IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-2211
[2024] NZHC 354

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review of a decision of the headmaster to remove the applicant from the roll of Mt Albert Grammar School
BETWEEN	SO by his Litigation Guardian, his mother Applicant
AND	PATRICK DRUMM and JOANNE MAREE WILLIAMS Respondents

Hearing: 8 February 2024

Appearances: R Cullen, self-represented applicant
P Robertson and K Griffiths for the Respondents

Judgment: 28 February 2024

JUDGMENT OF GORDON J

This judgment was delivered by me
on 28 February 2024 at 2.15 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Heaney & Partners, Auckland

Copies to: R Cullen
Litigation Guardian

[1] Rhys Cullen has applied to be appointed litigation guardian of a minor SO who has brought judicial review proceedings against the respondents Patrick Drumm and Joanne Williams, the Principal[1] and Associate Principal respectively of Mount Albert Grammar School (the school). In this judgment references to the respondent will be to Mr Drumm only.[2]

[2] Mr Cullen has known SO since early 2022 when SO began attending the youth development programme offering a gym, tutoring and life-skills, that Mr Cullen manages.

[3] Mr Cullen also applies to be appointed litigation guardian of two other minors, FO and SP, on the basis that there is an application that they be joined as plaintiffs to the judicial review proceedings brought by SO. That application to be joined has not yet been heard. There is limited evidence as to Mr Cullen's connection with SP and little, if any, in relation to FO.

[4] Mr Drumm opposes the application for Mr Cullen to be appointed litigation guardian for all three minors. Mr Cullen says Mr Drumm and Ms Williams lack standing to oppose.

[5] I will first consider the application in relation to SO. Then, if necessary, I will consider the application in relation to FO and SP. The issues to be decided are:

(a) does Mr Drumm have standing to oppose Mr Cullen's appointment; and

(b) is Mr Cullen a suitable litigation guardian for SO (having regard to the relevant provisions in the High Court Rules 2016 (HCR)).

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1 Mr Drumm refers to himself as the Headmaster as well as the Principal. I will use the term Principal, as recognised in the Education and Training Act 2020.

2 The parties appear to agree that Ms Williams should be removed as a respondent (but an order to that effect has not yet been made). In a memorandum dated 28 August 2023 filed by Mr Cullen in support of his application to be appointed litigation guardian he says that he included Ms Williams as a respondent in the draft statement of claim filed with his application because he had been told by the school that Mr Drumm was on leave at that time and Ms Williams was the Acting Principal. There is no suggestion Ms Williams was involved in the decision-making which is the subject of the substantive application for review.

[6] There is a further, and prior issue regarding SO. His mother has already been appointed litigation guardian and there is no application for her to be removed[3] nor an application by her to retire.[4]

Background

[7] In 2023 SO, FO and SP were Year 12 students at Mount Albert Grammar School. They are all aged 17 years.

[8] On 26 June 2023 Mr Drumm wrote a letter to SO's mother advising that her son was being removed from the school roll that day. The letter included the following:

> I am writing to advise you that your son [SO] is being removed from the school roll today.
>
> All students enrolled at Mount Albert Grammar School are required to attend school when the school is open for instruction unless they have a valid reason for non-attendance and this reason is accepted by the school.
>
> Your son [SO] has failed to attend school for an extended period of time despite the numerous attempts by my staff to remind you and him of his obligations to attend school when the school is open for instruction.
>
> These extended absences are impacting on his educational progress but despite the attempts by the Dean and the Deputy Principal and other staff to engage with him on this issue, he refuses to attend school when it is open for instruction, for extended periods of time.
>
> These numerous absences have a significant impact on the workloads of his teachers and the Dean and other staff, in trying to contact the family and [SO] about his absences and in attempting to mentor him to modify his behaviour so he does attend school.
>
> …
>
> I have sought guidance from the Ministry of Education in taking this step which is not a decision taken lightly. The school's Senior Adviser at the Ministry of Education agrees that it is appropriate to take this step because he has been absent without permission for more than 20 school days.

[9] Identical letters were sent to FO's parents and SP's mother on the same day.

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3 High Court Rules 2016, r 4.46(3).
4 Rule 4.46(1).

[10] On 28 August 2023 Mr Cullen filed his application to be appointed litigation guardian for SO together with a draft statement of claim.

[11] Mr Cullen formally filed the statement of claim on 26 September 2023. The claim alleges that the Principal had no authority to remove SO from the school roll. It is claimed that the expression "removal from the roll" is a euphemism for expulsion and that the Principal does not have authority to expel a student. It is pleaded that authority to do so resides exclusively with the Board of Trustees.

[12] The statement of claim further alleges that Mr Drumm was acting as a "tribunal or other public authority" as that phrase is used in s 27(2) of the New Zealand Bill of Rights Act 1990 when he made the decision to move SO from the roll of Mount Albert Grammar School and accordingly SO has the right to apply for judicial review of that decision. In the alternative SO says Mr Drumm was exercising or purporting to exercise a statutory power of decision.

[13] By way of relief SO seeks a declaration that Mr Drumm's action was unlawful and also an order that Mr Drumm restore SO to the roll of Mount Albert Grammar School, with his first day of re-attendance to be agreed between the parties, but to be no later than the last day of term one 2024.

[14] In his statement of defence dated 10 November 2023 Mr Drumm denies that SO was expelled and says he was removed from the school roll pursuant to reg 11 of the Education (School Attendance) Regulations 1951, which requires the head teacher to record that a pupil has been absent for any period of 20 consecutive school days without being informed that the pupil's absence was only temporary. Such a record provides grounds for the pupil's removal from the school roll.

[15] On 12 December 2023 SO's mother (the mother) applied in her capacity as litigation guardian (her appointment is referred to in [26]–[28] below) for an order that FO and SP be joined as applicants to the proceedings. As already noted, that application has not been determined.

[16] On 15 December 2023 Mr Cullen applied to be appointed litigation guardian for FO and SP. The Court directed that the application be heard in conjunction with Mr Cullen's 28 August 2023 application to be appointed litigation guardian for SO provided there was satisfactory proof of service in terms of r 4.36 of the HCR. Both FO and SP have filed the requisite affidavits of service.

Legal principles

Appointment of litigation guardian

[17] The HCR provide for litigation guardians. A minor[5] must be represented by a litigation guardian in any proceeding unless the Court orders otherwise.[6] A litigation guardian is a person authorised by or under an enactment to conduct proceedings in the name of or on behalf of an incapacitated person or a minor.[7]

[18] The Court may appoint a litigation guardian on its own initiative or on the application of any person, including a person seeking to be appointed as litigation guardian.[8] Rule 4.35 relevantly provides:

> (2) The court may appoint a litigation guardian if it is satisfied that—
>
> …
>
> (b) the litigation guardian—
>
> (i) is able fairly and competently to conduct proceedings on behalf of the incapacitated person; and
>
> (ii) does not have interests adverse to those of the incapacitated person; and
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> (iii) consents to being a litigation guardian.
>
> (3) In deciding whether to appoint a litigation guardian, the court may have regard to any matters it considers appropriate, including the views of the person for whom the litigation guardian is to be appointed.

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5 High Court Rules 2016, r 4.29: Minor means a person who has not attained the age of 18 years.
6 Rule 4.31(1).
7 Rule 4.29.
8 Rule 4.35(4).

[19] A litigation guardian may do anything in relation to a proceeding that a litigant could do if he or she were of capacity or was of age.[9]

[20] In *Erwood v Holmes* Downs J, after referring to New Zealand and overseas authorities regarding the obligations of a litigation guardian and their nature, summarised the position as follows:[10]

> [56] I summarise. A litigation guardian may do anything the litigant could do, if able. This broad power attracts a duty to act in the litigant's best interests, and independently. These duties are fiduciary, or analogous to fiduciary ones. Litigation guardians have a broad discretion concerning the extent to which the litigant's views should be considered, or placed before a court. A litigation guardian may not have interests adverse to the litigant. Breach of any of these may lead to the removal of the guardian, and substitution of an alternative guardian. Breach may also lead to the quashing of an order, at least in sufficiently clear cases. Courts will not enter this area lightly given the nature and breadth of a litigation guardian's discretion.
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> (footnote omitted)

[21] In *Shetty v Fitzpatrick* Associate Judge Gardiner determined an opposed application for appointment of litigation guardian for a minor. After referring to the duties of a litigation guardian the Judge said:[11]

> [16] While independence is the fundamental obligation of a litigation guardian, this is in the sense of the guardian "bringing an independent mind and careful judgement" to the case and does not entail that they must be entirely indifferent to the outcome of the proceedings. The Rules do not prohibit any interest in the outcome, only interests that conflict with those of the incapacitated person or minor. How exactly to determine whether a proposed litigation guardian has interests adverse to those of the person they are representing is not set out in the legislation and turns on the facts of each case. *McGechan on Procedure* considers that it is enough to show that success by the incapacitated person or minor would not disadvantage the guardian (financially or otherwise), and nor would failure by that person benefit them.
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> (footnotes omitted)

[22] I gratefully adopt the above two summaries.

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9 Rule 4.38.
10 *Erwood v Holmes* [2019] NZHC 2049.
11 *Shetty v Fitzpatrick* [2022] NZHC 2601.

Removal of a litigation guardian

[23] Rule 4.46 of the HCR relevantly provides:

> 4.46 Retirement, removal, or death of litigation guardian
>
> (1) A litigation guardian may retire only with the leave of the court.
>
> (2) Unless the court otherwise orders, the appointment of a litigation guardian under rule 4.35 ends if another person is subsequently authorised by or under an enactment to conduct the proceeding in the name of, or on behalf of, the incapacitated person.
>
> (3) A litigation guardian may be removed by the court when it is in the interests of the person he or she represents.
>
> …

[24] Justice Katz in *Groombridge v Blanche* determined an application for removal of the plaintiff's litigation guardian.[12] As Katz J noted, the test for removal of a litigation guardian is somewhat different from the test for appointment. The Judge stated: "… the overarching issue is whether the removal of the litigation guardian is in the best interests of the person represented".[13]

[25] However, as Katz J further noted, in practical terms, if a litigation guardian does not currently meet the appointment criteria in r 4.35, "their removal is likely to be in the best interests of the person represented".[14] The Judge therefore held that the r 4.35 criteria are therefore "clearly relevant to an assessment of the best interests of the person represented, although other factors may also be relevant".[15]

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12 *Groombridge v Blanche*, [2020] NZHC 2394.

13 *Groombridge v Blanche*, above n 12, at [12] citing *Re Goldman* [2016] NZHC 1010; [2016] 3 NZLR 331 at [33a]; *Re Clapham* [2015] NZHC 210 at [61]; *A v D* (1994) 7 PRNZ 502 (HC); *Re Taylor's Application* [1972] 2 QB 369; [1972] 2 All ER 873 (CA) at 380.

14 At [12].

15 At [12].

Application by SO's mother for appointment as litigation guardian

[26] On 14 November 2023 the mother filed a without notice application for an order appointing herself litigation guardian for SO together with an affidavit in support sworn 13 November 2023 and a memorandum dated 14 November 2023. In her affidavit the mother states:

> 5. Rhys Michael Cullen has applied to be [SO's] litigation guardian. That application is opposed by the respondents. Mr Cullen's application will not be heard until after the 2024 school year has started. By that time [SO] will have been out of school for seven months. This is not in his interests.
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> 6. I am able fairly and competently to conduct proceedings on behalf of [SO] (by instructing someone to represent [SO] if required). I do not have interests adverse to those of [SO]. I consent to being a litigation guardian.

[27] In her memorandum of 14 November 2023 the mother refers to Mr Cullen's application to be a litigation guardian for SO and she says Mr Cullen has the full support of both her and SO's father. She further says that Mr Cullen's application for appointment as a litigation guardian is not withdrawn and that her appointment as a litigation guardian would allow the matter to proceed. She suggests the Court may appoint multiple litigation guardians.

[28] The mother's application was granted by the Court on 16 November 2023 on a without notice basis, the Court being satisfied that the mother met the criteria in r 4.35(2)(b).

[29] As already noted there is no application for the mother to be removed as a litigation guardian nor an application by her to retire.

[30] The first question that arises is whether there can be more than one litigation guardian appointed under r 4.35. I tend to the view that there may only be one litigation guardian appointed. However, in the end it is not necessary to decide the point. Mr Cullen's position in oral submissions was that if he was successful in his application the mother would prefer to be relieved of her position as litigation guardian.

[31] As the mother was present in Court I asked her to address me on that point. She said that if Mr Cullen was appointed she would ask for her appointment "to be terminated".[16] While there might be a brief period of overlap if the Court were to grant Mr Cullen's application the intention is that there be only one litigation guardian.

[32] The issue then becomes whether Mr Cullen should be appointed in place of the mother. I will address that issue in the context of the criteria in the HCR after first addressing the issue of standing.

Respondent's standing to oppose Mr Cullen's appointment

[33] Rule 4.36(1) permits an application to act as a litigation guardian to be brought without notice unless the Court orders otherwise. Mr Cullen's application of 28 August 2023 was made without notice.

[34] In his minute of 11 October 2023 Jagose J stated that he was satisfied that r 4.36(1)(a) of the High Court Rules permitted the application to be made without serving notice of the application. The Judge further noted Mr Cullen's advice that the mother had been served.[17] The Judge directed that Mr Cullen file proof of service but there was no direction that the respondent be served.

[35] Counsel for Mr Drumm then filed a memorandum dated 16 October 2023 stating that Mr Drumm wished to be heard on Mr Cullen's application.

[36] In support of his submission that Mr Drumm does not have standing to oppose the application Mr Cullen refers to the comments of Toogood J in *Re Goldman*.[18] In that case the defendant applied to revoke or vary the appointment of a litigation guardian for the plaintiff. The Judge found that the order appointing the litigation guardian was one the Court was entitled to make without notice as it was an application affecting only the plaintiff. Accordingly, the defendant had no standing to apply for variation or rescission of the order because he was not a party affected by it.[19]

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16 The issue of whether that would be a 'retirement' under r 4.46(1) or 'removal' under r 4.46(3) was not addressed.
17 Service of the minor's parent or guardian required by r 4.36(2).
18 *Re Goldman*, above n 13.
19 At [19].

[37] Justice Toogood considered that in the absence of exceptional circumstances it was difficult to see how the appointment of a litigation guardian to commence, continue or defend a substantive proceeding on behalf of a party, could be said to be a matter affecting an opposing party to the proceeding such that the opposing party may apply for an order varying or rescinding such appointment.[20]

[38] Mr Cullen's position is that the statements by Toogood J on an application for removal apply equally to an application for appointment.

[39] Commenting on *Re Goldman* in *Shetty v Fitzpatrick* Associate Judge Gardiner, who was required to determine the issue of standing in the context of an application for appointment, said:[21]

> [19] It is true that the without notice procedure suggests that applications of these kind are not generally ones in which an opposing party is considered to have a legitimate interest. Notwithstanding this, the defendants refer to comments in case law stating that anyone with a reasonable connection to the incapacitated person or minor has standing to be heard on such an application. After the paragraphs in *Re Goldman* referred to by Polina, Toogood J analysed the defendant's application as an application for removal brought under r 4.46. He acknowledged that the Rules did not limit the class of persons who may apply for removal and in *Re Clapham* it was held that anyone reasonably connected with the person being represented by the guardian may apply.
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> (footnotes omitted)

[40] Justice Toogood accepted the Judge's statement in *Re Clapham* that it is open to anyone reasonably connected with the incapacitated person to bring an application for removal must be right, but went on to say the question in the case before him was what, if any, weight the Court should give to the views of the defendant about the suitability of the Court-appointed representative of the plaintiff suing him.

[41] Mr Robertson, counsel for Mr Drumm, refers to the statement by the authors of *McGechan on Procedure* citing *Shetty v Fitzpatrick* to support the proposition that if a party has standing to apply for an order removing the litigation guardian they should also have standing to oppose appointments in the first place.[22] Mr Robertson submits that Mr Drumm in his role as Principal of the school has oversight of the

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20 At [20].
21 *Shetty v Fitzpatrick*, above n 11.
22 Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR4.35].

school and is ultimately responsible for all students. Adopting the 'reasonable connection' test, Mr Robertson submits that as the three minors were students at the school and as they seek to be reinstated to the school roll, Mr Drumm is "reasonably connected" with them.

[42] In *Shetty v Fitzpatrick* Associate Judge Gardiner concluded on balance that the defendants did have standing to oppose an application by a mother to be appointed litigation guardian of her nine-year-old daughter. The Judge held that as administrators of the estate, the defendants clearly had a duty to protect the minor's interest as a beneficiary. The Judge considered this could extend to protecting the minor's interests in litigation involving the estate.[23]

[43] In this case Mr Drumm's role as Principal allows him "complete discretion to manage the school's day-to-day administration" as he thinks fit, subject to the Board's general policy directions.[24] Mr Robertson submits that Mr Drumm is reasonably connected with the students because, as Principal, he is effectively acting in *loco parentis*. However, I was not referred to any law or authority suggesting that Mr Drumm would have direct or ongoing connection with students outside of school.

[44] In my view (and I say this without deciding the point) a Principal *may* be reasonably connected to students at their school. However, in the present case, SO is no longer on the school roll. In those circumstances I do not consider that Mr Drumm is reasonably connected to SO. He accordingly does not have standing to oppose Mr Cullen's appointment.

[45] But in any event I follow the approach of Associate Judge Gardiner that putting aside the issue of standing, given that concern has been raised regarding Mr Cullen's suitability to be a litigation guardian for SO, it is appropriate that the Court takes into account the evidence available to it when assessing the criteria in r 4.35(2)(b) and all relevant matters under r 4.35(3).[25]

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23 *Shetty v Fitzpatrick*, above n 11, at [21].
24 Education and Training Act 2020, s 130(2)(b).
25 *Shetty v Fitzpatrick*, above n 11, at [22].

[46] The HCR simply require the Court to be 'satisfied' that the litigation guardian is suitable for the role (by reference to the criteria in the HCR).[26] The word 'satisfied' does not connote a burden or standard of proof. The Court simply makes up its mind.[27] Mr Cullen accepts that the Court is able to rely on all the evidence before it, including evidence filed by Mr Drumm, in making up its mind. Although he does submit if the Court were to find an absence of standing that might affect the weight the Court would give to the evidence filed by and on behalf of Mr Drumm.

[47] I will therefore consider whether Mr Cullen is a suitable appointee in terms of the criteria in r 4.35(2)(b) and any other relevant matters in r 4.35(3) on the basis of all the evidence filed.

Mr Cullen's position

[48] Mr Cullen not only wishes to be appointed litigation guardian for SO (as well as the other two students) but he makes it clear that in that role he proposes to conduct the proceeding himself in all respects, including making submissions in the substantive hearing.

[49] As regards the criteria in HCR, r 4.35 Mr Cullen says first, he is able fairly and competently to conduct the proceedings on behalf of SO (and the other two students). He made submissions designed to demonstrate his grasp of the legal issues involved.

[50] Mr Cullen also says he does not have interests adverse to those of SO (and the other two students). He confirms SO's affirmation that his preference was for SO to enrol at another school but SO wishes to return to Mount Albert Grammar.

Ability of litigation guardian to appear in person

[51] I accept that a litigation guardian may appear in person. The question of litigation guardians self-representing was considered by Potter J in *M and D v S*.[28] The case concerned two appeals from the Family Court on procedural issues, each brought

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26 Rule 4.35(2).
27 *R v Leitch* [1998] 1 NZLR 420 (CA) at 428.
28 *M and D v S* [2008] NZFLR 120 (HC).

by litigation guardian for the child. Both litigation guardians were previously court-appointed Lawyer for the Child for the respective appellants but neither was acting in that capacity for this proceeding. As Potter J explained:[29]

> Representation of the children as appellants was through the litigation guardians. The litigation guardians were clearly not acting as lawyer for the child — they were not so appointed. They were, in effect, self-represented litigants, acting in that capacity as the children could have done, had they not been incapacitated persons.

[52] The issue of whether a litigation guardian has the power to appear in person was raised by amicus curiae. The Judge answered that in the affirmative:[30]

> Mr Jefferson submitted that the authority of a litigation guardian under r 87, to do anything in relation to the proceeding that could be done by the incapacitated person if he or she were not so incapacitated, must include the power to appoint counsel or, alternatively, to prosecute the appeal "in person". I agree. Both are options that would be available to an appellant who was not an incapacitated person and must be included in the authority of a litigation guardian under r 87.
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> …

[53] In a summary of conclusions, Potter J stated that:[31]

> The litigation guardian may do anything the child appellant could do, if not a minor: r 87 [equivalent to r 4.38 of the HCR]. This includes instructing counsel or self-representing on the appeal.

[54] While that conclusion was stated generally, the appointed litigation guardians in *M and D v S* were both lawyers, whereas Mr Cullen is not a lawyer. However, it is not a requirement for a litigation guardian, who intends to conduct the proceedings themself, to be a practising lawyer. This was confirmed in *X v M* where a father (who was not a lawyer) sought to appeal a decision declining his application to be appointed as litigation guardian for his child.[32] When considering the father's ability to conduct proceedings on his child's behalf, Lang J did not take issue with the father potentially being able to appear in person, only stating that "the Court might have more confidence that [independence and objectivity] could occur if Dr X instructed counsel to act on his behalf in the proposed proceeding" before ultimately declining the

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29 At [42].
30 *M and D v S*, above n 28, at [47].
31 *M and D v S*, above n 28, at [91(e)].
32 *X v M* [2020] NZHC 1377.

father's application.[33] That is an issue to which I will return when discussing Mr Cullen's suitability.

Discussion

[55] Having considered the evidence,[34] I cannot be satisfied Mr Cullen would represent SO's interests in a fair and competent manner, nor can I be satisfied that he does not have interests adverse to those of SO, for the following reasons.

[56] First, the proceedings have been delayed while Mr Cullen has pursued his application to be appointed litigation guardian. SO's mother has been in the role of litigation guardian since November 2023. There is no evidence suggesting she cannot continue her role. Had Mr Cullen not pursued his application it is possible that the substantive claim could have been heard by now. Evidence has been filed. While I accept SO has been receiving tuition by correspondence, he has potentially missed out on other beneficial aspects of attending school such as involvement in sport and socialising with other students. The delay caused by Mr Cullen's pursuit of his application is contrary to the interests of SO.

[57] Second, the school has received complaints from another student tutored by Mr Cullen, for which subsequent evidence seemingly showed the complaints were not made by the student or his parents. An email from the father to Mr Cullen includes the following:

> … use [sic] are doing a great job with the boys but we still need Mags to do their part, cutting them out and pulling [the student] from school is a NO from me.

[58] That, again, suggests Mr Cullen may take steps in this proceeding that are against SO's interests.

[59] Third, there is evidence that since 2020 Mr Cullen has had increasingly fraught interactions with staff at Mount Albert Grammar School which at times reached a level described by the school as harassment. He has also made and repeated accusations of

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33 At [24].

34 I see no reason to give any of the evidence limited weight as submitted by Mr Cullen.

racism (which the school says are unfounded) against staff members. Associated with this there is evidence that Mr Cullen has encouraged students to defy staff which made engaging and supporting the students difficult for staff members. All of that raises questions as to Mr Cullen's objectivity in conducting the proceedings.

[60] Fourth, there are current litigation proceedings between Mr Cullen on his own behalf and the school. In his affidavit Mr Drumm says that he became increasingly concerned in 2023 at the defiant behaviour of students who were tutored by Mr Cullen and Mr Cullen's encouragement of his students to defy staff and not engage constructively with them over their education. Mr Drumm says Mr Cullen was coming onsite meeting with students without signing in at reception as all visitors to the school are required to do.

[61] He says those onsite visits were without the knowledge or agreement of the school and Mr Cullen collected students at various times while the school was open for instruction. Mr Drumm says Mr Cullen's presence onsite was disruptive and unhelpful. On 16 March 2023 Mr Drumm made the decision to ban Mr Cullen from the school and block his emails. He says it was not a decision arrived at lightly and followed weeks of concerns expressed by staff.

[62] Mr Cullen applied for judicial review of that decision. This Court dismissed Mr Cullen's application.[35] Mr Cullen has filed an appeal against that decision.

[63] Given Mr Cullen's ongoing litigation against the school, I am not confident based on all the evidence that Mr Cullen will be able to separate out his interests and accordingly be able to perform the fiduciary duties towards SO which are consistent with the responsibilities of a litigation guardian.

[64] The fifth and final reason relates to aspects of Mr Cullen's character. Mr Cullen had his registration as a medical practitioner cancelled as a consequence of a finding of professional misconduct made by the Health Practitioners' Disciplinary Tribunal. The charge related to the period between January 2003 to December 2004 when Mr Cullen wrote a substantial number of prescriptions for Sudomyl (a

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35 *Cullen v Pa'u* [2023] NZHC 3782.

pseudoephedrine-based product) including but not exclusively at least 790 prescriptions (in excess of 46,000 tablets) dispensed by a particular pharmacy when there was no medical/clinical justification for much of that prescribing.

[65] Mr Cullen's appeal against the finding of professional misconduct was dismissed by this Court.[36]

[66] Mr Cullen was also found guilty after a trial by a judge and jury on 15 counts of receiving stolen vehicles in June 2009 under s 246 of the Crimes Act 1961. That conviction was upheld by the Supreme Court.[37]

[67] Had Mr Cullen's intention been to instruct counsel I would likely have given the fact of deregistration and the criminal convictions little weight. However, I do take both into account given that Mr Cullen is proposing to conduct the proceedings. I note that Katz J in *Groombridge v Blanche* considered the fact that Mr Groombridge was legally represented provided a further safeguard when the Judge was considering whether a litigation guardian should be removed.[38] That safeguard will be missing in this case should Mr Cullen be appointed.

[68] Taking into account all the evidence, as Lang J held in *X v M*[39] this Court might have more confidence that the proceeding would be conducted in an independent and objective manner if Mr Cullen were to instruct counsel to act in the proceeding. But that is clearly not what Mr Cullen proposes.

[69] For all the above reasons I refuse Mr Cullen's application to be appointed litigation guardian for SO. There is no evidential basis for the removal of SO's mother. She remains SO's litigation guardian.

[70] Reasons two to five above (at [57]–[66]) apply to Mr Cullen's application to be appointed litigation guardian for SP and FO. That application is also refused.

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36 *Cullen v A Professional Conduct Committee of the Medical Council of New Zealand* HC AK CIV-2008-404-6786 (14 November 2008).
37 *Cullen v R* [2015] NZSC 73.
38 *Groombridge v Blanche*, above n 12, at [32].
39 *X v M*, above n 32.

Costs

[71] The respondent, as the successful party, is entitled to costs. However, as I did not hear submissions on costs, costs are reserved.

[72] If the parties are able to agree costs then a joint memorandum is to be filed within 20 working days of the date of this judgment. If there is no agreement as to costs, the respondent is to file and serve his memorandum of submissions within five working days of the date for the joint memorandum. Mr Cullen is to file and serve his memorandum within five working days of the date of service of the respondent's memorandum.

[73] Submissions are not to exceed four pages (excluding any attachments). I will determine costs on the papers.

Gordon J

Postscript:

[74] Towards the end of the hearing the Court was referred to the Education and Training Act 2020 which contains provisions regarding a student's right to enrol at a school if they live "in zone".[40] It was said to the Court that SO was now (or again) living "in zone" for Mount Albert Grammar School. I urged SO to make an enrolment application promptly to potentially enable him to return to Mount Albert Grammar School, thus avoiding the need for the substantive proceeding to be heard.

[40] At the Court's request counsel for Mr Drumm filed a memorandum subsequent to the hearing identifying the following provisions: ss 13, 33, 35 and 74.