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

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IN THE FAMILY COURT
AT PALMERSTON NORTH

FAM-2014-054-000208
[2016] NZFC 10716

IN THE MATTER OF	CHILD THE APPLICATION IS ABOUT: BABY PK, Born [date deleted] 2016
BETWEEN	MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	BK MR Respondents

Hearing:	13 December 2016
Appearances:	Ms McLean & Ms Kelly for the Ministry Ms Zabidin for the Father Ms Lohrey for the Child Ms Rennie as Counsel to Assist
Judgment:	14 December 2016

RESERVED JUDGMENT OF JUDGE J F MOSS
[as to whether PK is a "subsequent child"]

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[1] PK was born on [date deleted], almost three weeks premature. She is the fourth child of these parents. The other children do not live with their parents. They have been living with their paternal grandmother, although that placement will soon change. The older three children were removed from the care of their parents in

2014. Some time around February 2016 the goal for the children to return to their parents care changed. The plans and reports in July 2015 record the aspiration for the children to return to their parents care. The February 2016 plan recorded a new goal. No explanation was given. There was no record in the report of the failure of the previous goal. One memorandum by Lawyer for Child records that there was a review meeting in January which the parents attended where it was decided that the children would remain permanently with their paternal grandmother.

[2] The Family Group Conference history for the children records in July 2014 that the primary goal was to return to parents and on 2 December 2016 the goal had changed. There were no Family Group Conferences between those two dates.

[3] On no occasion during the course of the proceedings, which included the making of a declaration in July 2014, disposition orders then, and in February 2015, July 2015, February 2016 and October 2016, did the Court convene in the presence of the parents. On the first occasion (July 2014) when the declaration was made the parents were represented, but have not been since then. No consents appear on the Court file.

[4] The plans filed in August 2016 for the older children record under the heading Purpose of Plan:

> Is there a realistic possibility of return to the care of BK and or MR (person/s who previously had the care).
>
> No.
>
> This plan is prepared on the basis there is no realistic possibility of return home. The purpose of this plan is to outline the child's long-term needs (including care arrangements) and how these will be met.

Once the plans were served and once lawyer for child reported, the plans were considered by a Judge in chambers, as is the usual process. The Judge continued the existing orders, and made no comment about the plan.

[5] At about that time the Ministry applied for a declaration under s 14(1)(ba) Children, Young Persons and Their Families Act (CYPFA). The Ministry sought a declaration on the basis that the child, at that point unborn, was a subsequent child.

[6] The assessment required under s 18A CYPFA was completed on 7 October 2016, and the application for declaration made the same day.

[7] The issue for the Court's consideration is whether the grounds set in s 14(1)(ba) are available. This requires a finding that the parents are persons to whom s 18B applies, and that the social workers assessment completed under s 18A establishes that the parent is not unlikely to inflict on a subsequent child the kind of harm which led to the earlier classification as a s18B parent.

[8] Because there have been few reasoned decisions in relation to this new legislation, I appointed Counsel to Assist the Court with a view to determining whether, at the outset, the Ministry could satisfy the Court that this child is a "subsequent child".

[9] All counsel included in their submissions before me the proposition that this legislation is difficult, and the meaning is not clear.

[10] However, the Court is obliged to implement the legislation, and for this reason it is necessary to analyse with care the steps which the Court must take.

[11] In summary, where a child is born to parents or a parent who has had a child removed from their care on a permanent basis, the Ministry must apply for a Declaration that the new child is in need of care and protection. The Court must then make the Declaration. The exception to each obligation is where the social worker on the one hand or the Court on the other, is satisfied that the parent is unlikely to inflict harm to the new child.

[12] The detailed focus in this initial procedure is on the close reading of the legislation, on deciding whether the parents are persons to whom s 18B(2) applies.

[13] The relevant sections read:

> **14 Definition of child or young person in need of care or protection**
>
> (1) A child or young person is in need of care or protection within the meaning of this Part if—

(ba) the child is a subsequent child of a parent to whom section 18A applies, and the parent has not demonstrated to the satisfaction of a social worker (under section 18A) or the court (under section 18C) that he or she meets the requirements of section 18A(3); or

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.

67 Grounds for declaration that child or young person is in need of care or protection

(1) A court may, on application, where it is satisfied on any of the grounds specified in section 14(1) that a child or young person is in need of care or protection, make a declaration that the child or young person is in need of care or protection.

(2) However, on an application under section 18A(4)(a) or 18D in relation to a person to whom section 18A applies, if the court is satisfied that the subsequent child is in need of care or protection on the ground in section 14(1)(ba), it must make the declaration unless it is satisfied that the parent has demonstrated that he or she meets the requirements of section 18A(3).

[14] In argument before me counsel focussed on the question of whether the Court had determined that there was no realistic prospect of the return home of the older children (s 18B(2)(c)). At my invitation counsel also focussed on whether the phrase "kind of harm" as it appears in s 18A(3), is the harm which led to a Declaration application (s 18B(2)(a)) or the kind of harm which led to the determination that there is no realistic prospect of the child being returned to that person's care (18B(2)(c)). Counsel also focussed, again on my invitation, upon the question of whether these provisions are retrospective, and therefore, on the face of them, limited by s 7 Interpretation Act 1999. Whether the effect of the section is "retrospective" requires careful consideration, in my view, as the term "retrospective" delineates a far from clear category.

So what does "determined" mean?

[15] In order to invoke s 18A, a social worker must believe on reasonable grounds that the Court has "determined… that there is no realistic prospect that the child or young person will be returned to the person's care."

[16] Ms McLean, for the Ministry, submitted that the Court determined the matter when it considered the plan of February 2016. At that time, Ms McLean submitted that the parents had an opportunity to be heard on the matters before the Court, and that the Judge continued the orders on the basis of the plan. Ms McLean accepted that there had not been any kind of hearing. She accepted that the parents were not at that point represented. She did, however, submit that the opportunity to be heard can be implied by the service of documents.

[17] An examination of the Court file indicates that there were no communications from the Court to the parents, at that time, indicating that the Court was planning to consider the matter.

[18] Both Ms Lohrey for the child and Ms Rennie assisting the Court submitted that there is a need for a clear determination because the consequences for subsequent children are serious and adverse. Ms Lohrey submitted that there was at most, a permanent removal of the older three children by acquiescence. Ms Lohrey raised concern that there will always be a power imbalance between family members and the Ministry in these cases, that there need to be clear elements of check and balance, including legal representation, an ability to be heard and the opportunity for understanding the consequences which flow from this finding. Ms Lohrey submitted that this had been an agreed outcome at the July 2014 Family Group Conference, but only as a contingency plan. Ms Lohrey recommended a change in the Court process in order to make the "determination" step plain.

[19] Ms Rennie stressed that a "determination" must be an active process and recommended a specific Court procedure for a determination that there is no realistic prospect of return home.

[20] The word 'determine', and its constituent parts appears extensively in legislation. Taking guidance from the High Court and District Court Rules[1], it appears that determination of a matter may refer to an individual point which, itself, feeds into the overall decision. Within the Family Courts Act[2] the word 'determine'

[1] Rule 20.19 and Rule 18.24 respectively.
[2] Section 11, Family Courts Act.

generally appears in the phrase "hear and determine". In the more inquisitorial processes in the Intellectually Disabled (Compulsory Care Recipient) Act, Criminal Procedure (Mentally Impaired Persons) Act, Mental Health (Compulsory Assessment and Treatment) Act and Protection of Person and Property Rights Act the term 'determine' appears, in multiple sections, as synonymous with consider, decide and conclude.

[21] Elsewhere in the Children, Young Persons, and Their Families Act the term appears, again on multiple occasions, and appears to be synonymous with consider and decide. Although in sections related to specific hearing process, the word 'determine' appears in the phrase "hear and determine"[3] in Parts 2 and 3 with which the Court is concerned here, the term 'determine' appears without the conjunctive "hear".

[22] Because the Court's obligation to review reports and plans, periodically, is to ensure oversight, for the well being of children, CYPFA specifically limits the Court's obligation to convene a hearing. The Court may, but need not provide to parents and others the "opportunity to be heard" on reviews. (s 137 (1A)). The Court may consider representations by parents (s 169). The Ministry and the Court have both been concerned to ensure that the review process is not used to elongate disputes or offer a forum to parents for repeated expression of the same objections to the Ministry's intervention[4]. A balance must be found between the need to address planning in a time-frame relevant to the child's need, to address planning with the child's needs and the first and foremost need, and the integrity of the principles in the Act relating to involvement of whanau in decision making. This latter matter is not merely a matter of form. Children's wellbeing will be enhanced by having their whanau engaged in their needs and issues, even if the children are not living with parents. The degree to which an opportunity to be heard will be offered will depend on the degree to which a new plan is proposing change in arrangements, or the report is recording a change in the needs of the child or conduct of the parents.

[3] Sections 1, 5, 6-8 Children, Young Persons, and Their Families Act.
[4] See Westlaw commentary, NT 12.1.04, 12.3.04 and 12.4

[23] However, on each occasion where the issue of prospect of return home is considered, a plain reading of the legislation requires the conclusion that "determination" is an active decision-making process.

[24] In considering a plan filed under s 135 CYPFA the Court's role, as defined in s 137 is to consider the report and plan. Although that consideration has at times been referred to as "approval"[5] this consideration is not synonymous with the term 'determine'.

[25] Thus, although a plan and review report (filed under s 135 CYPFA) may include the statement referred to at para [4] above, under the Purpose of the Plan heading, I am satisfied, having considered the statutory use of the word 'determination', and contrasting it with the term 'consideration', that the Court does not determine the correctness or adequacy of that statement in undertaking its consideration of the plan and recording whether orders are to continue or not.

[26] In this matter, the Court considered a plan and report dated 12 August 2016 in relation to the older children and on 7 October recorded that the orders were to continue. This implies completion of the process of consideration of the plan, but did not occur in open Court, was not a consideration in the light of the parents' input, and cannot be seen as a "determination" of the proposition that there is no realistic prospect of return to the parents' care.

[27] I am satisfied that the submissions of Ms Rennie and of Ms Lohrey are right that determination requires a specific, clear, and transparent process in which the Court can have some assurance that the parents understand the future implication of the determination sought.

[28] Having formed this conclusion, it follows that PK is not a subsequent child, because s 18(2)(c) CYPFA is not fulfilled.

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[5] See the description of that process in Chief Executive of Ministry of Social Development and TP & HT [2016] NZFC 8909 at para [14].

Is the enactment retrospective?

[29] Section 7 Interpretation Act 1999 provides that an enactment shall not have retrospective effect. As the authors of Burrows & Carter Statute Law in New Zealand[6] argue, retrospectivity is not always easy to discern. The learned authors cite CK Allan thus:[7]

> New law cannot always be solely prospective in its operation; it is almost certain to affect existing rights and, still more, existing expectations. It may be intended to operate in the future, but the mere fact that it operates at all inevitably, in the long run, impinges upon rights and duties which existed long before it came into being. Whether a piece of legislation is regarded as prospective or retrospective cannot be sharply drawn, and whether it is regarded as retrospective or as retroactive will require consideration of the consequences of the imposition of the change.

In a peculiarly durable statement Willes J said:[8]

> Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

[30] The presumption that an enactment does not operate retrospectively must be subject to consideration of whether that enactment is indeed retrospective.

[31] IN the continuing commentary in Chapter 18 of Burrows % Carter, the authors cite the statement of principle, relating to considerations of justice and convenience, the need to consider the purpose and intention of Parliament and give many examples before recording Blanchard J's staightforward statement that:

> The basis of the law's string disposition against allowing legislation retrospective operation is "no more than simple fairness"[9]

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[6] Burrows & Carter Statute Law in NZ, 5th Edition, Ross Carter 2015, Chapter 18.
[7] CK Allan, Law in the Making, 7th Edition 1964, cited at Burrows & Carter, Chapter 18, page 615.
[8] *Phillips & Eyre* 1870, LR6QB1 (QB) at 23 - The case concerned an Act purporting to indemnify the Governor of Jamaica, personally, after a brutal suppression of rebellion at Morant Bay, Jamaica in 1865.
[9] *Board of Management of BNZ Officers Provident Association v McDonald (2002)* 1NZSC 40,570 (CA) at [30]

[32] In terms of s 18A-D (CYPFA) and associated amendments (s 14(ba), s 130 and s 135) the question of retrospectivity is limited to whether a person meets the qualifying definition in s 18B(2)(c) where a child has been the subject to the qualifying circumstances in 18B(2)(a) and (b), and remains out of the care of that person at the time a s 18A assessment is begun. Where a person meets the qualifying circumstances in 18B(2)(a) and (b), but a child has then returned home, it is easy to conclude that the factual context establishes that there is a realistic prospect of return home.

[33] The group of qualifying people is, however, extensive. Until 1 July 2016 the Court was not asked to consider the question of whether there was a realistic prospect or possibility of return home. Rather, the Court was asked to consider plans in which the "permanent placement" or "home for life" would be approved. To determine that a child may not return to the home of a former caregiver is a different determination from determining that the child will live, permanently or for life, somewhere else. There are many reasons, generally related to the effluxion of time, why a child may reside permanently away from a parent, while at the same time the parent is caring competently for another child or children.

[34] The question for the Court is whether the s 18A(2) grounds can be satisfied where a child has been removed and has not returned home to a person prior to 1 July 2016.

[35] In the months since the Act came into force, the Ministry has changed the drafting and format of plans, as the amendments envisaged. The plans routinely include the statement quoted above at para [4] under the heading Purpose of the Plan. The new plans routinely ask the question whether there is a realistic possibility of return home, and where a child has been placed in a "home for life" placement or a "permanent placement" the answer is given as no. The Ministry justifies this on the basis that where a plan has contained an approval of home for life that is synonymous with the absence of a realistic possibility of return home. The Ministry then relies on the Court's confirming orders sought as the determination that there is

no realistic prospect of return home. As discussed in *MSD v TP*[10], I explained the typical chambers process for consideration of plans. It has been rare for the shift in goal from return home to permanent placement to be adjudicated. Typically, a Family Group Conference has not been convened to consider that. I observe, based on many years experience that the point at which the Ministry decides that children cannot be returned home, parents are discouraged, disengaged from litigation, are rarely represented by counsel and rarely appear in Court. At those points, up until 1 July 2016, there have been no significant future consequences, legally, attaching to that moment when the aim for children to be returned home is no longer prosecuted. It is a matter of significant disadvantage and great grief to parents, and while sad, it does not cause surprise that few pursue legal remedies at that point.

[36] However, if parents knew that the Court was, in effect, deciding about the parenting of children not yet born, it appears to me likely that more parents would engage in the legal process, and they would object to any such finding. It also appears more likely that the Court would examine the grounds upon which the Ministry formed that view. This belief arises from knowledge of social science research findings, and observation of family patterns within the care and protection children community which lead me to suggest the following common threads.

- Foster children have some more risks inherent as obstacles to safe and complete development and maturity.

- Most parents seek the return of children, and struggle with linear and timely improvement in the social circumstances, and matters relating to health and maturity which may have led the Ministry to intervene in the first place.

- People without the competence to present linear and timely improvement are also less than averagely competent litigants.

- The grief attendant on the loss of a child, for a parent, often leads to another child being born, to replace the loss, rather than overcoming the difficulties which led to the child being removed from the parents' care.

[10] *MSD v TP* [2016] NZFC 8909.

- Parents who are struggling find it difficult to engage with Child Youth and Family social workers who, by their statutory role, must be both the punitive interveners and the observers and reporters of parental progress.

[37] In these particularly sensitive and complex situations, the risk of injustice arising because a parent has not engaged in proceedings at a critical juncture, because of their own incapacity, is high. The consequences of the Court accepting in a routine way that s 18B(2)(c) has been fulfilled where there has not been an adjudicated process are significant and adverse. Where a declaration application is made on the ground in s14(1)(ba), no Family Group Conference need be convened.[11] The parent bears the onus to persuade the Court that that parent is unlikely to act or omit action leading to harm being inflicted or to allow the infliction of that harm.[12]

[38] I consider that s 18B(2)(c) has retrospective effect which is objectionable based on a combination of these four factors:

- The absence of an adjudicated process at the point that a child's permanent home away from parents is established.

- That parents are typically personally at a very low ebb when that moment occurs.

- That up until 1 July 2016 the parents could not have understood or predicted that the permanency decision would have later ramifications.

- The statute purports to impinge on the rights of children not yet born, which offends the State's obligations pursuant to United Nations Convention on the Rights of the Child.[13]

[39] Thus, it follows, in my view that a consideration of a decision for children to live elsewhere made before 1 July 2016 may not be a qualifying determination for the purposes of s 18B(2)(c) unless there has been a fully adjudicated process where

[11] Section 18A(6).
[12] Section 18A(7)(a)(ii) and 18A(3)
[13] See *MSD v TP* [2016] NZFC 8909.

the judicial findings and reasoning establish that the prime reason for children not being returned home is a risk of continuation of a kind of harm which gives rise to care and protection concerns.

A new process for determination

[40] In order to give voice and active purpose to s 18B(2)(c) it is necessary for Ministry and Court practice to develop such that at succeeding reviews, but only probably on one occasion, parents have a well informed real and substantial opportunity to ask the Court to consider and decide the question of a realistic prospect of return home. Unless this process develops, it is difficult to see how the statute will become operational as intended. All counsel agree, as I do, that Parliament's intention was to enact a process to make it easier and more practical for the Ministry and for the Court to implement safe, welfare focussed, intervention and care for children, and to ensure that the progress into foster care is not delayed because parents use an administrative or a litigation process to limit the provision of timely services to their children. The legislation also serves as a clear and timely reminder that it is wrong to ask children to wait for their parents to improve their own functioning. It is necessary for the services for children to be delivered in a developmentally timely way, and this amendment paves the way for that.

[41] The amendment to s 135(4) relating to the reconvening of a Family Group Conference at time of review has, I am advised, resulted in a change of practice within the Ministry. Social workers will now be obliged to reconvene the Family Group Conference where there is a change in the goal or purpose, from return home to another structure of care. This will potentially enable the Court to be satisfied that the second limb of s 18B(2)(c) is met. However, counsel to assist the Court submitted that this may not be sufficient to satisfy s 18B(2)(c) for several reasons. These include:

- Parents are not routinely represented at Family Group Conference where a goal is changing from return home to permanent placement away from

parents. The parents' own focus at that day is unlikely to be fully engaged to consider the future of as yet unborn children.

- The inclusion of the words "as the case requires" tends to suggest that s 18B(2)(c) may not, in every case, be satisfied if a Family Group Conference agreement records no realistic prospect of return home. It is arguable that given the particular characteristics of Family Group Conference, its privilege status, the exclusion of legal representatives, that the Court may not consider that such a Family Group Conference outcome is sufficient, without a confirming determination by the Court.

[42] A process by which the Court could confidently say that a person qualifies pursuant to s 18B(2) would necessarily include:

- The opportunity for parents to be heard, including but not necessarily limited to formal proof hearing, of which notification to parents is provided.

- Written confirmation from parents that they understand the ramification of the finding of no realistic return home.

- Confirmation by lawyer for the existing children that that determination appears, from the children's point of view, to be proper. This last matter is necessary, because the finding impacts on living children's potential sibling group.

[43] It appears that the Court may deal with this matter, employing the power contained in Rules 13 and 15 Family Court Rules 2002. Rule 15 provides:

> **15 Matters not expressly provided for in rules**
>
> (1) The Judge must deal with any matter not provided for by any enactment (including any of these rules)—
>
> (a) under provisions of these rules dealing with similar matters if that can be done; or
>
> (b) in a way decided by the Judge, in the light of the purpose of these rules, if the Judge considers the matter cannot be dealt

> with under provisions of these rules dealing with similar matters.
>
> (2) This rule is subject to rule 13(1).

This rule empowers the Court to establish a process for resolution of proceedings where the rules and the statute do not clearly establish such a process.

Other Issues

[44] Ms McLean raised the question of a difference in meaning between "no realistic possibility of return home" as appears in s 135 and "no realistic prospect of return home" as appears in s 18B. Neither term is so frequently used in legislation that the clear parameters of interpretation are immediately obvious. This is not a matter which needs to engage the Court at this point, but it may be that the word "prospect" as it appears in s 18B, places upon the Court a higher level of satisfaction than the word "possibility" as it appears in s 135.

[45] In order for the s 14(1)(ba) ground to being made out, the Court must consider the kind of harm, and whether it is satisfied that the new child is unlikely to be exposed to the same "kind of harm" (s 18A). That term appears twice in s 18B(2). First, it appears related to the application for declaration in s 18B(2)(a) and second, in relation to the finding that there is no realistic prospect of return home in s 18B(2)(c). It is the Court's experience that the kinds of harm change. Initially, at the time of the removal of a small child from a parent, and the application for declaration, there may be issues of immaturity and transience. Later, when a more permanent decision is made that the child will not return to that parent, those issues may have resolved, but then be replaced with issues related to drugs and alcohol abuse, family violence, or other health issues. Thus, although not necessary to determine that matter in the case of this baby, it will be necessary for the Court to determine which is the kind of harm which will satisfy s 18A. Although counsel before me argued that the "kind of harm" relates to that present at the point of declaration (s 18B(2)(a), I am less sure. To determine the matter in that way may not adequately meet the purpose of the legislation, because the Ministry's concern must be the enduring risks to children, rather than ones which might resolve.

Conclusion

[46] I have concluded that this baby is not a subsequent child. In parallel to the application under s 14(1)(ba), the Ministry has applied for a declaration citing the grounds in s 14(1)(a) and (b). The Ministry sought, and was granted a s 78 Interim custody order in its favour. In the days between the hearing and the release of this judgment, it has been established that that was a wise course on the Ministry's behalf. Sadly, the Court has been advised that the mother briefly took the child from hospital. The child was retrieved after some hours, after Police intervention. The fact of that event does not, in my view, detract from the need to carefully consider the questions arising in ss 18A and 18B. For the foregoing reasons, I consider that this baby is not a subsequent child, and the s 14(1)(ba) ground for a Declaration is not available.

J F Moss
Family Court Judge