EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT LEVIN

FAM-2013-019-000835
[2016] NZFC 8909

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	TP & HT Respondents
AND	PP born [date deleted] 2013 Child or Young Person the application is about

(In chambers on the papers)

Judgment: 26 October 2016

DECISION OF JUDGE J F MOSS
Review of Plan

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[1] The Court has been asked to consider the most recent plan related to the care of PP.

[2] He has been subject to orders under the Children Young Persons and Their Families Act since [date deleted] 2013, when he was two months old. The history of

his care is fully documented on the file. The father was, in his infancy, the primary caregiver. He attempted to undertake that role on his own, but then lived with his grandparents. There was some dispute about whether a declaration would be made, but that was ultimately made by consent. The Ministry (CYFS) had an initial plan that PP would return to the care of his parents. By [date deleted] 2014 when PP was 14 months old CYFS was making more specific demands on each of the parents in terms of their obligations to undertake improvements, so that they could parent their baby. Between June and November 2014 the position changed. CYFS obtained a parenting assessment which is not currently on file. The Family Group Conference (FGC) was reconvened in August, but permanent placement was not then referred to in the FGC outcome. It appears that the parents and great grandparents of PP agreed about contact and guardianship matters, but did not address permanent care. In November 14 the plan recorded that PP would remain permanently in the care of his paternal great grandparents.

[3] The Court has been asked to consider the continuation of the consequential s 101 and 110 orders based on a plan filed on 5 August 2016. This plan contains the statement as follows:

> Purpose of plan: Is there a realistic possibility of return to the care of PP to Mr TP and or Ms HT?
>
> No because PP has been parented by his great grandparents since four months of age and his parents are unable and unwilling to provide PP with the day-to-day parenting needs that he requires as a vulnerable child.
>
> This plan is prepared on the basis that there is no realistic possibility of return home. The purpose of the plan is to outline PP's long term needs…

[4] The documents were sent by courier post to the parents. They have not responded.

[5] The effect of the statement in the plan is to trigger ss 18A and 18B Children Young Persons and Their Families Act.

[6] These sections read:

18A Assessment of parent of subsequent child

(1) This section applies to a person who—

(a) is a person described in section 18B; and

(b) is the parent of a subsequent child; and

(c) has, or is likely to have, the care or custody of the subsequent child; and

(d) is not a person to whom subsection (7) applies.

(2) If a social worker believes on reasonable grounds that a person is a person to whom this section applies, the social worker must, after informing the person (where practicable) that he or she is to be assessed under this section, assess whether the person meets the requirements of subsection (3) in respect of the subsequent child.

(3) A person meets the requirements of this subsection if,—

(a) in a case where the parent's own act or omission led to him or her being a person described in section 18B, the parent is unlikely to inflict on the subsequent child the kind of harm that led to the parent being so described; or

(b) in any other case, the parent is unlikely to allow the kind of harm that led to the parent being a person described in section 18B to be inflicted on the subsequent child.

(4) Following the assessment,—

(a) if subsection (5) applies, the social worker must apply for a declaration under section 67 that the subsequent child is in need of care or protection on the ground in section 14(1)(ba); or

(b) in any other case, the social worker must decide not to apply as described in paragraph (a), and must instead apply under section 18C for confirmation of the decision not to apply under section 67.

(5) The social worker must apply as described in subsection (4)(a) if the social worker is not satisfied that the person, following assessment under this section, has demonstrated that he or she meets the requirements of subsection (3).

(6) No family group conference need be held before any application referred to in subsection (4) is made to the court, and nothing in section 70 applies.

(7) This subsection applies to the parent of a subsequent child if, since he or she last became a person described in section 18B,—

(a) the parent has been assessed under this section by a social worker in relation to a subsequent child and, following that assessment,—

(i) the court has confirmed, under section 18C, a decision made under subsection (4)(b); or

(ii) the social worker applied for a declaration under section 67 that the child was in need of care or protection on the ground in section 14(1)(ba), but the application was refused on the ground that the court was satisfied that the parent had demonstrated that he or she met the requirements of subsection (3); or

(b) the parent was, before this section came into force, subject to an investigation carried out by a social worker under section 17 in relation to a child who would, at that time, have fallen within the definition of a subsequent child, and the social worker did not at that time form the belief that the child was in need of care or protection on a ground in section 14(1)(a) or (b).

18B Person described in this section

(1) A person described in this section is a person—

(a) who has been convicted under the Crimes Act 1961 of the murder, manslaughter, or infanticide of a child or young person who was in his or her care or custody at the time of the child's or young person's death; or

(b) who has had the care of a child or young person removed from him or her on the basis described in subsection (2)(a) and (b) and, in accordance with subsection (2)(c), there is no realistic prospect that the child or young person will be returned to the person's care.

(2) Subsection (1)(b) applies, in relation to a child or young person removed from the care of a person, if—

(a) the court has declared under section 67, or a family group conference has agreed, that the child or young person is in need of care or protection on a ground in section 14(1)(a) or (b); and

(b) the court has made an order under section 101 (not being an order to which section 102 applies) or 110 of this Act, or under section 48 of the Care of Children Act 2004; and

(c) the court has determined (whether at the time of the order referred to in paragraph (b) or subsequently), or, as the case requires, the family group conference has agreed, that there is no realistic prospect that the child or young person will be returned to the person's care.

> (3) If a person is a person described in this section on more than 1 of the grounds listed in subsection (1), the references in section 18A(3) to the kind of harm that led a person to being a person described in this section is taken to be a reference to any or all of those kinds of harm.

[7] The effect of these sections is to transfer the onus from CYFS to justify intervention in a family to parents to justify the right to have the care of a child. The sections also appear, in practice, to be being cited in s 135 Plans to pave the way for activation of ss 18A and B at the birth of a subsequent child. This new legislation cannot have been considered by the Court when permanency was established for this child with his great-grandparents, because of course the legislation did not exist. This is the first occasion, for this child, where the impact of the new sections applies.

[8] New Zealand is a signatory of United Nations Convention on the Rights of the Child. Article 9 addresses children's right to live with their parent(s), unless it is adverse or impossible. Article 9 reads:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. …..

[9] In this case the State, by its agent Child Youth and Family Services (CYFS), and applying the legislation quoted above has commenced a process by which a child not yet born will be deemed to require separation from its parents, for its own best interests. Although the CYFS process for family to participate in CYFS decisions, the FGC, was held once the CYFS decided that the child could not live with his parents, it does not appear that the parents participated in that decision. They had and used the opportunity to participate at the FGC in the decisions which followed upon that primary decision, namely contact, and the exercise of the Guardianship responsibilities.

[10] Although the parents had the opportunity to be heard in relation to the November 2014 plan, in reality, that "opportunity " has become very limited, for reasons at para [13]. It was on that occasion that the CYFS decision was subject to judicial review (as referred to in UNCROC)

[11] Although CYFS has filed the proper Review documentation and although there can be no criticism of the current plan and structure of this child's care, I cannot be satisfied on the basis solely of the plan, that there has been a proper process by which the Court has "determined" that the child cannot live with his parents into the future. Nor can it be an adequate process for determining a child not yet born can only live with parents if the Court agrees, after application either by CYFS or the parent(s).

[12] Thus, I do not consider that it is proper, prospectively, to make a binding ruling about realistic possibility of return s 18A for a number of reasons.

[13] In practical terms, bearing in mind the workload of CYFS and of the Court, the practice has become established that plans of this nature are considered by a Judge in chambers after documents have been given to parents and in light of the consent of Lawyer for Child. If the parents take no steps, the Court accepts that they do not wish to be heard.[1] It appears to me that the discretion to give parents an opportunity to be heard is one which must be considered in terms of the gravity of the decision which is required in respect of any particular review report. In light of the amended legislation, it is unlikely that the state's international obligations under Article 9.1 and 9.2 of UNCROC are adequately met, unless the parents have a real opportunity to participate in the decision making procedure and make their views known. It may be that CYFS must reconvene the FGC at the time of each review, in order to enable that participation.

[14] The Court's task in considering the Plan is defined in s 137. It is an inquiry into the report. The section empowers the Court to determine applications made under s 125, and to vary discharge and continue any existing order. The Court may

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[1] The power to give an opportunity to be heard appears in s 137 (1A) of the Children, Young Persons and Their Families Act.

examine the author of the review documents, may direct any person to make an application, may direct an FGC, and may direct that a revised plan is filed. Importantly, for understanding the process by which the Court concludes a review, the Court may direct that a revised Plan address any matter where the Court considers the report or Plan inadequate[2]. In practice, Courts often record that the Plan is "approved". The section does not require or enable that process. It is convenient shorthand for consideration of the matters in s 137. For convenience, I use the term in this judgment.

[15] Approval of a plan which records no prospect of return to parents implies approval of that assertion. That implies a finding by the Court that, at that point, s 18A and 18B will be triggered for any subsequent child of either parent. So grave is the outcome of that finding, it is unlikely that the Court will have the confidence to make a ruling which will be binding in the future, in unknown circumstances and at an unknown time about whether, at the time the Court was considering the plan for the earlier child, there was no realistic possibility of return home.

[16] Thus, in my view, although the Court may establish a procedure for considering the "no realistic possibility of return" proposition, when that is first mooted by the Ministry, the ruling cannot have binding effect in relation to subsequent children, unless a number of preconditions have been met.

[17] These preconditions include a meaningful opportunity for parents to be heard. That opportunity must be extended having informed the parents of the potential impact of the particular statement in the plan. Reconvening the FGC would, from the Court's perspective, enable parents to participate in the CYFS decision making process.

[18] For the Court, at the transitional stage of this legislation, while children currently subject to s 101 orders, after a declaration made pursuant to s 14 1 (a) or (b) have their first reviews considered under the new legislative scheme, I consider it necessary that either the Court adopts a contested and adjudicated process, if need be using counsel to assist to advise the Court, if parents do not engage, or that approval

[2] S 137(1)(e)

of the plan specifically excludes approval of the "no realistic prospect of return" statement in the plan.

[19] For this child, having considered the plan with care, and having considered the consent of lawyer for child, I approve the plan, subject to excluding the approval of the "no realistic possibility of return" statement. The ss 101 and 110 orders are to continue. A review is to occur in February 2017. The review documents are to be filed in the usual course, six weeks prior to that date.

[20] However, I do note the concern expressed about the child's social and educational development as observed at day-care. It appears to me that it is insufficient to note that the grandparents will work with special education services. The impact for children arising from adverse childhood experience in infancy is well understood. They are at increased risk of neurological or development difficulties. These difficulties may surface in different ways and at different times.

[21] It is clear from the evidence filed at the time of the application for declaration that the few days at the time that PP was uplifted had been adverse indeed. It may be that CYFS has more information about difficulties experienced by the parents, and therefore by the baby in the weeks prior. CYFS may have information about ingestion of substances in utero. It may be that the result of some of these adversities is appearing now. The next report and plan will be required to address specific interventions and investigations. CYFS is seeking to reduce its active involvement, and is asking the Great Grandparents to seek orders for PP's care under Care of Children Act. It would seem inadequate if the state involvement in PP's care was reduced to a minimum until that investigation had occurred.

J F Moss
Family Court Judge