at a (non-criminal) Family Court hearing under the Act, Ludbrook and de Jong say:[32]

> The New Zealand Family Court has always been a private forum where parties can seek to resolve their differences away from the glare of publicity and the intrusion of the media. Over the last decade the Family Court has been subjected to a series of attacks, largely from groups representing men who have complaints about the family law system. They have complained that there is no transparency and no community accountability in Family Court processes and that the restrictions on attendance at hearings and on reporting proceedings has served to cover up the injustices that are alleged to occur. The government announced on 23 September 2004 that new legislation would be introduced to open up Family Court proceedings to the public and media. It indicated that the changes were designed to improve transparency of Court processes and to strike a balance between facilitating open justice and protecting the privacy of the children and families involved. It is anticipated that the changes will remove misconceptions by individuals, interest groups, and the media that the Family Court's closed nature leads to unfair processes and bias.

[32] *Care of Children in New Zealand: Analysis and Expert Commentary* (Thomson Brookers, 2005) at 425, para CC137.07

[70] How is the s 139(2) jurisdiction initiated? Ordinarily, a written application is required to initiate a Family Court process to seek a particular order.[33] However, the word "application" does not appear in s 139 and, for Mr Hart's argument to prevail, it would be necessary to imply a requirement for an application to be made. In my view, it is not necessary to imply such a requirement in order to give a purposive interpretation to s 139, in accordance with s 5 of the Interpretation Act 1999.

[71] It is settled law that the Family Court's jurisdiction over children is inquisitorial in nature: see *P v K*.[34] That was a decision of a Full Court of this Court comprising Priestley J and myself. Priestley J,[35] with whom I concurred on this point, quoted with approval the following passage, from an unreported judgment of Judge Inglis QC in the Family Court:[36]

> The welfare of the child is the first and paramount consideration, and it must always be remembered that a compromise which may seem fair to the adults may not appropriately meet the needs of the child. The imperative need to distinguish between ordinary civil proceedings and proceedings of the present kind rests upon a line of high authority in the House of Lords, originally explaining the special nature of the wardship jurisdiction (see *Re K* [1965] AC 201; *Re E* [1984] 1 WLR 156 (HL)), and now accepted as having general application in any litigation concerning custody or access: see *Oxfordshire County Council v M* [1994] Fam 151 (CA), approved in *Re L* [1997] AC 16. The appellate division of the Family Court of Australia has followed the same approach: see *Hutchings v Clark* (1993) FLC 92–373 and *CW v CW* (1998) FLC 92–802. The principle is that the Court's duty is to focus on the welfare of the child and is not limited to arbitrating the particular issues which the parties themselves have placed in dispute, a point conveniently summarised in *Re L* by Lord Jauncey of Tullichettle at p 28:
>
> > '. . . in these proceedings, which are primarily non–adversarial and investigative as opposed to adversarial, the notion of a fair trial between opposing parties assumes far less importance. In the latter case the Judge must decide the case in favour of one or other party upon such evidence as they choose to adduce, however much he might wish for further evidence on any point. In the former case the Judge is concerned to make a decision which is in the best interest of the child in question and may make orders which are sought by no party to the proceedings . . ..'
>
> It follows that the Court is not required to adopt a proposal for settlement of a custody issue put forward by the parties unless it can be assured that the proposal meets the first and paramount criterion of being in the welfare of the child. As Lord Scarman pointed out in *Re E* [1984] 1 WLR 156 at pp 158

[33] Family Courts Rules 2002, rr 19 and 20
[34] [2003] 2 NZLR 787 (HC)
[35] Ibid at para [148]
[36] *McClelland v McClelland* (Family Court, Wanganui, FP 083/205/97, 17 December 1998)

> – 159, the Court must never lose sight of the fact that it is not exercising an adversarial jurisdiction:
>
> ….

[72] In the absence of constraining language, I hold that the Family Court does have jurisdiction, *in appropriate cases*, to permit publication of a report of its proceedings of its own initiative. Such a power should, generally, be exercised only in cases of real urgency, where an order will promote the welfare and best interests of the child. However, an order may also be appropriate when the parties have already put material information into the public domain and, in the public interest, there is a need to provide a balanced account of what actually occurred.

[73] It is not possible to envisage cases in which it might be appropriate for a Family Court to exercise power under s 139(2) of its own initiative. An abduction case may be the very type of case in which the power could, properly, be exercised. The original decision of the Family Court to which the *Newspapers Publishers* case refers[37] is an example of what could be done in such circumstances. Nevertheless, the cases in which it would be appropriate for the Family Court to initiate publication of reports of private disputes before it will be rare.

[74] I conclude that the Family Court did have the power to exercise the s 139(2) jurisdiction of its own motion. The next question is whether that jurisdiction ought to have been exercised, in this case, without first hearing from the parties.

The natural justice point

[75] Mr Hart places reliance on s 27(1) of the Bill of Rights which provides:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[37] See paras [48] and [49] above

[76] In essence, Mr Hart submits (assuming jurisdiction) that the Family Court must always hear from the parties before granting permission to publish reports of proceedings. That is because, he submits, there may be information which is prejudicial or, for some other reason, ought not to be published which, on a unilateral review of the proceeding, may not be immediately obvious. For example, in the context of this case, Mr Hart refers to information which he says prejudices Ms Skelton's right to a fair trial.

[77] Mr Hart also submits that Ms Skelton's privacy interests have been, unacceptably, undermined by the orders made.

[78] The Solicitor-General submits that while it is desirable that the Family Court hear from the parties and the Lawyer for the Child, it is not prevented from granting permission of its own motion and without notice in appropriate cases. This is a case, he submits, in which it was clear that publication was justified. Therefore, there was no need to give notice to the parties of an intention to permit publication of the judgment.

[79] In making that submission, Mr Collins noted that the judgments released[38] (other than that of Judge Riddell on 23 January 2007) were given before Ms Skelton was arrested and could not infringe fair trial rights. Further, he submitted that the right to a fair trial had been adequately considered by the Family Court, referring in particular to partial suppression orders made by Judge Riddell to protect that very right.

[80] With respect, I reject the Solicitor's submission that publication of judgments given before Ms Skelton's arrest could not affect fair trial rights. The judgments contain judicial comments on credibility issues involving Ms Skelton. Such comments (to put it at its lowest) could, if published in the area from which any jury panel might be drawn, have a prejudicial effect on Ms Skelton's right to a fair trial.

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[38] *Jones v Skelton* (Family Court Hamilton, FAM 2001-019-1413, 27 September 2005, Judge A E McAloon), *Jones v Skelton* (2 June 2006, Judge D R Brown), *Jones v Skelton* (23 June 2006, Judge D R Brown; Reasons for Ex Parte orders), *Skelton v Jones* (4 August 2006, Judge D R Brown)

[81] Although earlier decisions to permit publication are said to have been made, I take the critical order, to be the one made by the Principal Family Court Judge on 24 January 2007. The previous day, Judge Riddell had made a decision permitting publication of the judgment she gave after Jayden's return, tailoring the order to ensure nothing published could affect Ms Skelton's fair trial rights. Judge Boshier's order was unilateral and, although purporting to rely on earlier publication decisions of Judge Brown and Judge McAloon (which had not been acted upon), was made after the factual landscape had changed through Jayden's return. Nevertheless, I make it clear that the absence of notice renders the decisions of Judge Brown and Judge McAloon open to the same criticisms I make in respect of the Principal Judge's order.

[82] As at 24 January 2007, Jayden's welfare and best interests remained the "paramount" consideration: s 4(1) of the Act. Ms Skelton's right to a fair trial on the kidnapping charge[39] was also engaged. Further, rights of privacy[40] to which Ms Skelton, Mr Jones and Jayden may have been entitled were also relevant considerations.

[83] In order for the Family Court to determine whether permission should be granted to publish a report of the Family Court hearings to which the judgments relate, it was necessary for the Judge making the decision to consider whether those various rights could be adversely affected and, if they could, to determine whether, in any event, there was a basis to make an order without notice to the parties.

[84] Section 139(2) requires expressly that "the Court that heard the proceedings" give permission. While that section envisages any Judge of the Court exercising the jurisdiction, ordinarily the Judge who dealt with the proceeding would make a decision of that type. In this case, after the critical date of Jayden's return, the only Judges who exercised the power were Judge Riddell and the Principal Judge. There is no challenge to Judge Riddell's decision.

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[39] New Zealand Bill of Rights Act 1990, s 25(a)
[40] *Hosking v Runting* [2005] 1 NZLR 1 (CA)

[85] Once the Family Court, through one of its Judges, had decided *to consider* exercising its power to permit publication of its own motion, two options arose. The first was to seek submissions from the parties and the Lawyer for the Child before making a decision under s 139(2). The second was to act unilaterally, without the benefit of submissions.

[86] In acting unilaterally, the Family Court made an order of an *ex parte* nature. I describe the order in that way because it was initiated by the Court without notice to anyone; as opposed to an *ex parte* order, which is made following an application by only one party to a dispute. The standard to be applied by the Family Court in making a unilateral decision can be no lower than that required to make an *ex parte* order.

[87] The circumstances in which it is appropriate for Family Courts to make *ex parte* orders were discussed in detail in both *Martin v Ryan*[41] and *Y v X*.[42] Those cases emphasise both that the exercise of such jurisdiction should occur rarely and the need for caution in proceeding *ex parte.* Both cases dwell on the need for compliance with the principles of natural justice, particularly the *audi alteram partem* (hear the other side) principle. The need to comply with those principles of natural justice is both affirmed and emphasised by s 27(1) of the Bill of Rights.

[88] Rule 220 of the Family Courts Rules 2002 specifies the circumstances in which applications might be made *ex parte.* Rule 220 provides:

> **220 Applications that may be made without notice**
>
> (1) An application need not be made on notice if the family law Act or District Courts Rule under which it is made provides, or any other of these rules provide, that the application, or an application of that kind, may be made without notice.
>
> (2) An application need not be made on notice if subclause (1) does not apply and the application, or an application of that kind, is not expressly required to be made on notice by the family law Act or District Courts Rule under which it is made or by any other of these rules, and the Court is satisfied that—

[41] [1990] 2 NZLR 209 (HC)
[42] [2003] 3 NZLR 261 (HC)

> (a) the delay that would be caused by making the application on notice would or might entail,—
>
> > (i) in proceedings under the Children, Young Persons, and Their Families Act 1989, serious injury or undue hardship, or risk to the personal safety of the child or young person who is the subject of the proceedings, or any person with whom that child or young person is residing, or both; and
> >
> > (ii) in proceedings under the Child Support Act 1991 or the Family Proceedings Act 1980 or the Care of Children Act 2004, serious injury or undue hardship, or risk to the personal safety of the applicant, or any child of the applicant's family, or both; and
> >
> > (iii) in proceedings under the Domestic Violence Act 1995, a risk of harm or undue hardship to the applicant, or any child of the applicant's family, or both; and
> >
> > (iv) in proceedings under the Property (Relationships) Act 1976, irreparable injury; or
> >
> > (v) in any other proceedings, undue delay or serious detriment to the applicant; or
>
> (b) the application affects the applicant only or is in respect of a routine matter or is about a matter that does not affect the interests of any other person; or
>
> (c) every person in respect of whom the order is sought has either died or cannot be found.

[89] The decision to permit publication did not, in my judgment, meet any of the criteria set out in r 220(2).

[90] I acknowledge that, read strictly, r 220 does not apply to the relevant s 139(2) decision for two reasons:

a) First, no application was necessary to trigger the ability of the Court to make an order.

b) Second, no application was, in fact, made to trigger the r 220 procedure.

Nevertheless, the principle remains the same. Rule 220 provides a touchstone against which a Court initiated order of this type should be judged. Indeed, the type

of Court-initiated decision made in this case is not that far removed from the type of order with which *Y v X* was concerned.[43]

[91] Fisher J, explained the effect of an *ex parte* order in *Martin v Ryan*:[44]

> Above all, it should not be overlooked that an order made *ex parte* represents a fundamental denial of that natural justice upon which our whole system of civil litigation normally rests. Even where the stated criteria . . . are satisfied, the rule merely provides that an order "may" be made. That discretion is to be favourably exercised only with reluctance and caution in cases where a denial of conventional natural justice is unavoidable: *Anon* [1876] WN 12 (only "in cases of emergency" per Lindley J); *Brand v Missom* (1876) 34 LT 854 (property in danger of being lost or destroyed); *Bates v Lord Hailsham* ("Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion" per Megarry J.) As Ormrod LJ said in *Ansah* at p 142:
>
> > Orders made *ex parte* are anomalies in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party: see *Craig v Kanseen* [1943] KB 256, 262. Nonetheless, the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately.

[92] For present purposes, it is unnecessary for me to determine whether the privacy rights of Ms Skelton, Mr Jones or Jayden were (or were likely to be) breached if publication were ordered. All that was needed, before notice of the proposed decision was required, was the reasonable possibility that rights might be affected, so that the order was not "routine" in nature.[45]

[93] Save for Judge Riddell's judgment, the published decisions are replete with references to evidence given by Ms Skelton and the reasons given by Judge Brown and Judge McAloon for finding that she was not a credible or reliable witness. The findings are, on a number of occasions, expressed in strong language. Similar observations can also be made about the position of Mr Headley.

[94] Placement into the public domain of adverse credibility findings made by a judicial officer about a person likely to face trial on a charge arising out of events that were related to the Family Court proceeding was, at the very least, likely to raise

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[43] Ibid, at paras [1], [2], [6]-[36] and [39].
[44] *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 229

fair trial concerns that could not be addressed without giving interested parties an opportunity to be heard. That being so, there was a clear obligation on the Family Court to seek submissions before making a publication order of its own initiative. By not extending the opportunity to be heard, Judge Boshier fell into error.

[95] The next and related question is whether this error was of any consequence. Is it possible, had the Judge sought submissions, that he might have decided not to make an order? While this inquiry is not strictly necessary, given my finding on the need for notice, an analysis of the point does demonstrate forcefully why notice was necessary.

[96] When the decision to release the judgments was made by Judge Boshier on 24 January 2007, he took six factors into account:

a) Because Jayden had been returned, no harm was likely to occur to him if the judgments were published in full.

b) It was in Jayden's best interests that an accurate and transparent record of the Family Court proceeding be available for public scrutiny.

c) Ms Skelton and members of her family were continuing to present only their side of the dispute to the media.

d) Public confidence in the Family Court required the media to be given the opportunity to publish all of the details of the Family Court judgments.

e) It was "highly unlikely" any criminal trial would be compromised.

f) The parties had waived any right to privacy they may have had.

[97] The first two factors relate to the welfare and best interests of Jayden. With respect to the Principal Family Court Judge, I could not so readily conclude either

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[45] Family Courts Rules, r 220(2)(b)

that no harm was likely to occur to Jayden or that it was in his best interests that an accurate and transparent record of the Family Court proceeding go into the public domain. Ultimately, that decision might have been justified. However, it was a decision that ought not to have been made until informed by submissions received from Jayden's parents, the lawyer appointed to represent him and (probably) evidence from the psychologist who saw him before the Family Court hearing on 23 January 2007. Jayden was, on 23 January 2007, a young boy who had been subjected to five months of detention away from his parents. Little was known, as at 24 January 2007, of the emotional impact of that detention on him.

[98] The fact that Ms Skelton and members of her family were perceived to be presenting only one side of the dispute to the media was a relevant factor. But (even assuming waiver of privacy considerations), it was a factor that had to be weighed against the likely effect of publication on Ms Skelton's fair trial rights and any adverse effects the order might have on Jayden.

[99] Once Jayden was returned, the public interest in ensuring a full presentation of conflicting evidence and findings in the Family Court was lessened, though not extinguished.

[100] Public confidence in the Family Court is a relevant factor to the extent that unwarranted public criticisms of the Court's processes and decisions can, in appropriate cases, be met by releasing information relating to the particular proceeding in issue: *AH v SS*.[46] In that case, Bryant CJ of the Family Court of Australia said:

> 40. In discussion with counsel two reasons for the publication of the judgment, with at least the identification of the expert witnesses, emerged. The first of the two arguments that I have identified is the public interest argument. In my view the reasonable reader could conclude from reading this article that the Family Court is not concerned with putting the interests of children first and would allow in this case an alleged abuser to have residence of the children.
>
> 41. Absent s 121 [of the Family Law Act 1975 (Cth)], a response to the article might be achieved by referring the judgment or a part of the judgment to the relevant newspaper, or otherwise allowing some publication of it which would bring a balance to the comments made in

[46] (2005) 194 FLR 111.

> relation to this case and provide an explanation to the public as to how the decision in this case was arrived at. However, s 121, absent any order or direction of the Court, does not permit that publication to be made.
>
> 42. Insofar as it would identify parties or witnesses, one of the difficulties in what has occurred in this case, is that by identifying themselves as witnesses in the article, the very publication of the judgment (which could have omitted the names of witnesses or parties) in refutation of the allegations, would in fact have the effect of identifying the witnesses and thereby, of itself, breach s 121.
>
> 43. This is in my view a very clear case where the public ought to be able to read for themselves, and the newspaper ought to be able to report the judgment and the findings of the trial judge on the matters raised by the article. In particular, the competing views of other experts would provide a balanced view, and explanation of the decision which the public might need, having read the original article, to provide some confidence about the processes, procedures and decisions of the Family Court.
>
> 44. Public confidence in the Family Court, as in all courts, is vital in our society. In my view the publication of the judgment in this case is necessary to enable a proper understanding of the expert evidence that was given in this case, the reasons for judgment, how the trial judge dealt with the evidence and ultimately arrived at the view that it was in the best interests of these children to live with their father.[47]

That factor also needed to be weighed against the private interests of Jayden and Ms Skelton's fair trial rights. The weight to be given to those competing interests would have been informed by submissions.

[101] The fair trial issue was one that, given the findings of credibility made against Ms Skelton in the judgments, required careful consideration. With respect, assuming (without deciding) that issues involving Jayden's welfare and privacy issues could be put to one side as having no material weight, I do not accept that the Family Court could assess the likelihood or otherwise of fair trial rights being compromised without first hearing from the parties. It was not inevitable that the s 139(2) discretion would be exercised had submissions been heard.

[102] A lengthy hearing was not required. The issues were relatively narrow. There was no urgency that required an order being made without notice.

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[47] Ibid, at 118, paras 40-44

[103] A short Minute could have been issued by the Court to counsel for the parties and the child indicating the type of order the Court was minded to make and requesting written submissions on relevant factors from the parties before a decision under s 139(2) was made. Even if an oral hearing had been requested, it could, legitimately, have taken place by telephone or by a short attendance on a Judge in chambers.

[104] Submissions from interested parties may have persuaded the Court not to permit publication. Alternatively, they may have resulted in the imposition of appropriate conditions. Or, the same order could have been made.

[105] In my view, the natural justice point is not only seriously arguable, it is unanswerable. The Family Court ought not to have made the decision to permit publication without hearing from the parties. In so holding, I do not say the decision was wrong on the merits. On a judicial review application, it is not my function to express a view on the merits of the decision in issue. What I do say is that a different decision could readily have been reached had interested parties been heard.

Discretionary issues

[106] The question is whether interim relief is necessary to preserve the position of Ms Skelton pending a substantive hearing. Whether discretionary relief should be granted must be assessed in the context of the findings I have made on the natural justice point: that the Family Court ought not to have made a decision to permit publication of the judgments without hearing from the parties and that the discretion may have been exercised differently had it been informed by submissions.

[107] Mr Hart submitted that, if his grounds of attack were upheld, relief should be granted to contain any damage that may have been done by publication to date. However, he acknowledged that any prohibition on future information being published ought properly to be subject to any judicial order made on notice to the parties under s 139.

[108] Mr Collins submitted that, even if I were satisfied one or more of the grounds had been made out, I should not exercise my discretion in favour of granting relief because the judgments released provided a balance to media statements made by or on behalf of Ms Skelton which criticised the father and the decisions of the Family Court. He relied, in particular, on the public interest in protecting the integrity of the Family Court from unjust criticism.

[109] Mr Collins also submitted that, having regard to her conduct prior to leave being granted, Ms Skelton sought discretionary relief without "clean hands". In addition, he submitted that relief would be futile in respect of information already within the public domain and that any prohibition on future release of information would undoubtedly be subject to the exercise of a proper judicial discretion.

[110] Mr Gray QC, on behalf of the publishers of the New Zealand Herald, submitted that considerations of free speech and open justice supported the Family Court's decisions to release the judgments, particularly having regard to the widespread national interest in the story. He submitted that the decision to grant permission to publish had been made after proper evaluation by a specialist Court which was entitled to respect. Mr Gray also submitted that there was no right to a remedy, as against media publishers, through s 8 of the Judicature Amendment Act 1972.

[111] Mr Stevens, for the publishers of the Waikato Times, largely supported the submissions made by both Mr Collins and Mr Gray.

[112] In *R v Burns (Travis)*[48] Thomas J, delivering the judgment of the Court of Appeal, expressed the tension between the rights of freedom of expression and to a fair trial in the following terms:

> … The public's right to receive information, the principle of open justice, the type of information in question, its public importance and interest, its likely circulation, methods of diluting its effect on the minds of potential jurors, the presumption of innocence, and other issues are all to be balanced against its prejudicial effect. But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of

[48] [2002] 1 NZLR 387 (CA) at 404-405, para [11]

> freedom of expression and open justice must then be departed from; not balanced against. There is no room in a civilised society to conclude that, "on balance", an accused should be compelled to face an unfair trial.

[113] Whether the paramountcy generally given to the fair trial right will always prevail is something I do not need to decide in the present case. There are two important features, in the present case, that distinguish it from the situation that confronted the Court of Appeal in *Burns*. They are:

a) First, the content of the published judgments is already in the public domain and has been disseminated widely.

b) Second, in relation to the potential to disseminate additional information in the future, a judicial decision would be required, after hearing from interested parties.

[114] It is settled law that a Court has a discretion to refuse relief. That discretion can be exercised if the Court were satisfied relief would be futile.[49]

[115] There are two reasons why relief would be futile in the present case. The first is because the information is already in the public domain and an order from the Court cannot alter that reality. The second is that no order is sought against representatives of the media. Although media intervenors have been heard, they are not parties to the proceeding against whom any order could be enforced.

[116] It is also settled law that discretionary relief can be refused if an alternative remedy exists. The risk of prejudice to a fair trial through adverse publicity can be met in a different way. If Ms Skelton were committed for trial on the kidnapping charge, it would be open to her to seek a stay of the prosecution on the grounds that a fair trial was impossible having regard to the prior publicity.[50] It would be open to Mr Headley to make a similar application.

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[49] For example, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 at 735-736 and *Berryman v Solicitor-General* [2005] 3 NZLR 121 at 130-131, para [38]

[50] *R v Burns (Travis) (No 2)* [2002] 1 NZLR 410 (CA) and (on stays generally) *R v The Queen* [1996] 2 NZLR 111, as adapted for pre-trial publicity cases in *R v Cara* (High Court, Auckland, CRI 2004-004-006560, 30 July 2004, Potter J) at paras [57]-[89]

[117] I am not saying that an application for a stay would be successful. What I am saying is that an alternative remedy, designed expressly to deal with the very situation that now confronts Ms Skelton, exists. If the Court to which she may be committed were satisfied that a fair trial was no longer possible, the prosecution would be stayed. If the Court were to take the view that the passage of time was likely to cure any difficulties that might otherwise arise in relation to a fair trial, it would be open to the Court to allow the case to go to trial.[51]

[118] Notwithstanding that this is an application for interim relief, I decline to grant any remedy. I base that decision on the twin pillars of futility and alternative remedy.

[119] I have considered whether to make a declaration that the order was made in breach of the principles of natural justice. I conclude that is unnecessary. As I have indicated previously, if any further information were to be published from the Family Court proceeding, a judicial decision would be required to permit that to occur. Such a decision would need to be made after hearing from all interested parties. To that extent, the interests of Ms Skelton, Mr Jones and Jayden are protected so far as is possible.

[120] Two further matters arise which are linked indirectly to questions of relief. The first concerns a suppression order I made at the conclusion of the hearing on 31 January 2007 concerning portions of the released judgments read out in open Court by Mr Hart to demonstrate fair trial issues arising from credibility findings. The second concerns an embargo on publication of this decision so that affected parties have an opportunity to consider and reflect on my judgment before it is published in the media and parties are asked for comment.

[121] On the suppression issue, I take the view that the order should be discharged. As the information is in the public domain, there is no warrant to suppress it from further publication. This Court does not act as an editor of media publications or broadcasts. Responsible editors will, undoubtedly, take into account the possibility of further publication of information contained in the judgments impacting adversely

[51] For example, *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563

on Ms Skelton's fair trial rights or, possibly, enhancing prospects of a successful stay application in the criminal proceedings. However, the judgment whether to publish or broadcast is for the editors to make.

[122] On the question of embargo, I am conscious that there has been much public interest in the issues addressed in this judgment. Publication of the result and content of this judgment is embargoed until 3pm today so that the parties can consider it before making any public pronouncements. I record that 24 hours notice has been given to all parties who were heard on 31 January 2007, to counsel for Mr Jones and the lawyer appointed to represent Jayden, of the time for delivery of this judgment so that they can consider it before the embargo expires.

Result

[123] For the reasons given, the application for interim relief is dismissed.

[124] The suppression order made on 31 January 2007, in relation to extracts of the released judgments read in open Court by Mr Hart, is discharged.

[125] I order that no publication in any media (including posting on an Internet site) of the result of this application or the content of this judgment shall be made until 3pm today. For completeness, I add that nothing in this judgment is suppressed from publication once the embargo expires.

[126] All questions of costs are reserved.

[127] The proceeding is adjourned for a case management conference before me at 9am on Tuesday 8 May 2007. Ms Skelton will need to advise the Court whether she wishes to pursue the substantive claim for judicial review. If the claim were not to be pursued, the Court will need to be advised on the position of each party on questions of costs.

[128] I direct that counsel for Ms Skelton file and serve a memorandum outlining her position on those issues by midday on Friday 27 April 2007. The memorandum shall be served on all parties and intervenors heard on 31 January 2007.

[129] I will be sitting in Auckland on 8 May 2007. As counsel are based in Auckland and Wellington, I indicate that I would be prepared to conduct the hearing by video-conference so that counsel can appear from Wellington by video link. Should any counsel wish to appear in that manner arrangements should be made through the Registrar at Hamilton.

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P R Heath J

Delivered at 9.30am on 4 April 2007