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

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IN THE FAMILY COURT
AT HAMILTON

FAM-2016-019-000919
FAM-2016-019-000644
FAM-2016-019-000766
[2017] NZFC 2426

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	YW Respondent
AND	LW born on [date deleted] 2016 Child or Young Person the application is about

Hearing:	1 March 2017
Appearances:	D McColl for the Chief Executive S Fox for the Respondent M Earl as lawyer for Child
Judgment:	4 April 2017 at 15:00PM

RESERVE JUDGMENT OF JUDGE S D OTENE

Introduction

[1] LW born [date deleted] 2016 is the sixth child of YW. LW's father is SA-G. He is also the father of another of Ms W's children, ZA-G, born on [date deleted] 2014.

[2] LW is in the custody of the Chief Executive by way of an interim custody order made without notice pursuant to s 78 of the Children, Young Persons, and Their Families Act 1989 ("the Act") on 18 October 2016.

[3] Contemporaneously with the application for an interim custody order the Chief Executive applied on notice for a declaration pursuant to s 67 that LW is a child in need of care and protection on the grounds in s 14(1)(a), (b) and (f). The matter is proceeding (or by now may have proceeded) to a family group conference ("FGC") to consider those grounds.

[4] The Chief Executive has also made a separate application for declaration on the grounds in s 14(1)(ba). Section 14(1)(ba) was one of a suite of amendments to the principal Act introduced by the Children, Young Persons, and their Families (Vulnerable Children) Act 2014 that came into force on 1 July 2016 and established, inter alia, the concept of a "subsequent child". Those amendments are a legislative labyrinth.

[5] At a judicial conference on 19 January 2017 the primary issue put to the Court was whether it should direct that an FGC be convened on the s 14(1)(ba) ground. It was submitted for Ms W that the Court should not do so because that would in effect imply a determination by the Court that Ms W met the various criteria to be described as a parent of a subsequent child. She does not accept that she meets the criteria. Her counsel invoked the *res judicata* principle. The matter was therefore set down for a submissions hearing on what was described as a "jurisdictional" issue to determine the s 18B matter.[1] For reasons that I will explain I do not accept the submission for Ms W. I consider that there are compelling reasons

[1] I am satisfied that the reference at paragraph [3] of Judge Riddell's minute of 18 Janaury 2017 to section 18 was an oversight. Clearly the issue arises in terms of s 18B.

of substance, process and economy that mean an FGC should be held before the Court determines any aspects relevant to the grounds upon which a declaration might ultimately be made. I make it clear that by those observations I intend no criticism of counsel or the Court for the way in which this matter proceeded, in my view prematurely, to hearing. It is an entirely explicable consequence of the novelty and complexity of the legislation.

Background

[6] In addition to LW and ZA-G, YW is the mother of RM born [date deleted] 2005, aged 11, EB born [date deleted] 2007, aged 9, KB born [date deleted] 2009, aged 8 and LH born [date deleted] 2013 aged 3 years. RM's paternity is unclear. The Chief Executive suggests her father may be IC or JQ though RM believes her father to be CB, the father of EB and KB. Mr B has applied for a declaration as to paternity of RM. LH's father is MH.

[7] All children have been or are currently the subject of Family Court proceedings. I record at this juncture that the complete record of those proceedings has not been put in evidence. What is available are documents received by consent pursuant to s 9 of the Evidence Act 2006 and the evidence of social worker Tania Snowden in her affidavit of 18 October 2016 making reference to Ms W's participation in those proceedings. Ms W has filed an affidavit in response to Ms Snowden. She does not challenge Ms Snowden's evidence as to her participation.

RM, EB and KB

[8] An FGC agreed on [date deleted] 2009 that RM and EB were in need of care and protection on the grounds in s 14(1)(a) and (b).[2] The FGC was attended by Ms W and Mr B. The FGC record makes the following statements under the heading "Permanency (return home)":

> The Social Worker made it clear to the conference that a return home to parent care is not possible.

[2] KB not then born.

> After much discussion, the conference agrees to Family/Whanau Placement as the Permanency Goal for EB and for RM.
>
> ……..
>
> The Social Worker made it clear to all in attendance that any Family/Whanau Placement will be permanent.

[9] An FGC convened for all three children on 25 August 2009 failed to reach agreement.

[10] Despite that Ms W, though initially opposed, did not contest the Ministry's application for a declaration in respect of all three children.

[11] The Court declared on 19 March 2010 that all three children were in need of care and protection on the s 14(1)(a) and (b) grounds and made a s 101 custody order in favour of the Chief Executive.

[12] KB was placed with Ministry caregivers on [date deleted] 2010. On 31 March 2014 the Court made a parenting order pursuant to s 48 of the Care of Children Act 2004 ("COCA") granting KB's caregivers his day to day care and Ms W monthly supervised contact of two hours duration.

[13] A s 128 plan dated 25 August 2010 for all three children, presumably filed in anticipation of six month review of the custody order, noted the "Goal" as follows:

> The goal of this plan is for, RM, EB and KB to be placed with kin or non-kin permanent caregivers and provided a safe, nurturing and secure "Home for Life" and have opportunity to develop a significant attachment with the families in whose care the children are placed ….

[14] RM and EB were placed with Mr B's sister in September 2010 where they remained until placed with Mr B on August 2016 following allegations of abuse in their aunt's care.

[15] LH has been the subject of FGC plans but not of applications pursuant to the Act. An FGC on 11 December 2013, attended by Ms W, agreed that LH was in need of care and protection on the grounds in s 14(1)(a) and (b). That FGC and a subsequent FGC on 17 October 2014 agreed to LH remaining in the care of Ms W subject to various supports.

[16] LH is currently the subject of COCA proceedings between Ms W and Mr H. LH is now in Mr H's care. Mr H is seeking a final parenting order for LH's day to day care and Ms W is seeking contact. The matter is proceeding to a defended hearing.

ZA-G

[17] ZA-G is in the custody of the Chief Executive pursuant to a s 78 interim custody order made on 25 July 2016. There is an extant application for a s 67 declaration on the grounds in s 14(1)(a), (b) and (f). She is placed with family caregivers. The Chief Executive intends that to be permanent. Counsel for Ms W indicates that there is likely to be consent to the making of the declaration but that disposition by way of the making of a s 101 custody order in favour of the Chief Executive is likely to be opposed.

The Law

[18] In addition to s 14(1)(ba) the other amendments most relevant to the position of subsequent children are new ss18A to 18D and amended s 67. For easier reference they are annexed to this decision. (Appendix A)

[19] As the authors of Westlaw describe,[3] the introduction of the concept of a "subsequent child":

> ….was intended to give effect to the concern that the policy of minimum practical intervention was resulting in cases where a child born to parent(s) who had already been criminally responsible for the death of a child, or had a children removed for abuse or neglect, was being left with the parent until the new child was abused.

[3] NT1.20.08.

[20] It is legislation of complex drafting, abundant with propositions in the negative and internal reference. I distill the broad effect[4] of the amendments as follows.

[21] The application of the amendments is to a person who[5]:

(1) Has been criminally responsible for the death of a child[6] in his or her care; or

(2) Has had a child removed from his or her care if:

(i) a Court declared under s 67 or a family group conference agreed, that the child is in need of care and protection on a ground in s 14(1)(a) or (b); and

(ii) the Court has made a s 101 custody or s 110 guardianship order or s 48 parenting order under COCA and

(iii) the Court has determined (at the time the custody, guardianship or parenting orders were made or subsequently) or a family group conference has agreed that there is no realistic prospect that the child will be returned to that person's care.

[22] When a person falls within that criteria and is the parent of a subsequent child[7] of which the person has or is likely to have care or custody, a social worker must assess whether:[8]

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[4] There are various aspects of the legislation that I will not detail unless relevant to this matter.
[5] Section 18B.
[6] "Child" is used in this judgment for ease of reference but the legislation is equally applicable to "young persons".
[7] "Subsequent child" is defined in s 2 as "a child, born or unborn, who has parent who is a person described in section 18B". Whilst use of the term "subsequent" in normal usage would suggest children born to a person after the earlier death or removal of a child in that person's care, the definition would appear to encompass children, older or younger than the child deceased or removed, subsequently in the parent's care.
[8] Section 18A(3).

(1) the person is unlikely to inflict the same kind of harm on the subsequent child (in circumstances where that person's act or omission lead earlier to the death of a child in his or her care or the removal of a child from his or her care); or

(2) the person is unlikely to allow the same kind of harm to be inflicted on the subsequent child (in any other case).

[23] It is for the person under assessment to demonstrate to the social worker that he or she is unlikely to inflict or unlikely allow that same harm to be inflicted on the subsequent child. If the person does not do so the social worker must apply for a declaration that the subsequent child is in need of care and protection on the ground in s 14(1)(ba).[9]

[24] An FGC does not need to be held before the application is made.[10] That is in distinction to applications on the other s 14(1) grounds where, except in cases of urgency or abandonment, an FGC is a mandatory prerequisite to the application.[11] If an FGC is held the matter for consideration by the FGC participants is whether the child is a "subsequent child" and whether the parent has failed to satisfy a social worker or Court, not the FGC participants, that they are unlikely to inflict or unlikely to allow the same harm to be inflicted upon the subsequent child. The focus then is primarily on the status of the parents in relation to a prior child rather than the actual harm or risk to the subsequent child. The utility of an FGC in these circumstances is not easily evident. The grounds may well be challenging for participants to understand.

[25] If the person demonstrates to the social worker that he or she is unlikely to inflict or unlikely to allow the harm to be inflicted on the subsequent child, the social worker must apply to the Court for confirmation of the decision not to apply for a declaration.[12] The Court may:

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[9] Section 18A(4)(a) and 18A(5).
[10] Section 18A(6).
[11] Section 70.
[12] Section 18A(4)(b).

(1) confirm the social worker's decision if satisfied that the person has demonstrated that the requisite harm is unlikely;[13] or

(2) decline to confirm the social worker's decision and treat the application as an application for a declaration on the ground in s 14(1)(ba).[14]

[26] The proviso to all of this is that a social worker is not required to make the assessment and hence the application to Court (whether that be for a declaration or to confirm a decision not to apply for a declaration)[15] if:

(1) Upon an earlier assessment the Court refused an application for a declaration or confirmed a decision by a social worker not to apply for a declaration on the ground in s 14(1)(ba); or

(2) prior to 1 July 2016 the person was subject to an investigation by a social worker of ill treatment or neglect of a child who would have met the subsequent child criteria, and the social worker did not then form a belief that the child was in need of care and protection on a ground in s 14(1)(a) or (b).

[27] Various and significant consequences flow from these amendments. Given that the legislation is relatively new those consequences are yet to be fully appreciated but immediately apparent is:

(1) a retreat from the family decision making philosophy of the Act by empowering the Chief Executive to make an application on the s 14(1)(ba) ground without an FGC being held[16] and, as discussed at paragraph [24], a seemingly more limited ambit when an FGC is held;

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[13] Section 18C(5).
[14] Sections 18C(4)(b) and 18D(a).
[15] Section 18A(1)(d) and (7).
[16] Section 18A(6).

(2) transfer of the onus[17] from the Chief Executive to justify intervention with a subsequent child to parents to justify the right to have the care of a subsequent child;

(3) the mandatory requirement that the Court make a declaration if satisfied that the s 14(1)(ba) ground is established[18]rather a discretion to do so as in the case of the other s 14(1) grounds.[19]

[28] Additionally there are questions as to how matters of earlier Court and FGC decisions are to be treated and what new processes might need to be adopted as a result of the amendments. Those matters are of potentially significant import to the rights of children and parents.

What falls for determination?

RM, EB and KB

[29] There is no dispute that first two criteria to establish Ms W as the parent of a subsequent child are met because RM, EB and KB have been removed from her care the Court having :

(1) declared under s 67 that the children are in need of care and protection on the grounds in s 14(1)(a) and (b); and

(2) made an order under s 101 for all three children and an order under s 48 COCA for KB.

[30] The questions are:

(1) Was the making of a parenting order on 31 March 2014 granting KB's caregivers his day to day care or the consideration of the s 128 plan dated 25 August 2010 for all three children recording a

[17] As observed by Judge Moss in *Ministry of Social Development v BK* [2016] NZFC 10716, 14 December 2016, FC Palmerston North, at paragraph [7].
[18] Section 67(2).
[19] Section 67(1).

goal as permanent placement out of the parents' care a determination that there was no realistic prospect of return of the children to Ms W's care?

(2) Was the FGC agreement on 30 April 2009 of "Family/Whanau Placement as the Permanency Goal for EB and for RM" an agreement that there is no realistic prospect that the children will be returned to Ms W's care?

(3) Can and should the Court make a contemporary determination that there is no realistic prospect that the children will be returned to the Ms W's care?

(4) If there has been or is such a determination or agreement, was Ms W's prior to 1 July 2016 subject to an investigation by a social worker of ill treatment or neglect of LH or ZA-G with the result that the social worker did not form belief that they were in need of care and protection on a ground in s 14(1)(a) and (b).

LH

[31] The first criteria to establish that Ms W is the parent of a subsequent child is on the face of it met by the FGC agreement that she was in need of care and protection on the grounds in s 14(1)(a) and (b).

[32] The second and third of the criteria are not yet been met because the Court has not made orders under s 48 COCA nor has the Court determined or an FGC agreed that there is no realistic prospect that LH will be returned to Ms W's care. The criteria may be met through resolution of the COCA proceedings between Ms W and Mr H.

ZA-G

[33] None of the criteria to establish that Ms W is the parent of a subsequent child are met. They may be established through resolution of extant proceedings under the Act.

Has the Court determined there is no realistic prospect of return of RM, EB or KB?

[34] Judge Moss in *Ministry of Social Development v BK*[20] having considered the use of the word "determine" in the High Court and District Court Rules, in other provisions in the Act and in other legislation falling within the jurisdiction of the Family Court concluded that where the prospect of return home is considered "determination" requires an active decision making process. I concur and further adopt Judge Moss' view that the gravity of a determination requires the Court to adopt a process of determination that provides parents with a meaningful opportunity to be heard having been informed of the potential effect of the determination. [21]

[35] The next and obvious point is that the parenting order for KB was made and the "Home for Life" plan for all children was considered by the Court before enactment of the subsequent children amendments. There was therefore no expressed determination by the Court of no realistic prospect of return. The question is then is whether a determination was implicit.

[36] Before considering whether that was so on the particular facts of this case, I think there must first be broader consideration of whether a determination of no prospect of return can ever be implicit in the making of the parenting orders placing children away from the care of parents or by consideration of the plans to the same effect undertaken prior to the subsequent children amendments. I conclude that it cannot for the following reasons:

(1) an active decision making process must surely involve participants not only turning their mind to the issue at hand but also appreciating, or at least being aware of, the consequences of that decision;

[20] Ibid note [17] at paragraph [23].
[21] Ibid at paragraph [17].

(2) neither parents nor the Court could have appreciated the consequence the determination might have in respect of subsequent children and their parents simply because there was no consequence then to be had;

(3) it follows that prior to the subsequent children amendments it was not possible to have a decision making process that laid a legitimate foundation for a determination of no realistic prospect of return;

(4) it is no answer then that a parent who, having been afforded an opportunity to participate, acquiesced, consented or did not otherwise seek to be heard upon the making of a parenting order or consideration of a plan or even that a parent actively contested matters. Due process is no cure to a fundamentally flawed premise.

[37] I find therefore that the Court has not thus far determined that there is no realistic prospect of return of RM, EB or KB to the care of either of their parents.

Has an FGC agreed that there is no realistic prospect of return of RM, EB or KB?

[38] For the reasons articulated at paragraphs [34] and [36] I similarly conclude that an FGC agreement to permanently place a child away from a parent made prior to the subsequent children amendments can never imply an agreement that there is no realistic prospect of return carrying as that does the consequences for subsequent children and their parents. Like a determination an agreement must surely involve an active process whereby participants are aware of the consequences that flow from the matters to which they give their agreement. FGC participants could not have been aware that agreement to place a child permanently away from the care of parents would have consequence for subsequent children and their parents simply because those consequences did not then exist.

[39] This is leant further weight by the observation that whanau and family participants in an FGC who agree that there is no realistic prospect of return affect future rights not only of subsequent children and their parents but also the rights of

participants themselves to be involved in decisions regarding subsequent children. That is because as traversed at paragraph [24] an FGC need not be held before the application is made and whilst, as I will come to, an FGC must be held before the Court makes a declaration the ambit of the FGC appears limited.

[40] I find therefore that no FGC has thus far agreed that there is no realistic prospect of return of RM, EB or KB to the care of either of their parents.

[41] I recognise that on this interpretation of "determination" and "agreement" the s 14(1)(ba) grounds are incapable of being established on the basis of any Court determination or FGC agreement made prior to the enactment of the subsequent children amendments. If so the amendments may have more narrow application than intended by Parliament. That is a matter for remedy by Parliament not the Court. The bluntness of that result is nevertheless mitigated by the ability of the Court to make a present determination that there is no realistic prospect of return of a child removed prior to the amendments.

[42] Furthermore I consider that such an interpretation is consistent with the s 6 principle that the child's welfare and interests are the first and paramount consideration as guided by the principles set out in ss 5 and 13 focusing as they do on protection of children, recognising where possible that should occur within families. This Court has in numerous cases summarised the fundamental underpinnings of those principles. The following passage from the decision of Judge Moran in *Re DM*[22] is helpful:

> [22] Section 5 details the principles that the Court must be guided by and which can be summarised are those which provide for consultative and collaborative decision making; strengthening bonds for families; ascertaining the wishes of children where appropriate and for the making of timely decisions.[23]
>
> [23] The principles in s 13 are subject to the overriding principles of s 5 and the paramountcy principle of s 6. They are unusually detailed and explicit[24] but condense down to three basic principle ideas, being:
>
> The wellbeing of the child is entwined with that of his or her family;

[22] FC Greymouth FAM 2008-081-95, 3 September 2010.
[23] *W v Chief Executive of Child Youth and Family Services* [2004] NZFLR 12 at 17, paragraph [37].
[24] *C* FC Nelson CYPF 042-400-2/92, 20 October 1995.

> The child's wellbeing is to be promoted by and through the family to the fullest extent possible;
>
> The child is to be severed from the family to the least extent necessary, and only as a last resort.
>
> [24] There is a strong emphasis on the retention of family placement and ties which sends a clear message that children have a right to live with and be nurtured by, family and to enjoy a sense of identity and belonging "wherever possible".[25] The latter proviso recognises that for some children a family placement cannot ensure their safety and for them, the emphasis is on providing an opportunity to develop significant psychological attachment to their caregivers.[26] Decisions affecting these children should wherever practicable, be made and implemented within a timeframe appropriate to their sense of time.[27]

[43] Further assistance is gained from the following remarks of Judge E Smith in *Chief Executive of MSD v LA*[28]*:*

> [4] The essence of the principles in s 13 is that a child must be "protected from harm"[29], only removed from its family if there is a "serious risk of harm"[30], "protected from harm" whilst outside its family[31], and returned to its family only when it is practicable for the child to be "protected from harm" within that family.[32] In summary, therefore, "protection from harm" is the only justification for removing a child from its family and is the only barrier to a return to the family."

Is there now any realistic prospect of return of RM, EB or KB to Ms W's care?

[44] Two issues arise: first the process of determination and second whether the facts establish no realistic prospect of return. For the reasons that follow I do not consider that I am in a position at this stage to deal with the second issue.

Process

[45] The Chief Executive invites the Court to make a determination of whether there is a realistic prospect of return of Ms W's children to her care at the date of

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[25] ss 5 (a) and (b) Children Young Persons and Their Families Act 1989.
[26] s 13(h) Children Young Persons and Their Families Act 1989.
[27] s 5(f) Children Young Persons and Their Families Act 1989.
[28] [2016] NZFC 1640 at [4].
[29] Section 13(a).
[30] Section 13(e).
[31] Section 13(f)(ii).
[32] Section 13(f)(i).

hearing.[33] It is open to the Court to do so given that s 18B(2)(c) makes express reference to a determination "subsequently" to making custody, guardianship or parenting orders.

[46] The Act does not prescribe a process for determination. Curiously however s 18C dealing with the Court's confirmation of a decision not to apply for a declaration requires a specific application to be made and sets out a specific process for determination of the application.

[47] A s 18C application is a matter of potentially far less prejudice to a parent and consequence for subsequent children than a s 18B determination. A s 18B determination requires in my view a process cognisant of the gravity for the parent and subsequent children and must therefore be observant of principles of natural justice.

[48] To make a determination without due process would in effect be to invite the Court to determine the matter without notice to the parent. Such an approach simply does not accord with any reasonable expectations as to natural justice or for that matter comply with the requirements of rr 23 and 24 of the Family Court Rules 2002 ("FCR"). The threshold for proceeding without notice has been well established subsequent to *Martin v Ryan.*[34]

[49] Further in addition to the r 23 expectation that generally applications must be on notice unless r 24(1) or (2) applies, I also note that r 276 applies to without notice applications specifically under the Act and on its face does not permit application for a s 18B determination without notice.

[50] When the FCR and/or the Act prescribe a careful process for all manner of steps from the relatively minor (for example lawyers seeking declarations that they no longer represent a particular party - r 88) to the most significant (for example applications for declarations that a child is in need of care and protection - rr 152, 153, 155 and 281) I do not consider the failure to provide a process for dealing with

[33] Submissions of counsel for the Chief Executive dated 20 February 2017, paragraph [15]. Although the term "assessment" is used I take it to mean determination.
[34] [1990] 2 NZLR 209; (1990) 6 FRNZ 187.

a s 18B determination to be deliberate or indicative that due process is not required. Rather, as with any other application for which a specific process is not prescribed, r 15 applies:

> **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).

[51] Rule 13(1) in turn provides that:

> **13 Practices must be consistent**
>
> (1) A practice that is not consistent with these rules or a family law Act must not be followed in any Court.
>
> (2) Subclause (1) overrides rules 14 to 16.

[52] Given the significance of a s 18B determination, it would hardly be consistent for it to be addressed in a less formal manner than, say an application for a declaration that counsel no longer represents a party which requires a formal application supported by evidence and in most cases service of that application.

[53] I consider that at the very least the process for s18C applications should be adopted when the Chief Executive seeks a s18B determination. That is there must be:

> (1) an application accompanied by an affidavit by the social worker setting out the reasons for which it is contended s 18B applies; and

(2) service of the application on the persons described in s 152(1) as if it were an application for a declaration under s 67; and

(3) when considering the application the Court may (but need not), give any person an opportunity to be heard on the application.

[54] That process has not been followed here. Again there can be no criticism of any counsel or indeed the Court for that given the novelty of the legislation. Rather what has occurred is application made by the Chief Executive without notice for the s 78 interim custody order for LW contemporaneously with the on notice applications for a declarations on the s 14(1)(a), (b), (f) and (ba) grounds. Ms W filed a notice of intention to appear in opposition to the making of a declaration and an affidavit in support. The Court then directed the submissions only hearing on the s 18B matter. That is not in strict compliance with the process I have identified but it has been partially followed in substance in that the Chief Executive has now made it clear that a contemporary determination is sought and notice of that has been given to Ms W. I consider that the process has faltered in provision of an opportunity of Ms W to be heard because clarity of what is sought only emerged through submissions at the hearing and this decision. Whilst Ms W has filed an affidavit in support of her notice of intention to appear the focus of her evidence is on her present and future ability to safely parent LW rather than on matters relevant to no prospect of return of RM, EB or KB to her care. That is explicable in the context of how the issue belatedly crystalised rather than it being evident at the outset. It is yet another reason why a specific process is desirable so that the parties and the Court are clearly upon notice as to the issue at hand and the relief sought.

[55] I consider that the defect in process can and should be remedied by providing Ms W with opportunity to present evidence focused on no realistic prospect of return of RM, EB and KB to her care at this time. The affidavit of the social worker Tania Snowden sworn 18 October 2016 appears to place all relevant evidence of the Chief Executive before the Court so I do not intend to seek further evidence from the Chief Executive.

Did a social worker determine prior to 1 July 2016 that neither LH or ZA-G were in need of care and protection on the s 14(1)(a) and (b) grounds: s 18A(7)?

[56] If this proposition is answered in the affirmative Ms W is not susceptible to the s 18A(2) and (3) assessment as to the unlikelihood of inflicting or allowing harm to be inflicted on LW.

[57] As I understand the evidence LH and ZA-G were both in Ms W's care at 1 July 2016 prior to which she had been subject to an investigation or investigations by a social worker of their ill treatment or neglect. A social worker participated in an FGC held on 17 October 2014 that agreed that both children were in need of care and protection on the grounds in s 14(1)(a) and (b). That satisfies me that up to point there had been no such determination by a social worker. The question is whether there was a determination of this kind by a social worker as between that date and 1 July 2016. I accept the submissions of Mr Earl, counsel for LW, that the evidence before me does not preclude that at this stage. I require the Chief Executive to file further evidence to address this matter.

Adjournment pending determination of matters regarding LH and ZA-G

[58] As noted there has not yet been either a determination by the Court or agreement by an FGC that there is no realistic prospect of either of these children to Ms W's care. A determination may come about upon resolution of the respective proceedings to which they are currently subject. I am hesitant to adjourn the application for declaration for LW pending that resolution. There has already been abject failure to meet the statutory obligation to ensure the commencement of the declaration hearing within 60 days[35] and to implement decisions in a time frame appropriate to LW as is required by principle in s 5(f). That failure will obviously be compounded by further adjournment.

Necessity for an FGC

[35] Section 200.

[59] This is where I return to my observations at the start of this judgment as to the desirability of holding an FGC before determination. It requires consideration of s 72 which reads as follows:

> **Court not to make declaration unless family group conference held**
>
> (1) Subject to subsection (2) of this section, the Court shall not make a declaration under section 67 of this Act that a child or young person is in need of care or protection unless a family group conference has been held under this Part of this Act (or, in the case of an application on the ground specified in section 14(1)(e) of this Act, under Part 4 of this Act) in relation to the matter that forms the ground of the application.
>
> (2) Nothing in subsection (1) of this section applies in respect of any application to which section 70(2)(c) of this Act applies.
>
> (3) Where an application is made to the Court for a declaration under section 67 of this Act, the Court may, at any stage of the hearing of that application, on the application of any party to the proceedings or of its own motion, direct a Care and Protection Co-ordinator to convene a family group conference in relation to the matter that forms the ground of the application.

[60] The following observations of Judge Callinicos in *MOSD v Osteen*[36] in relation to s 72 (1) are apt:

> [29] There is a fundamental requirement under the Act that a family group conference (FGC) must have been held in relation to the matter that forms the ground of the application. In *H v Chief Executive Department of Child Youth and Family Services*[37] Courtney J considered the provisions of the CYPF Act as to fundamental requirements of the FGC process. Although aspects of the decision were overturned by the Court of Appeal, Her Honour's discussion of the CYPF Act process was not disturbed. She confirmed that s 72(1) requires that a Court shall not make a declaration unless an FGC has been held "in relation to the matter that forms the ground of the application". Although s 72(1) does not expressly provide that the specific s 14 grounds as stated in an application must be stated as precisely in the FGC record, Courtney J's decision suggests that there must be sufficient material available to ascertain that the FGC was held in respect of the same grounds as the application. For instance, Her Honour referred to the possibility of comparing the circumstances at the time of the FGC to those at hearing in order to see if s 72(1) was complied with. Ideally, of course, the written record of the FGC should normally specify the precise s 14 grounds upon which the conference was convened, making it an easy task to see whether s 72(1) has been met. She held that if the circumstances of a family have changed significantly between the date of the conference and the hearing, then the FGC is unlikely to satisfy s 72(1).[38] Accordingly, where the Chief Executive applies for a declaration it must ensure that

[36] [2013] NZFC 4876.
[37] [2007] NZFLR 802, at [32].
[38] Ibid a paragraph [35].

> the s 14 grounds upon which the declaration is sought must have been grounds considered at the FGC relied upon."

[61] I come to the position that on the plain reading of s 72 the Court cannot make a declaration on the ground in s 14(1)(ba) in the absence of an FGC being held on that ground.

[62] As a social worker cannot make a referral to an FGC on the s 14(1)(ba) ground[39] it would seem that the only pathway to an FCG on the s 14(1)(ba) ground is upon exercise of the Court's discretion pursuant to s 73(3) to direct a care and protection co-ordinator to convene an FGC.

[63] I do not accept that if the Court directs that an FGC be convened it implies that the Court accepts or has determined that Ms W is a person of the type described in s 18B. The direction to convene an FGC is made to comply with the mandatory prerequisite to the making of a declaration. A direction made on that express basis simply cannot be taken to imply that the Court has accepted that the s 18B criteria are established.

[64] Furthermore delays and multiple hearings are potential consequences of having an FGC on the s 14(1)(ba) ground separate from other the grounds. This case is an example. There has been this hearing to first determine the "jurisdictional" issue. If there is no agreement at one or both the FGCs another hearing (or hearings) to determine the declaration application (or applications) will be necessary. The Chief Executive may in the future wish to consider when making an application for a declaration on the s 14(1)(ba) ground seeking a direction from the Court pursuant to s 72(3) to convene an FGC so that it can be held at the same time as the FGC on the other grounds, if any, relied upon.

Directions

[65] I have considered whether to simply adjourn matters pending the FGC in accordance with the preferable process I have indicated. However having embarked on the hearing I have decided it should be brought to conclusion with further delay

[39] Section 19(1)(b).

ameliorated by making direction now to convene an FCG. The hearing to determine whether at this time there is no realistic prospect of return of Ms W's other children to her care is adjourned to a further submissions only hearing for one hours before me to be held as soon as possible after the expiration of the following timetable. If at that time the respective proceedings for LH and ZA-G are not resolved consideration will need to be given to either dismissing or adjourning the application as it relates to them.

[66] Within 21 days:

(1) Ms W is to file an affidavit addressing matters relevant to the Court's determination of whether at this point there is no realistic prospect of return of RM, EB or KB to her care;

(2) The Chief Executive is to file an affidavit as to any investigation of Ms W pursuant to s 17 in relation to LH and ZA-G between 17 October 2014 and 1 July 2016 and whether or not as a result of any such investigation a social worker determined that either child was in need of care and protection on the grounds in s 14(1)(a) or (b).

[67] Counsel are to file written submissions no later than 5 days prior to the hearing.

[68] Pursuant to s 72(3) a care and protection co-ordinator is directed to convene an FGC in relation to matters forming the s 14(1)(ba) ground.

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S D Otene
Family Court Judge

APPENDIX A

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 of this Act if—

(a) the child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or

(b) the child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or

[(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 **[[**the chief executive**]]** (under section 18A) or the court (under section 18C) that he or she meets the requirements of section 18A(3); or**]**

(c) serious differences exist between the child or young person and the parents or guardians or other persons having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or

(d) the child or young person has behaved, or is behaving, in a manner that—

(i) is, or is likely to be, harmful to the physical or mental or emotional wellbeing of the child or young person or to others; and

(ii) the child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control; or

(e) in the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child; or

(f) the parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person; or

(g) the parents or guardians or other persons having the care of the child or young person have abandoned the child or young person; or

(h) serious differences exist between a parent, guardian, or other person having the care of the child or young person and any other parent, guardian, or other person having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or

(i) the ability of the child or young person to form a significant psychological attachment to the person or persons having the care of the child or young person is being, or is likely to be, seriously impaired because of the number of occasions on which the child or young person has been in the care or charge of a person (not being a person specified in subsection (2) of this section) for the purposes of maintaining the child or young person apart from the child's or young person's parents or guardians.

(2) The persons referred to in subsection (1)(i) of this section are as follows:

(a) any person who has custody of the child or young person pursuant to the order of any Court, whether or not that Court is a Court within the meaning of this Act:

(b) any person who has the child or young person in that person's care—

(i) pursuant to an agreement under section 139 or section 140 or section 141 or section 142 of this Act; or

(ii) for the purpose of adoption, and the requirements of section 6 of the Adoption Act 1955 are being complied with:

[(c) any person who is caring for the child or young person in—

(i) any residential accommodation provided for children or young persons attending a registered school within the meaning of the Education Act 1989:

(ii) a hospital care institution within the meaning of section 58(4) of the Health and Disability Services (Safety) Act 2001.**]**

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 **[[**the chief executive**]]** believes on reasonable grounds that a person is a person to whom this section applies, the **[[**chief executive**]]** 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 **[[**chief executive**]]** 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 **[[**chief executive**]]** 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 **[[**chief executive**]]** must apply as described in subsection (4)(a) if the **[[**chief executive**]]** 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 … 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 **[[**chief executive**]]** 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.]

18D Court declining to confirm decision

If, under section 18C(4)(b), the court declines to confirm **[[**the chief executive's**]]** decision under section 18A(4)(b), the court must give written reasons for its decision, and the application for confirmation—

(a) must be treated as an application for a declaration under section 67 … on the ground in section 14(1)(ba) …; and

(b) must be served and heard in accordance with Part 3 and the rules of court, except that, although section 70 does not apply, if a family group conference is convened pursuant to section 72(3), the chief executive (or his or her representative) is entitled to attend the conference as if he or she were entitled to do so under section 22(1)(a) to (h).**]**

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) of this Act 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).**]**