NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA165/2024
[2024] NZCA 389

BETWEEN	JEREMY EVANS Applicant
AND	HANNAH EVANS Respondent

Court:	Courtney and Palmer JJ
Counsel:	E M Eggleston and D G D M Wilsher for Applicant V A Crawshaw KC and G G Edwards for Respondent
Judgment: (On the papers)	19 August 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to bring a second appeal is declined.

B Mr Evans must pay Mrs Evans costs on a band A basis.

REASONS OF THE COURT

(Given by Courtney J)

[1] Mr Evans and Mrs Evans have two school age children, Thomas and Olivia.[1] In May 2023 Family Court Judge McHardy made parenting orders in respect of Thomas and Olivia under which Mrs Evans has full-time day-to-day care of the

[1] These are not the parties' real names but are the names used in the High Court in recognition of the statutory suppression orders applying.

children and Mr Evans permitted bi-weekly contact.[2] There are conditions for different arrangements during the school holidays and on special days. A further condition stipulated that Mr Evans' brother, Silas Evans, was not to have any contact with the children.[3]

[2] Justice Brewer dismissed Mr Evans' appeal against the Family Court Judge's decision.[4] Mr Evans has applied for leave to bring a second appeal to this Court. The application is brought under s 145(1)(b) of the Care of Children Act 2004 (COCA). Leave to bring a second appeal will not be granted lightly. Mr Evans needs to show that there was a material error of law or fact capable of bona fide and serious argument in the High Court decision that is sufficient to justify the cost and delay of a second appeal.[5]

[3] The application for leave to appeal asserts that the Judge made errors of fact and/or law in upholding the:

(a) condition precluding Silas Evans from having contact with the children;

(b) finding that Mrs Evans (a recovering alcoholic) had not relapsed when the evidence was inconclusive;

(c) findings as to Mr Evans' response to Thomas' medical condition;

(d) conclusion that a shared care arrangement was not appropriate; and

(e) making of a costs award against Mr Evans.

The Family Court decision

[4] The case came to hearing in the Family Court in May 2023 following approximately a year of interlocutory applications and disputes. Central to many of

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2 [*Evans*] *v* [*Evans*] [2023] NZFC 10351 [Family Court judgment]. The orders will remain in place for at least two years: Care of Children Act 2004, s 139A(1)(b).

3 Also not his real name.

4 *Evans v Evans* [2024] NZHC 349 [High Court judgment].

5 *L v K* [2010] NZCA 618, (2010) 28 FRNZ 692 at [17].

the allegations by the parties against one another and to the issues determined by the Family Court Judge was an incident that had occurred in March 2022, at a time when an informal shared care arrangement was in place. Mr Evans, when on a video call with Mrs Evans, accused her of being drunk. Mrs Evans denied being drunk and said that she was ill with a migraine. Mr Evans and Silas Evans went to Mrs Evans' house and forcibly uplifted Olivia.[6]

[5] The five-day hearing was scheduled for May 2023 as a back-up fixture, and the parties had been advised of it being called on as the primary fixture in November 2022.[7] The parties had filed evidence. Witnesses had been arranged. Mr Evans did not appear at the hearing but, after it started, his brother emailed the Court to advise that Mr Evans had a medical certificate confirming that he was not well enough to attend Court. The certificate was not provided until later in the day. The Judge ruled that the hearing was to continue; it was apparent from the evidence that it was vital for the children's welfare and in their best interests for the dispute to be resolved, and it could be a further 12 months before another hearing date could be allocated.[8]

[6] The factual issues considered by the Judge were Mr Evans' use of physical violence against Thomas and Olivia, safety risks resulting from Mr Evans' conduct during the incident in March 2022, Mr Evans' allegations that Mrs Evans had relapsed and her ability to parent the children safely. The Judge had before him a substantial amount of evidence — "numerous affidavits", video evidence filed by both parties and cross-examination by lawyer for the children of Mrs Evans and of a psychologist.[9] He undertook a lengthy examination of the evidence, including of Mr Evans' affidavits.

[7] The Judge concluded that the evidence showed "a concerning power and control dynamic on the part of Mr [Evans] [who had] sought to use a situation of his making to take control of the parenting of [the] children".[10] He did not make findings against Mr Evans in respect of the allegations of physical violence against the children but did consider that Mr Evans had lost the ability to focus on what was in the

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6 Family Court judgment, above n 2, at [75]–[86].
7 At [7].
8 At [15]–[17] and [19].
9 At [18].
10 At [138].

children's best interests (including addressing Thomas' medical condition) and that there were concerns in respect of the "bigger picture of safety, such as the emotional harm caused by Mr [Evans'] conduct".[11]

[8] The totality of the evidence persuaded the Judge that the parties could not engage in a shared care arrangement and that it would not be in the children's best interests to put such an order in place.[12] The Judge was satisfied that Mrs Evans was able to provide adequate day-to-day care for the children.[13]

The High Court judgment

[9] In the High Court, Brewer J addressed each of the grounds of appeal which related to the brother's contact with the children, Mrs Evans' asserted relapse, Mr Evans' response to Thomas' medical condition, the Family Court's finding relating to emotional harm resulting from Mr Evans' conduct, the Family Court's conclusion that the parties would not be able to engage in a shared care arrangement, the Family Court's findings as to Mr Evans' assertions that Mrs Evans had discussed adult issues with the children and criticised Mr Evans and alienated the children from his family, the failure of the Family Court to give weight to Thomas' views about a shared care arrangement, the findings the Family Court made about Mr Evans' behaviour towards Mrs Evans, and the awarding of costs against Mr Evans.[14]

[10] Broadly, Brewer J's view was that the factual findings the Family Court Judge made were open to him on the evidence and that Mr Evans' failure to appear did not deprive him of natural justice, particularly because the Judge took into account the affidavits he had previously filed.[15] The costs award was orthodox.[16]

Application for leave to appeal

[11] In support of the application, Mr Eggleston submitted that while the case principally concerned an assessment of safety under s 5(a) of COCA, the Family Court

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11 At [139] and [150]–[151].
12 At [157].
13 At [159].
14 High Court judgment, above n 4, at [18]–[54].
15 At [49]–[50].
16 At [53].

Judge's approach, confirmed in the High Court, failed to properly identify and weigh all the s 5 factors, especially s 5(d) (continuity of care). As a result, a complete enquiry into the best interests of the children was not undertaken.

[12] Mr Evans' complaint about the factual findings is essentially that the Judge ought to have treated some of the evidence differently, such as the evidence relating to Mrs Evans' alcoholism and Mr Evans' responses to Thomas' medical condition. The fact that alternative views of evidence could have been accepted do not make a factual finding wrong. If, as the High Court Judge held, conclusions are properly available on the evidence, no error arises. A second appeal is not an opportunity to relitigate findings of fact.

[13] Likewise, Mr Evans' complaints about the basis for some of the orders really amount to an assertion that other orders might have been made. However, the fact that there might have been other ways of, for example, controlling the children's exposure to Silas Evans, or that a different view might have been taken about the viability of shared care arrangements, does not mean that the Family Court Judge erred in taking the view he did or that the High Court Judge erred in concluding that there was an evidential basis for that view.

[14] As to costs, we note that Mr Evans had the opportunity to address the issue of costs in the Family Court but did not do so. Costs were at the discretion of the Family Court Judge and there is no apparent error in the High Court Judge's assessment of the costs award.

[15] Mr Evans has not identified any material error by the High Court Judge that is capable of serious argument. A second appeal is not justified in this case.

Result

[16] The application for leave to bring a second appeal is declined.

[17] Mr Evans must pay Mrs Evans costs on a band A basis.

Solicitors:

Lance Lawson, Mount Maunganui for Applicant
Morris Legal, Auckland for Respondent