

FAMILY COURT OF AUSTRALIA

TARELLI & LANGLEY (NO. 5)

[2021] FamCA 26

FAMILY LAW – PRACTICE AND PROCEDURE – Stay of proceedings – Where the father seeks a stay of final parenting and property orders pending the determination of an appeal – Consideration of the relevant principals relating to a stay – Where the stay is granted.

Aldridge & Keating (Stay Appeal) [2009] FamCAFC 106

Clemett & Clemett (1981) FLC 91-013

APPLICANT:

Mr Tarelli

RESPONDENT:

Ms Langley

FILE NUMBER:

PAC 4311 of 2014

DATE DELIVERED:

22 January 2021

PLACE DELIVERED:

Sydney

PLACE HEARD:

Sydney

JUDGMENT OF:

Henderson J

HEARING DATE:

21, 22 January 2021

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Mr Shaw

SOLICITOR FOR THE APPLICANT:

F W Ewart & Ewart

COUNSEL FOR THE RESPONDENT:

Mr O’Ryan QC

SOLICITOR FOR THE RESPONDENT:

Adam Jones Solicitor

COUNSEL FOR THE INTERVENER:

Ms Mahony

SOLICITOR FOR THE INTERVENER:

Crown Solicitors Office

**COUNSEL FOR THE INDEPENDENT
CHILDREN’S LAWYER:**

Ms Messner

**SOLICITOR FOR THE INDEPENDENT
CHILDREN'S LAWYER:**

Robertson Solicitors

ORDERS

- (1) The father's amended application for a stay on final orders filed 20 January 2021 is granted.
- (2) The mother's application for enforcement filed 4 January 2021 is dismissed.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Tarelli & Langley* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: PAC 4311 of 2014

Mr Tarelli
Applicant

And

Ms Langley
Respondent

And

Department of Communities and Justice
Intervener

REASONS FOR JUDGMENT

1. This was an application by the mother for enforcement of final orders dated 18 December 2020 in relation to parenting and an application for a stay of those orders by the father pending the hearing of an appeal which appeal was filed on 4 January 2021.
2. Mr O’Ryan, senior counsel, appeared for the mother, Mr Shaw for the father, Ms Messner for the Independent Children’s Lawyer (“ICL”) and Ms Mahony for the Department of Communities and Justice (“the Department”).
3. I determined to hear the stay application first as that decision would impact upon the mother’s enforcement application. I note the Department and the Independent Children’s Lawyer support the father’s application for a stay.
4. The material I read was as follows.
 - a) For the mother:
 - i) Application in a Case filed 4 January 2021 supported by an affidavit together with an affidavit of 18 January 2021 and her Response to the father’s application for the stay;
 - ii) Affidavit of her mother, Ms OO, sworn 11 January 2021.
 - b) For the father:
 - i) Notice of appeal filed 4 January 2021;

- ii) Application for stay of orders filed the same date and an amended application for stay filed on 20 January 2021;
 - iii) Response to the mother's application for enforcement of orders dated 20 January 2020;
 - iv) Affidavits sworn by himself on 30 December 2020, 5 January 2021 and 14 January 2021;
 - v) Affidavits of his partner, Ms S, sworn 5 January 2021 and 20 January 2021, except for paragraphs 5 and 6 which I did not read;
 - vi) Affidavit of the husband's friends, Mr VV, sworn 4 January 2021 and Ms WW sworn 6 January 2021;
 - vii) Affidavit of the father's solicitor, Mr Ewart, sworn 18 January 2021.
- c) For the Department, the affidavit filed by Ms XX dated 20 January 2021.
5. In addition, the mother tendered two exhibits:
- a) Exhibit 2 was her amended case outline;
 - b) Exhibit 1 was a bundle of correspondence, being four letters.
6. The first was a letter dated 24 December 2020 from John Shaw, the father's counsel, to the Crown Solicitor's Office, the mother's lawyer, Independent Children's Lawyer and other parties, which letter inter alia says the father was drafting and filing a Notice of Appeal seeking an expedited hearing and a stay of the orders and in those circumstances no steps will be taken to effect a changeover of the child, D, on 1 January 2021 to the mother.
7. A second document, a letter dated 29 December 2020, from the mother's lawyers saying they expected the orders to be complied with.
8. A third letter from Mr Shaw dated 30 December 2021 to the mother's solicitors, the Department, ICL and others confirming the Notice of Appeal and affidavit and stay application were being urgently drafted. The father had been on holidays. Whilst there was no stay of the orders they are not unenforceable, even if an appeal is being filed, and confirming the father will take no steps to frustrate or impede the operation of the orders, which remain in force, and changeover will occur as per the orders of 1 January.
9. The fourth letter, being an email from Ms Bennett, senior solicitor for the Crown Solicitor's Office, dated 31 December 2020, confirming she had had some communication from Mr M regarding the transfer of D tomorrow to his mother.
10. Mr M had been trying unsuccessfully to arrange to speak with D, to inform him of the Orders and provide some psychological support to him and the father

had not made him available. The email confirmed Order 8 of my Orders, stating that both parties were to accept Mr M's reasonable directions. Further, that Mr M was concerned regarding the psychological trauma to D if he did not speak with him and he was only available to 12.30 the following day. The father was encouraged to confirm and speak with Mr M and the Department indicated they had made arrangements for a contact worker to attend and support the transition.

11. At the outset there was a complaint from Mr O'Ryan, senior counsel, as to the involvement of the Department in the proceedings.
12. However, they had been joined and I had formed the view it was essential they be part of the stay application for the following. The affidavit filed by Ms XX contained information from the Departmental file, which would have otherwise have been extremely difficult for anyone to have obtained and, given that the stay application concerns a child and the best interests of a child are a relevant consideration forming in a stay application, it was crucial I had the best and most up to date information concerning D. Further, they were involved in the eight-day hearing before me in August 2020 and they will be involved in the appeal of those orders. The matter was heard over eight days, the last hearing date being 14 August 2020, and I delivered judgment on 18 December 2020.
13. In the judgment I ordered the child to be returned to his mother's care within two weeks of the date of the judgment delivery and provided a process for the child and his parents to have support from Mr M, who had given evidence at the hearing and had been assisting the mother in this protracted and difficult case some time prior to the child being removed from her care in 2017.
14. I had ordered the child to have time with his sister on Saturday and supervised time once a month with his father and provided ongoing therapeutic support for the child, his mother and father and the mother was to continue treatment with the psychiatrist, Professor LL.
15. I made orders for a property adjustment.
16. Between the cessation of the hearing and delivering of judgment and on or around 6 October 2020 the Department contacted my chambers and filed an application with an affidavit of Ms N indicating they were considering lodging an application to reopen on fresh or new evidence.
17. My chambers responded on 6 October that once that application to reopen was filed "it would, of course, be considered by [me]". No application was ever filed to reopen by the Department, Independent Children's Lawyer or any other party to the proceedings. It became clear during this hearing there was fresh evidence not before me during the trial and that information comes from the attachment to the father's affidavit of 14 January 2021.

18. The father attached to his affidavit a ROSH Report of a helpline interview, with a person unknown, concerning D on 4 September 2020 with a Ms ZZ from the Department. This assessment was not completed and released until 23 September due to her ill health.
19. I can only assume that that Report, which was never brought to the Court's attention, was the basis of the Department foreshadowing of the bringing of an application to reopen, which do not eventuate. I am unclear when the father received the report and the Independent Children's Lawyer received the report, if they did. However, the father says in his affidavit of 14 January 2021 at paragraph 4 in relation to ROSH Reports:

The five documents are clearly relevant to the mental and emotional health of D, however, I do have in my possession an earlier document which is dated 23 September, which is relevant to D's mental health and emotional health as at September 2020.

20. This document and its contents were never brought to the Court's attention, the mother's attention or Mr M's attention prior to delivery of my judgment. The report is concerning. It says as follows:

The [unknown informer]...

But I can deduce it is the mother, father or someone close to the child because it happened at the child's home:

... notes the department has no concerns about the child living with the child and Ms S and he has been thriving.

That was the evidence at trial.

There was a family law hearing at the start of August. There is a possibility D may be moved back to the care of his mother [and that is what she is seeking]. D is aware of the proceedings and that he may be moved back to the care of his mother. This has caused a lot of distress and anxiety for D.

21. His distress and anxiety was detailed in the report as follows.

On 1 September 2020 D was playing [on a board game] and disclosed experience of violence and fear of his mother. [He disclosed] when he lived with his mother and his mother was mad at him she "kicked him in the bum and locked him in his room."

[He] struggled to breathe due to lack of air and demonstrated how he hyperventilated when he was locked in his bedroom. [He] said he hid under his bed covers when he was locked in his bedroom to try and calm himself down and regulate his breathing. [He] disclosed he has recently been thinking he will need to smash his bedroom window to break out of his room, if he lives with his mum. However he thinks this will make his

mum madder and it would cause his hands to bleed from the broken glass. D said he had been kicked in his bum and locked in his room on multiple occasions when he lived with [his] mum previously.

[D was asked] how that made that him feel and he said, "I wish I had a different mum, a better mum."

[He was asked if he] missed his mum and he said, "Not really anymore after all she has done." [Asked how he] would feel if he went to live with his mum he replied, "I would hate it. I don't trust or believe Mum because she has made up lots of lies about Dad hurting her," that his mum has "lied to lawyers and everyone" and stated he does not know who to believe because his mum says she is scared of his dad.

[He] explained at his dad's house when he's in trouble he "has consequences...", [but] at his mum's house he "is hurt"...[that he] had developed a sweet tooth from his grandma giving him a lot of candy when he was younger and [they] had "McDonalds four times a week."

[He said he] now realises this is bad parenting, but not as bad as his mum's parenting. When asked what that meant [he] said, "Well, think about it, would you rather be given too much candy or be hurt?"

22. D told the interviewer his dad had told him to ring the police and had given him a phone if he feels scared and the interview was terminated at that point. A few minutes later D asked, "Are you going to tell [an unknown person] what I told you?"

23. And that person's name was blanked out when I say "unknown":

[He] was asked, "Would you like me to tell her?" and the child said, "Yes. That's why I told you." D then said, "I'm worried I will have to leave here and go and live with my mum. I don't want to leave here."

I can only assume the person he is speaking of is the judge, but I could be entirely wrong.

D said again, "It's just consequences here, but at my mum's house I get kicked in the bum and locked in the room. I'm worried if I'm locked in my room I will need to smash the window and break out, but then I might hurt my hand."

[...]

[He] said, "I don't want to live with my mum because then I will only see my dad 4 hours a month. That's not enough. There's 24 hours in a day. 4 hours is not even a quarter of a day."

24. Thus, it is clear that Mr M's opinion expressed by him in an email to Ms AB from the Department dated 31 December 2020 attached to Mr Shaw's affidavit

that D did not know of the Court orders, namely that he was to live with his mother, and Mr M was very keen to speak to him before he knew this may be correct. But he certainly knew the possibility of what might happen just shortly after the hearing as he had clearly been told about the four hours by his father and only his father, or Ms S for the following.

25. At the time of the interview with Professor TT just prior to the hearing the mother's application was the child live with her and spend no time with his father thus his knowledge of the four hours that was ultimately proposed by the mother at the final hearing can only have come about from conversations that the father and perhaps Ms S had with him. I don't know.
26. It is clear from this Report D has been concerned about the possible outcome of the Court proceedings since 4 September 2020 and has received no professional assistance whatsoever from the Department, who still had parental responsibility from him. This lack of providing this child with this necessary support is the continuation of the failure to provide assistance to the family when he was removed from his mother's care in 2017. Had this report become known to the Court prior to delivery of judgment it would have caused me to reassess the view I had formed as to the weight I should attach to D's wishes expressed by Professor TT and expressed to her by him.
27. Further, and of great significance, it would have caused me to assess the opinion I had formed based upon the evidence that D had never been hurt or harmed in his mother's care, physically in this sense. No such questions were asked of her or allegations made of this behaviour. However, in ignorance of this important evidentiary document I delivered judgment on 18 December 2020.
28. D has not been returned to his mother or placed in her care, as my orders anticipated he would be and as Mr M and the mother anticipated would happen as is clear from the email trail attached to Ms XX's affidavit. It was agreed with the assistance of Mr M that D would be returned to his mother's care with Ms S meeting the maternal grandmother at Suburb AC on 31 December 2020.
29. That was agreed on 30 December 2020 to happen on that day. It is clear from Mr M's email dated 31 December 2020 at 10.55AM and as set out in Ms XX's affidavit this did not eventuate as Ms S became concerned for her own reasons that as Suburb AC was a public place, she would be at risk and may not be able to contain D or control him. A decision was made that the changeover should occur at D's home. Mr M's email dated 31 December 2020 at 2.28PM was as follows:

I have had two lengthy conversations with D this morning by Zoom. He is prepared as much as he can be for a transfer to his mother's care at 10.30 am tomorrow. In...light of my discussions with D and Ms and I've changed the arrangements for his transfer [and] he is to be collected from

his home [in Suburb E] by his maternal grandmother and the contact worker. The father and the stepsister will not be at the home. All Parties were aware of this arrangement. As discussed I have advised the mother that the contact worker will drive D and his grandmother to [her] home.

30. There was some reference about mobile telephones. What occurred on the day of the alleged transfer is the father organised for other adults to be at the home and BD was also at the home with her mother. The father was not present. In addition, Mr Shaw, the father's counsel, and his assistant were also present.
31. I accept the evidence of the maternal grandmother that D only had one small bag packed and it appeared to her there had been little physical preparation for him to transition to her care into the van with the worker to be returned to his mother. The mother parked up the road and the grandmother remained at the father's home for nearly five and a half hours and I accept as time went by D became more anxious and his behaviour and emotional state deteriorated.
32. Ms WW says in her affidavit, she being one of the father's friends or support friends that came to the property, sworn 6 January 2020 as follows:

[I went to the home] as we knew Ms S was quite distressed about the whole situation and we wanted to give Ms S support...she has an infant aged 2 years, we went over with that intention. I was not aware Mr Tarelli had arranged for support persons to attend the home. I have never met [his] friends before.
33. Ms WW attests, and her attestation is supported by the maternal grandmother, that Mr Shaw was also in attendance at the home with his assistant. Thus, there were six adults at the home, not including Ms S and the grandmother. When the grandmother arrived there were eight. Mr M's email was clear. BD was not to be there. She was and Ms S and the grandmother were to do the changeover.
34. Continuing on with the affidavit, the driver who was to collect D and drive with him and his grandmother to the mother's home arrived "about 10.20am."
35. For reasons that escape me, Ms WW believed it was her right to question this person as to why he was involved, what his credentials were and why he was there. I did not know she has a role in this affair, but there it is. She further attests around 10.35AM the grandmother arrived and the mother parked a distance up the road. The grandmother alighted the car, spoke to the driver. D was playing on the trampoline and playing on the trampoline is a feature of everybody's affidavit material in this matter.
36. Ms WW observed D and his grandmother speak. His grandmother went to the van to get a gift that his grandmother had for him. She says the grandmother grabbed his arm. D called out, "You are trying to trick me. I'm not going with you." He ran inside and the grandmother kept calling out to him.

37. Ms WW, taking a somewhat proprietorial role, invited the grandmother to come in. Unsurprisingly, the grandmother refused. At this time Ms S had been breastfeeding her two year old daughter, BD, at the very time the grandmother arrived to have D transferred and transitioned into his grandmother's care. Further, one of the father's friends was filming the event, having been given a phone by Ms S. The grandmother observed this and she said she felt intimidated. The grandmother says she did not hear the mother or any of their friends or support people, if I can use that word, that the father had invited to his home encourage D to go with her and this is confirmed in their affidavits as no such thing is said by any of them at any time, including Ms S. Ms S and all the support people say the grandmother kept asking D to come with her.
38. Ms WW asserts D did not engage with his grandmother, kept saying, "I don't trust you. You tried to trick me." He was hitting his head against a wall, told her he wanted to hurt himself, "so they don't take me away." When he saw his grandmother he ran away. She says he was in the kitchen having a cup of orange juice, sitting at the table:
- ...I could see he was holding something with his right hand and tapping it with his left... I could not see what was in his hand. I heard him say, "*I'd rather kill myself than go with them... [I'd] rather die than go with Mum and [Grandma].*"
39. Another support friend, Mr VV, rushed over to where D was and said, "What are you doing?" took the large chef's knife away from him and hid the knife behind the kitchen sink.
40. D ran away as soon as he saw Ms OO and kept saying, "I love Ms S. I want to stay with her and BD. There is no way I am going with these people." Ms WW confirms what the grandmother says that Ms S left it up to the grandmother to encourage D to come with her, for she reports the grandmother saying to him there was a Court order and the judge wanted him to go and live with his mother. She does not report any other adult saying this, including Ms S.
41. Now going to the affidavit of Mr VV dated 4 January 2021 and it is as follows. She says she is a friend of the father and his partner. She was aware they were undergoing a "difficult if not traumatic situation" and went to their address with her fiancé to give them moral support.
42. She heard D say, "You can do whatever you like, but you will never get me," when the grandmother endeavoured to take his arm to take him to the waiting car. She saw D run into the house, hysterically scream, crying, found him at the rear porch of the house crying and screaming, saying, "I'm going to kill myself. I would rather kill myself than go with Grandma. I'm not living with Grandma. I'm not ever going. I'll kill myself if I have to live with Mum. I'm

never leaving this house. I thought Grandma was nice. She's just trying to make me go in the car."

43. At about 11.30AM when she walked into the kitchen she saw the child with a large kitchen knife on the table in front of him. She rushed forward and took the knife from him.
44. Later, she saw him pick up a toothpick and try to poke his arm with it then throw it back on the table, saying it's not sharp enough to give him a big scar. Later, she heard D say, "I'd rather kill myself than go with my grandmother...I want to lock myself in the tool shed so when the oxygen runs out I will die and my grandmother will never find me."
45. Where the knife was placed when this child threatened to kill himself is clearly an inconsistency between this woman's affidavit and that of Ms WW, who said he had something on his lap and she did not observe anything on the table.
46. It is correct, as Mr O'Ryan QC submitted, that the police did not witness any of this alleged threatening of the child to kill himself with a knife or hear him say those words and their report is a recitation of what the six unrelated to this family witnesses observed.
47. What the Report does confirm is there were at least eight adults at the home and once the ambulance officers and the police arrived at 10 to 12 and what the observe is as follows. They call the New South Wales Ambulance office to clarify appropriate action as they were concerned as to what they had been told of the child's threatening of self-harm. They made a decision. It was not beneficial to the child's mental and physical health to execute the family law order as the agreement of the transfer of the child was poorly organised and managed, leaving the child in an extremely vulnerable and distressed state culminating in the child making extreme threats of self-harm. Upon receiving news of the police decision, because the police said they kept the mother informed of what they were doing, the mother approached the house and started screaming out the child's name hysterically.
48. This caused the child to run inside and barricade himself in a bedroom for fear his mother was coming to take him. Police intervened with the mother to prevent a breach of the peace and she and her mother left. Thus, the police did not witness the child threatening self-harm, but they certainly witnessed the child in an extremely distressed and emotional state and, as the Independent Children's Lawyer correctly submitted, determined they would not execute or take part in any changeover.
49. Again, Mr O'Ryan, senior counsel, was correct to point out that at one point in time the father said he was going to comply with the order and yet it is clear he and Ms S had no intention of complying with the orders. Not one of the

father's witnesses confirm or support any encouragement by Ms S to have D transferred to his grandmother's care.

50. There was none whatsoever and she had absented herself at the very time when the grandmother arrived. Ms S, I mean. For five and a half hours this young child was subjected to adults milling around he and the grandmother, no doubt, being filmed and he was clearly in a distressed state.
51. It is clear to me that since 4 September 2020 D has been anxious about the decision and nothing has been done to assist him for this possibility and, inexplicably, no application was made to reopen the matter when that concerning evidence from the interview of 4 September was made known on 23 September.
52. The relevant chronology for the stay is as follows.
53. On 4 September 2020 the Child Protection Helpline receives the report in relation to the child.
54. On 23 September the reports are prepared.
55. On 6 October 2020 Ms N files an affidavit in application alerting the Court they may seek to reopen and will do so by no later than 30 November.
56. On 18 December judgment is delivered.
57. Ms S says she learns of the "shocking" parenting orders on 19 December. This is in her affidavit of 5 January.
58. On 22 December she spoke to Ms AB at the Department and said the child had told her he wanted to kill himself.
59. On 23 December Ms AD, psychologist, reported to Ms AB that D had said he wanted to kill himself. She was not sure the exact incident that resulted in this comment and Ms AB asked her what she should do if D said something like that in the future. They suggested she report it to the helpline. Interestingly, in her email to Ms AB Ms AD says:

D himself told me, and I believe he has also told his case workers, he does not want to live with his mother and he would run away if he had to live with this mother. I'm concerned this move will have a negative impact on D's wellbeing.
60. I am unclear when these statements by the child are alleged to have been made. However, no evidence of this nature was placed before the Court at the final hearing and neither was the mother cross-examined on any such allegations. I do not think they were raised with the father either.
61. On 23 December 2020 the mother spoke to Mr M.
62. The father said he spoke to Mr M on 23 December 2020.
63. On 24 December Mr Shaw wrote to the Crown Solicitor's Office.

64. A Report was made to the Department on 24 December, reiterating D says he does not want to live with his mummy. He wants to live with his dad and Ms S and remembers his mum used to “kick me up the bum” and lock him in his room. This report also stated that the child had said to Ms S he wanted to kill himself before he heard about the Court decision.
65. I have not seen any report or evidence from Ms S or the father that D had threatened to kill himself before he heard about the Court decision, but it is in this report. Had he done so it would be most surprising because no action was taken by the father or Ms S to assist D if, indeed, that is what he was saying.
66. This Report further says that the child did not know of the Court outcome. However, he has made statements he wants to kill himself and they were unsure why D was wanting to do that. The Department had investigated allegations of D being locked in his room and kicked by his mother in November 2020 and concluded that that risk was no longer in existence or did not require any action and, no doubt, the Department determined not to reopen the case after this investigation.
67. However I would not know. This was not evidence before me at the hearing, nor raised subsequently. The caller on this occasion said they were worried the child has told them directly he will run away if he has to go back and reside with his mother and there is a risk of harm to him.
68. The father’s affidavit of 30 December 2020 in support of his stay Application is clear he had no intention to comply with the Court orders. He has referred to that 23 September 2020 ROSH Report for the first time and indicated he was concerned for his son’s wellbeing from all of the reports attached to his affidavit.
69. On 30 December 2020 Ms S spoke to Mr M and she said she was in the country with the child. Changeover was due to occur on 31 December, but could not occur as D was not in Sydney and the arrangement was moved to 1 January.
70. On 31 December 2020 a report is made to the Department, in which the caller says the child has threatened to jump out of a window if he is made to live with his mother.
71. On 31 December Mr M sends an email to Ms AB concerning changeover arrangements.
72. Ms S’s affidavit of 5 January asserts on 31 December 2020 she was extremely fearful that the child might hurt himself or need hospitalisation when he learned his fate and was handed over to his mother, who he is terrified of. There was no evidence at the trial that D was terrified of his mother and Ms S was most accommodating and understanding and supportive of the child spending time

with his mother at the final hearing if he remained living in her and his father's care.

73. On 31 December 2020 the Crown Solicitor wrote to the parties' lawyers indicating the father had not made the child available to Mr M.
74. On 31 December Ms S returns to Sydney with D. He has his Zoom meetings with Mr M. The arrangements are made for Suburb AC. This was changed to the father's home and the events that occurred I have already referred to.
75. Stay applications are a common feature in this jurisdiction and the law is well-settled. A seminal decision in the matter is the Full Court's decision of *Aldridge & Keating (Stay Appeal)* [2009] FamCAFC 106. The principles distilled are as follows:
 - a) The onus to establish the stay is upon the person seeking the stay;
 - b) It is not necessary for the applicant to demonstrate any special or exceptional circumstances;
 - c) The person who has obtained a judgment is entitled to the benefit of the judgment;
 - d) The person who has obtained the judgment is entitled to presume it is correct;
 - e) The mere filing of an appeal is insufficient to grant a stay;
 - f) The bona fides of the applicant in filing an appeal;
 - g) A stay may be granted on terms;
 - h) A weighing up of a risk that the appeal may be rendered nugatory if the stay is not granted;
 - i) A preliminary assessment of the strength of the proposed appeal;
 - j) The desirability of limiting the frequency of any change in a child's living arrangements;
 - k) The best interests of the child the subject of the proceedings are a significant consideration but, the law is clear, not the paramount consideration as a stay application is not a parenting matter;
 - l) The period of time in which the appeal can be heard.
76. Going to these facts.
77. I accept the applicant is bona fide in bringing his appeal and I do not agree that he does not have an arguable case in either the parenting or property orders I made. There is always the possibility that a trial judge may have fallen into error and with this lengthy judgment that is a possibility.

78. The appeal has been brought quickly and the expedition has been filed and I have been told today by the appeals Registrar that an appropriate affidavit has been filed and it is hopeful the expedition application will be listed shortly in February. That should be known next week, I hope.
79. I accept the granting of a stay is not a parenting decision per se, but the best interests of the child the subject of the proceedings are significant and that is a significant and important factor in this matter.
80. I do not accept Mr Shaw's submissions that if I did not grant the father's stay his appeal would be rendered nugatory. The child would still exist. The property would exist. There would be nothing rendered nugatory.
81. There is no doubt, consistent with decisions such as *Clemett & Clemett* (1981) FLC 91-013, the change of a child's residence frequently is undesirable and that is a factor in the stay application. If I do not grant the stay the child goes to his mother's care, the appeal is heard, my decision is overturned and he will be back to his father's care. This cannot be in the child's interest and I cannot say this is not a possibility of happening.
82. There is no application by any party for a stay on terms such as therapeutic intervention with Mr M or for a different transition period or a lengthier period of time for transition or some other order. Nor did the Independent Children's Lawyer or the Department seek an adjournment of the stay application to enable Mr M to be called to give evidence in relation to this vexed matter, he having been very much involved. I am surprised that the Independent Children's Lawyer, who supported the final decision that D transfer to his mother's care, did not seek a stay on terms. However, that is a matter for those at the bar table and the result is I am faced with the stark position of granting or not the stay. It is as simple as that.
83. His usual care arrangements are living with his father and spending no time with his mother and in granting the stay I will be maintaining his usual care arrangements and this must be a factor in my determination.
84. The Department continues to be satisfied he is not at risk of harm in the father or Ms S's care, despite it being submitted to me he is living in a toxic environment presently. At trial I accepted this was correct as I was informed he was progressing well and doing well in his father's care and they had no concerns about physical harm to him from his mother and this had not been raised. It is now apparent D was concerned about his physical safety if living with his mother and was so concerned around the time of the hearing, as comes out in that ROSH report of 22 September. He was becoming anxious about having to live with his mother and he reported she had physically hurt him when he lived with her.

85. This, together with the ROSH Report of 24 December of a reporter speaking with Ms S on 22 December 2020 reporting that Ms S was worried about D's wellbeing because he mentioned he wanted to kill himself, before he heard about the Court decision, are of great concern to the Court let alone the consequence of events that occurred on that awful day of the attempted transition where there are witnesses who say they heard the child say he wanted to kill himself.
86. Thus, there were some difficulties for the child living in the father's home, of which the Court was not made aware, and the Court was completely unaware of the allegations he had made of his mother physically harming him when he lived with her and expressing a strong wish not to live with her.
87. Whether the father intended to comply with the orders or is still waiting for Mr M to assist him to do so, although important in the appeal, is not a relevant matter to me in the stay application. However, having said that I am not at all satisfied that the father was supportive of the child transitioning to his mother's care as I see no evidence from him or Ms S of them facilitating the easiest transition possible for D. The decision to have changeover at the father's home surrounded by the many adults the father asked to be there, including his barrister, was the antithesis of the least disruptive transition for D and it is difficult not to conclude had the father wanted the transition to the mother's care to work it would have worked and that he created the worst possible scenario for this order to work.
88. I accept he disagreed with the orders and he is perfectly entitled to do that, but in creating what I regard as the worst possible scenario his son has been subjected to emotional and psychological harm. The ICL casts blame on the grandmother and mother for the unacceptable emotional and psychological harm D was subjected to in this fraught and unsuccessful changeover, saying they had a choice and could have left earlier, rather than remaining there for five and a half hours. That was unfair in the circumstances where the mother was exercising her right to the orders and she has a right that to presume the judgment is correct and in circumstances where the changeover, the parameters of it, the nature of it, were set up by the father, not the mother or grandmother.
89. However, I too am gravely concerned as to the reaction of D to the decision he move to his mother care, be that reaction due to his father's behaviour, Ms S's behaviour, the mother, the grandmother, consequences of the order I made or a combination of all those factors. I do not know.
90. The consequences of this disgraceful day for D have been clearly borne out by the interview he had with Ms XX and Ms AF on 6 January 2021, found at page 63 of Ms XX's report, five days after this traumatic event and the relevant parts I read as follows. At this report, D was jumping on the trampoline when these

Departmental workers arrived, a common theme, and appeared to be in good spirits.

91. D was asked whether he recalled the conversation with Mr M “last week.” He said that he remembered. What he remembered was “the Court made a wrong decision, but I have to go and live with my mum, but I’m not going because I like the other Judges. I don’t like this Judge.” He was asked what he meant by “wrong decisions”. He said, “I will not be going to live with my mother.” He told the worker he was meant to go on 1 January and he didn’t go because he refused.

Ms S said he would be going on Monday and Tuesday. However, this hasn’t happened so he understands he is no longer going.

92. He was asked, “What if someone made him come to take him to his mum’s house in the next few days?” He said he will not go and will refuse to go, that his mum does not keep him safe and when asked why he was so worried about going to his mum’s house he said at his mum’s house, “I get kicked in the bum by her foot and locked in the room. With Daddy and Ms S I just get consequences like I don’t get TV for half an hour.” When he was asked if he remembered what happened on 1 January he replied, “They told me I had to go. I told them I’m not going. They told me I had to, so I ran to the kitchen and grabbed a knife and said I’m going to kill myself. Then Dad’s friend...took the knife from me and said, ‘D, no. Don’t do that.’”

93. When asked why he grabbed a kitchen knife D said he wanted to kill himself because he was being forced to go with his mum. He was asked had he had thoughts about killing himself before and he said he didn’t want to talk about it. He was asked how would he feel if he lived at his mum’s house. He said, “I would kill myself.” He became tearful and put a blanket over his face and faced the wall. He indicated he was worried and scared on the day of the interview and when asked why he said:

Because you told me the Court orders are still real and I will have to go...I’m not telling you my whole plan, but it involves a knife...I know I used to have a bike at Mum’s house, so if I can find that and put [Dad’s] address into the GPS I can ride home.

94. He was asked if he had been spoken to by his dad or Ms S about a safety plan if he was living with his mum. He said, “Yes. I will call the police or go up to say someone like in a shopping centre who has young children.”
95. This evidence is extremely concerning and shows a grave risk of harm to this child if the orders made on 18 December 2020 concerning his care are enforced as they stand. Thus, despite Mr O’Ryan’s best endeavours to convince me that I ought not grant the stay and embark upon a hearing of the mother’s enforcement of the orders, on the evidence before me I have formed the view

that it is an order in D's best interests that I grant the stay sought by the father resulting in the mother's application for enforcement of the orders being dismissed.

96. The fresh information that has come to the Court's attention, the conduct of the father and Ms S in relation to the changeover and the reaction of D on that occasion and subsequently, his continued expressions of fear and intention to harm himself if he is to live with his mother are overwhelming concerns for the Court.
97. I accept that is how D feels at present and I cannot enforce orders which would potentially place a child at risk and they would so place the child at risk in these circumstances if I enforce the orders. Therefore, the stay the father seeks of all the orders will be granted by me and this will now be a matter for the appeal division to determine what is the appropriate outcome in this vexed and tragic matter.

I certify that the preceding ninety-seven (97) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Henderson delivered on 22 January 2021.

Associate:

Date: 1 February 2021