FAMILY COURT OF AUSTRALIA

SMYTHE & HOLLY AND ANOR *[2007] FamCA 302*

FAMILY LAW – CHILDREN – New proceedings after 2 years – Whether new factor or significant change in circumstances shown – Application for summary dismissal – Application dismissed – New factor or significant change in circumstances shown

FAMILY LAW – CHILDREN – APPLICATION FOR COSTS – Whether preparation and filing of certain material unnecessary – Reserved for trial Judge

APPLICANT:	Ms Smythe
1st RESPONDENT:	Mrs Holly
2nd RESPONDENT:	Mr Holly
FILE NUMBER:	BRF 4026 of 2000
DATE DELIVERED:	2 April 2007
PLACE DELIVERED:	Brisbane
JUDGMENT OF:	O'Reilly J
HEARING DATE:	23 February 2007
REPRESENTATION	
COUNSEL FOR THE APPLICANT:	Ms Howe of Counsel
SOLICITOR FOR THE APPLICANT:	Hirst & Co Family Solicitors
COUNSEL FOR THE 1ST RESPONDENT:	The paternal grandmother in person
COUNSEL FOR THE 2ND RESPONDENT:	The paternal step-grandfather in person

ORDERS

(1) The mother's application filed on 27 November 2006 for the summary dismissal of the paternal grandparent's application for final orders filed on 18 September 2996 is dismissed.

(2) The mother's application filed on 1 November 2006 for an order that the paternal grandparents pay the mother's costs of and incidental to the mother's form 2A response filed on 11 October 2006 and the mother's costs of her costs application filed on 1 November 2006 is reserved to the trial Judge.

(3) The Reasons for Judgment given today in relation to the mother's costs application be brought to the attention of the trial Judge at the hearing of that costs application, and if the mother should be granted costs by the trial Judge, be brought also to the attention of the Registrar when the costs are assessed.

(4) The matter is adjourned to the trial notice list.

IT IS NOTED IN CONNECTION WITH THESE ORDERS that the judgment of the Honourable Justice O'Reilly delivered this day will for all publication and reporting purposes be referred to as *Smythe & Holly*.

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRF 4026 of 2000

Ms SMYTHE
Applicant

And

Mrs HOLLY and Mr HOLLY
Respondents

REASONS FOR JUDGMENT

Applications

1 There are two applications in a case by the mother which were listed for determination in the Judicial Duty List on 23 February 2007.

2 The first application, filed on 1 November 2006, is for an order that the paternal grandmother and the paternal step grandfather (for convenience "the paternal grandparents") pay the mother's costs of and incidental to: (a) the mother's form 2A response filed on 11 October 2006 on the indemnity basis, or alternatively the standard basis; and (b) the mother's costs of her costs application filed on 1 November 2006, on the same basis as may be ordered in relation to the mother's form 2A response. The mother's costs application relates to an application in form 2 filed by the paternal grandparents on 18 September 2006 and subsequently discontinued by them by a notice of discontinuance filed on 25 October 2006.

3 The second application, filed on 27 November 2006, is for the summary dismissal of the paternal grandparents' application in form 1 for final orders filed on 18 September 2006.

4 It is convenient to deal first with the mother's application for the summary dismissal of the paternal grandparents' application for final orders in form 1 filed on 18 September 2006.

Summary dismissal

Relevant background facts

5 On 13 September 2004, final parenting orders concerning the child, a daughter, born in October 1997, now nearly 9½ years, were made in the Federal Magistrates Court at Brisbane, the parties being the paternal grandparents as applicants and the child's parents as respondents.

6 The final orders made on 13 September 2004 provided (not by consent) that the child live with the mother and that she have sole parental responsibility for the child's long term care, welfare and development; and (by consent), and upon various undertakings, that (par 1) the child spend time with the paternal grandparents **at such times as may be agreed upon between the parties** or **failing agreement**, each fourth weekend from after school on Friday (or 3pm if not a school day) until 4.30pm on Sunday, for two weeks in each calendar year being one week at a time during the child's school holiday periods (but not to include the period from Christmas Eve to New Year's Day nor the last week of the Christmas school holidays and not to include weeks notified by the mother to the paternal grandparents during which the child may be on holidays with the mother) and from 9am until 4pm on Boxing Day (or otherwise as may be arranged for a date within 10 days either side of Christmas Day if the mother should notify that she and the child will be away from their residence on Boxing Day); as well as telephone contact on each Tuesday at 7pm and the child's birthday. Pars 2-13 then set out (as part of the consent regime) several facilitation, information and other provisions including, relevantly:

> 10 That the Paternal Grandparents shall not remove the child from the Commonwealth of Australia during periods of contact **without the written consent of the Mother.**
>
> 11 That the Commissioner of the Australian Federal Police and the Secretary of Immigration take all necessary steps to immediately place the child, [a daughter] born [in] October, 1997, on the airport watch list, also known as P.A.C.E. system at all points of arrival and departure in the Commonwealth of Australia.
>
> 12 That the Australian Federal Police maintain an airport watch for the said child on all flights leaving any international airport in all States and Territories in the Commonwealth of Australia.

13 That the Australian Federal Police and the police forces of the States and Territories of the Commonwealth of Australia assist in the implementation of, and give effect to, these Orders.

7 The consent orders provided several notations to which it is not necessary to refer.

8 The paternal grandparents' application in form 1 for final orders filed on 18 September 2006, that is, just two years after the orders and consent orders made on 13 September 2004, seeks the following relief:

Annexure A

F Final Orders the Applicants are seeking

1. That the Applicant Paternal Grandparents and the Respondent Father have contact with the child, [a daughter] born [in] October, 1997, at such times agreed upon between the parties or failing agreement, as follow[s], i.e.:

   (a) Every end of school year vacation commencing in an even numbered year for (4) four weeks from 12:00noon on 20 December, until 12:00noon on 18 January.

   (b) Every end of school year vacation commencing in an odd numbered year for (18) eighteen days from 12:00noon on 3 January, until 12:00noon on 21 January.

   (c) That, for the purposes of contact, the Paternal Grandparents collect the child from and return her to her domicile on the respective contact commencement and conclusion dates.

   (d) That the child is permitted to leave the Commonwealth of Australia, for the Respondent Father's domicile, notwithstanding that the consent of the Respondent Mother has not been obtained.

   (e) That the Applicant Paternal Grandparents:

      i. accompany the child to and from her Father's domicile, during each contact occasion, and

      ii. facilitate the child telephoning the Mother at 7:00pm on each Tuesday whilst exercising extended holiday contact overseas.

   (f) That the Respondent Mother:

i. as soon as practicable, provide the child with a passport to allow the child to proceed overseas as may be ordered by this Court;

ii. deliver the child's passport, in her possession or control, to the Registrar of this Registry of the Court to be held by the said Registrar pending further order of the Court;

iii. outfit and pack for the child for the probable climate for periods of up to (4) days at the Applicant Grandparents domicile and for the journey to her Father's domicile, and

iv. provide prescription and all other necessary medication, instructions and paraphernalia, for the child, sufficient for each contact occasion.

(g) That each party notify the other as soon as practicable of any travel arrangements, including an itinerary and telephone numbers involving the child.

(h) That the Applicant Grandparents and Respondent Father care and provide for the child during each contact occasion.

(i) That the Applicant Grandparents deliver the child's passport in their possession or control to the Registrar of this Registry of the Court to be held by the said Registrar pending further order of the Court.

2. All such other orders as this Honourable Court deems met.

3. That the Respondent Mother pay the Applicant Paternal Grandparents costs of an[d] incidental to this Application.

9 It is immediately apparent that the thrust of the paternal grandparents' current application for final orders is to effect the following changes:

- The child's holiday time with the paternal grandparents be for defined periods, rather than random periods, and for four weeks and then three weeks (18 days) in alternate years, rather than for two single weeks in each year
- The child be permitted to leave Australia without the mother's consent, so that the paternal grandparents may take the child to visit the father in England
- The mother provide the child with a passport to facilitate the trips

- Consequent changes relating to changeover related to the trips, notification of itineraries for the trips, things the child will need for the trips, care of the child while on the trips and telephone communication with the mother while the child is overseas.

10 Plainly, I have not included in this summary all of the changes sought. However, the ones mentioned are the salient changes sought so that the child may be able to travel with the paternal grandparents to visit the father in England.

11 It is plain, from the paternal grandparents' material, and from correspondence passing between the mother and the paternal grandparents since the orders were made on 13 September 2004, that the essence of the current dispute, which has arisen *since* the final orders were made, relates to a request by the paternal grandparents to take the child to England to visit the father, and the mother's refusal for that to occur. See the letter paternal grandparents to the mother 31 March 2006, the mother's response 20 April 2006, the paternal grandparents' further letter 10 May 2006 and the mother's further response 23 May 2006 (annexures 3, 4, 5 and 6 to the paternal grandparents' affidavit filed on 30 November 2006).

Principles relevant to the paternal grandparents' application and the mother's application for the summary dismissal of the paternal grandparents' application

12 The principles relating to new applications, where existing final orders are in place concerning a child, are well established. See, for example, *Rice and Asplund* (1979) FLC 90-725 at 78,905-6; and the cases referred to in the written submissions of Ms Howe of Counsel, for the mother.

13 In argument, Ms Howe of Counsel agreed that, procedurally, a Judge faced with an application by a respondent party for the summary dismissal of an application commencing new proceedings relating to a child may, properly, either:

- Summarily dismiss the new proceedings if, for example, the Court is not satisfied that there is a new factor or a significant change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served or

- Summarily dismiss the respondent party's application for summary dismissal of the new proceedings, if satisfied that there is a new factor or a significant

change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served or

- Find that there is a sufficiently arguable case of a new factor or a significant change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served, but not determine that matter on the basis of preliminary submissions, and leave it for the trial Judge to consider (*Rice and Asplund,* above at 79,905).

New factor or significant change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served?

14 The paternal grandparents rely upon the following circumstances:

- The child was only 6 years (almost 7 years) at the time the final orders were made on 13 September 2004
- The child is now 9 years (indeed, 9 years and 5 months now), although only 8 years (almost 9 years), when they commenced the new proceedings
- The child has commenced to express strong wishes to go to England to see the father, her new step brothers and half sister and to meet and spend time with her extended family in England, "pines" for the father and "asks constantly to be told stories of his life and times" (see, for example, the paternal grandmother's affidavit filed on 18 September 2006, annexure A, par 4; and annexure B, pars 21-27; the paternal grandparents' joint affidavit filed on 30 November 2006, annexure A, pars 17 and 19; and their further joint affidavit filed on 20 December 2006, annexure A, par 1C)
- The child is more mature since the final orders were made (affidavit filed on 20 December 2006, annexure A, par 1B)
- Although (as they properly concede) it is not a new factor that the father lives in England (he lived there at the time the final orders were made) however it is a new factor that the child is now expressing strong wishes to see him
- The child has a half sibling (F) living in the England with the father and his new partner, which sibling is now 3½ years whereas, at the date the final orders were made that child, although then born, was an infant, the new factor being that, as

both the child and half sister are older, there would be benefit now in the child being able to develop a sibling relationship with the half sister

- The father has gained more emotional stability in the period since the final orders were made, so that it would be of benefit for the child to spend time with the father, however, the father is unable to afford the cost of visiting the child in Australia (cf, however, the evidence that the father has agreed to pay the fares for the child and one of the paternal grandparents each year).

15 The paternal grandparents' application is supported by the child's father. See his response filed on 2 November 2006 and his affidavit filed on the same date.

16 The mother's case is that the child's circumstances are unchanged since the final orders were made. See her affidavit filed on 11 October 2006, pars 11-14.

17 Ms Howe of Counsel, for the mother, referred to the mother's affidavit as showing that all of the child's "living, schooling and other circumstances remain the same" as when the final orders were made, in particular that the child "still resides with the mother in the former matrimonial home at [B]", "she attends the same school" and "she remains in good health". Ms Howe submitted that the paternal grandparents' circumstances also are unchanged as are the father's living circumstances in that "he remains living in England with his de facto partner (the father says financée) Ms T, her two children and their child F. Ms Howe said that F, the child's half sister, had been born at the time that the orders were entered into in September 2004.

18 Ms Howe referred to the circumstance that the "only apparent change" is the age of the child and her "apparent expressed wishes".

19 Ms Howe referred to various authorities to the effect that whilst there is "no fixed minimum period" in which a question of changed circumstances "can or cannot be reconsidered by the Court", in this particular case the child was "about to turn 7 years" when the orders were made and is "currently 9", just over two years having passed since the orders were made, conceding however that the Court should consider the "development, age and maturity" of the child in deciding whether orders should be revisited. Generally, Ms Howe submitted that in the two years since the final orders were made, the child's "psychological and physical needs have not significantly changed to the extent necessary to justify reopening the issue of parenting orders" and that there is nothing in the paternal grandparents' affidavit material which

"compellingly demonstrates" a significant change. Ms Howe was critical of the paternal grandparents' evidence that the child "constantly" asks about the father and her sibling and has "often" asked to go to England, submitting that these words are of "little assistance" in the absence of "the actual words used by the child".

20 Ms Howe submitted that the father's affidavit is important because although it explains why he cannot come to Australia, he only says in the final paragraph that the child is "constantly asking if she can come to visit us".

21 Ms Howe referred to the mother's evidence that the child has not expressed *to the mother* that she wants to travel to England and has not "frequently" asked the mother to know more about the father and the child's extended family in England.

22 Ms Howe, otherwise, made submissions which would be relevant at the hearing of the matter, if it is not to be summarily dismissed, but which are not directly relevant to the threshold consideration of whether the circumstances are sufficiently changed to consider afresh how the welfare of the child should best be served. For example, Ms Howe submitted that the longest period of time the child has been separated from the mother is one week, and that the father's availability to the child in England, if the child were to travel there, appears to be limited to weekends and before and after school, because of the father's work commitments. However, these matters, and the related question whether it would be more in the child's best interests for the father to come to Australia to spend time with the child (which itself potentially would require a new final order, as not specified in the current order), rather than the child spending time with the father and the child's extended family in England, do not go to the question presently raised for decision, which is whether the paternal grandparents' new proceedings should be summarily dismissed for the want of a new factor or a significant change in circumstances.

23 Ms Howe concluded by submitting that in the absence of "clear and compelling evidence" of a material or significant change in circumstances there should be "no further litigation" between the parties and that "the Court should not be expected to guess or judge whether the passage of two years in the life of the child constitutes such a change", adding, by reference to *King and Finneran* (2001) FLC 93-079 at 88,368 (Collier J) that the change must be "of consequence and must be more than

that which would occur by the passage of time or in the usual course of human activity".

Decision

24 I have carefully considered the evidence (whether or not specifically referred to in these short reasons) and the written and oral submissions of the parties (again, whether or not specifically referred to in these short reasons).

25 I am satisfied, on the evidence, that there is a new factor or a significant change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served.

26 **First**, it is a new factor, and a significant change in circumstances, that *since* the final orders were made, the child has commenced to express strong wishes to see the father *in England*, as well as her sibling and other paternal relatives there. Put shortly (paternal grandparents' affidavit filed on 30 November 2006, annexure A, par 19):

> [The child] has expressed a very strong desire to go to England to see these people and places.

27 **Secondly**, it is plain enough to me that a new dispute has developed between the mother and the paternal grandparents *since* the final orders were made, as evidenced by the four letters to which I have referred. The heart of the current dispute, which developed only between March and May 2006, relates to the question whether the child should be permitted to travel outside Australia *without* the mother's permission, and to have provided to her a passport for that purpose. According to the paternal grandparents (affidavit filed on 30 November 2006, annexure A, pars 20 and 21) the correspondence evidencing the current dispute directly arose out of the child's own expression to the paternal grandparents of a strong desire to go to England to see the father and her other relatives there. Thus, the paternal grandparents wrote to the mother to request permission to take the child to England, and the mother flatly refused.

28 Although it is true that the final orders made on 13 September 2004 provided that the paternal grandparents *not* remove the child from Australia *without the written consent of the mother* (par 10, set out above), and PACE and other orders were made (pars 11-13), which matters demonstrate that the question of overseas travel for the child is not

in itself a new factor, and plainly was considered by the parties before those orders were made, the new factor has arisen by the *withholding* of that consent, in the significant circumstances which have arisen since the final orders were made, namely, as I have said, the child expressing strong wishes to visit the father in England, leading to the paternal grandparents' request for the issue of a passport for the child and their request for the mother's specific consent, which has been refused. These are new factors which have arisen only in 2006.

29 Further, the existing orders contemplated *agreement* between the parties in relation to such future matters ("such times as may be *agreed* upon between the parties" but *failing agreement* as provided in the orders). Thus, it is a further new factor or significant circumstance that the contemplated agreement for other or different orders has not been forthcoming. In this context, the child herself has said, as to the mother's refusal of permission (the child's own words): "I won't be allowed to go till I'm 20" (paternal grandparents' affidavit filed on 18 September 2006, annexure A, par 4).

30 In many cases, these matters are not necessarily the subject of preliminary submission or preliminary determination. However, as the mother has raised the matter for preliminary determination, and I have fully considered the matter, without hesitation I find that there is a new factor and a significant change in circumstances such as to require the Court to consider afresh how the welfare of the child should best be served, being the matters referred to above, but predominantly the child's newly expressed wishes, and the consequence of the mother's refusal leading to the current dispute, expressed in the four letters referred to.

31 Thus, at the hearing of the paternal grandparents' proceedings, the mother will be precluded from arguing again that the threshold test has not been met, so that the matter will proceed with that hurdle for the paternal grandparents out of the way, the task of the trial Judge then being to determine the paternal grandparents' application "in the ordinary way". See *Rice and Asplund* (above) at 78,906.2.

32 The mother's application filed on 27 November 2006 for the summary dismissal of the paternal grandparents' application in form 1 for final orders filed on 18 September 2006 will be dismissed.

33 I should add that Ms Howe's written submissions placed reliance on the paternal grandparents' failure to comply with the pre action procedures set out in the *Family Law Rules 2004* as a ground relating to the mother's application for summary dismissal. However, in oral argument, Ms Howe made clear that she relied on this aspect of the matter only in relation to the mother's costs application. It is therefore not necessary to deal with this aspect of the matter in relation to the summary dismissal application.

Costs

34 The paternal grandparents, who are litigants in person, also filed on 18 September 2006 a form 2 application and an affidavit by the paternal grandmother in the form styled "Interim residence, contact or specific issues order".

35 On 11 October 2006, the mother filed four documents in relation to those two documents filed by the paternal grandparents, namely:

- Response to an application in a case in form 2A
- Affidavit of Mr H
- Affidavit of the mother
- Further affidavit of the mother.

36 Presumably, the mother's costs application for her costs of "and incidental" to her form 2A response is intended to embrace not only the costs of the preparation and filing of her form 2A response on 11 October 2006 alone, but also the costs of the preparation and filing of the three affidavits referred to filed on 11 October 2006.

37 However, I do not know why any of those documents by or on behalf of the mother filed on 11 October 2006 was prepared or filed.

38 A cursory glance at the paternal grandparents' application in a case filed on 18 September 2006 shows **expressly** at Part C, item 5, that interim orders were **not** sought, and that the **only** matter which the paternal grandparents required to be determined was their application for final orders in form 1. Part C, item 5, asks the question "What type of orders are you seeking?" and gives the direction to "Mark [**X**] all boxes that apply". Below that question and direction nine boxes are represented. The first box marked "Interim children (parenting orders)" is **not** marked by the

paternal grandparents with an **X**. The **only** box marked by the paternal grandparents with an **X** is the box designated "Other (specify)" against which the paternal grandparents have printed clearly in black pen "Application for Final Orders Form 1 Family Law Rules – Rule 2.01".

39 It is plain to me that, as litigants in person, the paternal grandparents did not ever seek interim orders or any interim hearing, and simply used the wrong form, or rather, completed both a form 1 and a form 2, but making expressly clear, when read together, that their only application was for final orders in form 1.

40 In support of the mother's costs application (application in a case filed on 1 November 2006), Ms Howe (amongst other material) read an affidavit of Mr H filed on the same date. In that affidavit, Mr H refers to and annexes a letter by him to the paternal grandmother dated 3 October 2006 requiring the paternal grandparents to withdraw **both** the form 1 and the form 2 applications by 4pm on Friday 6 October 2006, warning that if this course not be taken then on 16 October 2006 (apparently the scheduled date of a case assessment conference before Registrar Gassner) the mother would seek an order on that date that the paternal grandparents pay the mother's costs on the indemnity basis. Mr H's letter points out also to the paternal grandparents that they had not complied with the pre action procedures required by the *Family Law Rules 2004*.

41 The paternal grandparents responded by email on 4 October 2006 acknowledging Mr H's letter and a further email on 9 October 2006 stating that on their reading of the *Family Law Rules 2004* the correspondence between the mother and them (referred to above relating to their request to take the child to England and the mother's flat refusal) amounted to a "genuine intractable dispute" so that they were exempt from complying with the pre action procedures. (See *Family Law Rules 2004*, Schedule 1, Part 2 – clauses 1(2) and 1(4)(d)).

42 The paternal grandparents' email on 9 October 2006 continued:

> Commencing action for a Court order was our last course of action and was only commenced after [the mother] made it clear that she would not permit our granddaughter to visit her father, her step brothers and sister, and her uncles, aunts and cousins that reside in England.
>
> We would request that rather than you threatening to have the matter thrown out of Court, that a mechanism be agreed whereby our granddaughter can

> spend time with and communicate with her father and other family members in England this Christmas.
>
> We do not seek for [the mother] to build up legal costs nor would we be liable for her costs on an indemnity basis. [The mother's] legal costs are for her and her alone to pay.

43 Earlier on the same day, the mother's solicitors had responded to the paternal grandparents' email of 3 October 2006 noting that it did not "respond to the matters raised" in their letter of 3 October 2006 and stating "We are proceeding to finalise our client's material in response which we will deliver tomorrow".

44 At the case assessment conference before Registrar Gassner on 16 October 2006, attended also by Family Consultant Fitzgerald, the Registrar ordered that within 14 days the paternal grandparents file and serve a notice of discontinuance in relation to their form 2 application filed on 18 September 2006. I do not know what transpired at the case assessment conference before the Registrar leading to the making of that order. However, on 25 October 2006, the paternal grandparents filed a notice of discontinuance in relation to their form 2 application filed on 18 September 2006. Thus, the form 2 application was on foot for the period of a little over 5 weeks.

45 On 16 October 2006, Registrar Gassner ordered also that a form 1A response be filed by the mother, that the parties attend a child dispute conference on 20 November 2006 and the mother file and serve any form 2 application for summary dismissal of the paternal grandparents' form 1 application by no later than 27 November 2006.

46 Further correspondence then ensued in relation to the mother's costs of the paternal grandparents' discontinued form 2 application, including an email from the mother's solicitors to the paternal grandparents on 26 October 2006, a response by email from the paternal grandparents on 28 October 2006, an email from the mother's solicitors to the paternal grandparents on 31 October 2006 (all annexed to Mr H's affidavit), and an email from the paternal grandparents to the mother's solicitors on 2 November 2006 (annexure 1 to the paternal grandparents' affidavit filed on 30 November 2006). In that email, the paternal grandparents suggested that the mother's application for costs be withheld until the matter has been heard by the Court.

47 The paternal grandparents have accused the mother of running up costs unnecessarily, and are critical of the mother's lengthy and in their submission "unnecessary" discourse in her affidavit material filed on 11 October 2006 extending unnecessarily

(according to the paternal grandparents) into the history of the matter long before the final orders were made on 13 September 2004, that material, in their submission, not being relevant to the short point in the current dispute; of annexing "voluminous" material which "has no bearing" on the matters now in issue, and concluding (paternal grandparents' affidavit filed on 30 November 2006):

> 57. We deplore the inclusion of extraneous material that is not relevant to the case, and the greed of a Lawyer trying to frighten us off with expenses we can ill afford.

48 It is worth setting out also the paternal grandparents' par 28 (and see generally pars 28-57):

> 28. The Registrar's Family Consultant sees the proceedings as essentially a "simple matter", made difficult by the Mother's intransigence and her solicitors desire to build up cost such as, for example, when he unnecessarily accompanied the Mother to a four hour Case Management Conference with the Family Consultant and the Registrar on the 16 October 2006, and then took her for coffee after the session had ended.

49 Leaving all of these matters aside, however, as I have said, a cursory glance at the paternal grandparents' application in a case shows plainly that they did not ever apply for any interim orders but made clear at all times that their only application was their application in form 1 for final orders. It appears that they made a procedural error in completing two forms, rather than one form, but made clear on any sensible reading of those two forms together that they did **not** have any application for any interim orders or any interim hearing. Further, there was never a listed interim hearing date. Rather, the only listed date was for the case assessment conference on 16 October 2006. Perhaps, Registrar Gassner pointed out to the paternal grandparents that they had used the wrong form, thus leading to the notice of discontinuance.

50 In these circumstances, it is not appropriate that I proceed further to consider the mother's costs application, because the mother's solicitors plainly should be given the opportunity to explain why on the mother's behalf they prepared the material filed on 11 October 2006, instead of simply writing to the paternal grandparents to confirm (which I would have thought plain) that no interim orders or interim hearing were sought.

51 I note that some of the mother's material filed on 11 October 2006 was relied upon also in relation to the mother's (wholly unsuccessful) application for the summary dismissal of the paternal grandparents' application in form 1 for final orders (see, for example, pars 16, 17 and 21 above), although this application was not filed until 27 November 2006, and was supported otherwise only by a short formal affidavit by Mr H (three short paragraphs) filed on the same date. That affidavit however incorporated by reference reliance on the mother's substantive affidavits filed on 11 October 2006.

52 Thus, it may be likely that if the two affidavits of the mother filed on 11 October 2006 had not already been prepared and filed, they may have had to have been prepared and filed in any event in support of that later (wholly unsuccessful) application. That is not however a reason to grant the mother those costs because, as I have said, that application by her was wholly unsuccessful.

53 Another consideration, generally, is that it is not an answer that in relation to the mother's resistance of the paternal grandparents' form 1 application, the same or similar instructions would have had to have been taken at some stage, and the same or similar affidavits of the mother prepared. That is because rule 15.06(3) provides that an affidavit may be relied on in evidence only for the purpose of the application for which it was filed, and rule 15.07(2) provides that, for the purposes of a trial, each party must file at least fourteen days before the pre trial conference one affidavit setting out the party's evidence in chief (unless the Court orders otherwise: see r 15.07(2) and Note 2).

54 Thus, in anticipation that the mother's one trial affidavit in the form 1 proceedings will or may be likely to be largely a reproduction of her two affidavits filed on 11 October 2006, the cost of taking the mother's instructions and preparing her substantive material, although that has already been done, possibly should be regarded, in all of the circumstances, as overlapping her necessary costs of meeting the paternal grandparents' form 1 application. This cannot be assessed until after the trial, when a comparison of the mother's affidavits filed on 11 October 2006 and her one trial affidavit can be made. Presently, having regard to the substance of the mother's affidavits filed on 11 October 2006, there is no reason to think that her one trial affidavit will be any different in content or format from her affidavits filed on 11 October 2006 (the major component of her proforma affidavit filed on that date is a

large, already prepared substantive annexure), although this material would have to be resworn, as the mother's one trial affidavit, unless the Court orders that she may be permitted at the trial to rely on her existing affidavits filed on 11 October 2006 as her trial material.

55 I am conscious that rule 5.05 requires that, upon the filing of a form 2, the Registry Manager must fix a date for a hearing, procedural hearing or case assessment conference. Thus, it may be that, regardless of the paternal grandparents' procedural error in filing their form 2 application, unavoidably they have caused (at least) the incurrence of the mother's costs of her solicitor's attendance on 16 October 2006 with Registrar Gassner and Family Consultant Fitzgerald.

56 I am conscious also that rules 9.05 and 9.06 require a respondent to a form 2 application who wishes to oppose it or who seeks different orders to file a response in form 2A and, at the same time, an affidavit stating the facts relied on in support of the form 2A; and that pursuant to rule 9.08 these were required to be filed at least 7 days (form 2A) and 2 days (affidavit) before the case assessment conference scheduled for 16 October 2006. However, in this particular case, what must be determined is whether it was reasonable for the mother to incur the expense of responding to the form 2 in the circumstances of the paternal grandparents' obvious procedural error, rather than, for example, simply writing to the paternal grandparents pointing out their error, or writing to the Registrar assigned to the case assessment conference to the same effect, and requesting in all of the circumstances that the mother's need to comply with rules 9.05 and 9.06 properly should be waived.

57 If this course had been taken, then the mother may not have been required to prepare or file *any* material before the case assessment conference scheduled on 16 October 2006. (Rule 9.02 provides in relation to a form 1A that, unless items 5 or 6 in Table 2.2 in rule 2.02 apply (which items do not apply because, relevantly, the paternal grandparents' application in form 1 did not relate *only* to a passport - see rule 4.30), an affidavit **not** be filed.

58 A further consideration is that the paternal grandparents have acted selflessly, in the child's best interests (certainly not their own interests) in seeking, properly, to bring the child's expressed wishes and current dilemma before the Court. On one view, it is difficult to think that they should be penalised for that by suffering a costs order. As

litigants in person, they cannot be expected to be as familiar with the Rules of Court as the legal practitioners, nor to read and understand the Rules of Court as a practitioner would. Plainly, the paternal grandparents believed that in order to comply with rule 2.02 (to which they expressly referred), they were simply following what was required of them.

59 I will therefore reserve the mother's costs application to the trial Judge, and order that these preliminary observations be brought to the attention of the trial Judge at the hearing of that costs application and, if the mother should be granted her costs by the trial Judge, be brought also to the attention of the Registrar when the costs are assessed.

60 I will add that, pursuant to Registrar Gassner's orders made on 16 October 2006, there has been a child dispute conference on 20 November 2006, with a consequent memorandum signed by Family Consultant Fitzgerald stating that in his opinion a judicial decision is required (folio 32). It may be hollow, thus, for the mother to suggest that the paternal grandparents' non compliance with the pre action procedures may have had the result of avoiding the proceedings. The paternal grandparents' non compliance with the pre action procedures, however, and the paternal grandparents' claim for exemption by reference to clauses 1(2) and 1(4)(d) of Schedule 1, Part 2, *Family Law Rules 2004*, are more relevant to the costs of the form 1 proceedings, rather than the mother's present application which is limited to her costs related to the form 2 proceedings.

61 I would emphasize (in case I should happen to be the trial Judge) that the observations which I have made in relation to the mother's costs application are not a prejudgment of the matter, but are to serve only as matters which, before the costs application can be determined, the mother's solicitors should have the opportunity to address and make specific submissions as to why they caused the material filed on 11 October 2006 to be prepared and filed which material, arguably, *may* have been wholly unnecessary because, expressly, the paternal grandparents did not seek any interim orders or any interim hearing. In all of the circumstances, it *may* be a proper exercise of the discretion to allow the mother her solicitor's costs of taking instructions for and attending the case assessment conference on 16 October 2006, but not of the preparation of any of the material filed on 11 October 2006. On the other hand, it *may* be that the view properly could be taken that, despite the paternal grandparents'

(obvious) procedural error, the mother, by her solicitors, was obliged to comply with rules 9.05 and 9.06.

62 It would be useful, at the further hearing of the matter, to have some indication of the amount of the mother's costs, both on the indemnity and on the standard basis for (1) taking the mother's instructions; (2) attending the case assessment conference; and (3) the preparation and filing of the material filed on 11 October 2006, having regard to the obligation under s 117(2A) to consider the parties' financial circumstances; plus some indication of how much of that work (if any) would have had to have been undertaken in any event to prepare the mother's trial affidavit (eg, taking instructions, and preparing the trial affidavit) to assess to what extent (if any) that work may overlap, or would or may have been incurred in any event by the mother in order for her trial affidavit to be prepared.

63 I would add further that there is no evidence as to the mother's financial circumstances, as frankly conceded by Ms Howe in her written submissions, page 4 (other than that the mother apparently owns her own home (value and any encumbrance unknown), and is employed (salary unknown)) and little evidence as to the paternal grandparents' financial circumstances, other than that they are retirees (in receipt of a War Service pension and superannuation) and cannot afford a lawyer themselves (let alone, on their case, pay the mother's solicitor's costs). The paternal grandparents said that they have spent $16,000 (apparently in the 2004 proceedings) but cannot afford their own legal representation now. Ordinarily, this deficiency in the mother's evidence as to her own financial circumstances would have been fatal to her application, having regard to the terms of s 117(2A)(a) as a relevant matter which the Court is required to take into account in considering what order (if any) should be made in relation to costs applications. Thus, if it had not been necessary to afford the mother's solicitors the opportunity to explain why on the mother's behalf they prepared and filed the material filed on 11 October 2006, it may be that, properly, I would have dismissed the mother's costs application outright for the fatal deficiency in necessary evidence concerning the mother's financial circumstances. There will now however be an opportunity to remedy that otherwise fatal deficiency, if the costs application is pursued at all.

I certify that the preceding sixty three (63) paragraphs are a true copy of the reasons for judgment of the Honourable Justice O'Reilly

Associate:

Date: 2 April 2007