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 PALMERSTON NORTH

FAM-2013-054-000886
[2017] NZFC 4052

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY FOR VULNERABLE CHILDREN, ORANGA TAMARIKI Applicant
AND	[VC] [MB] Respondents

Hearing:	29 May 2017
Appearances:	H McKenna and E Goulden for the Ministry R Walker, Lawyer for Children C Linton for [LH and PH]
Judgment:	8 June 2017

DECISION OF JUDGE D G SMITH

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[1] This proceeding concern [LB], born on [date deleted] July 2009 and [KB], born [date deleted] May 2011, now aged seven years 10 months and six years respectively.

[2] The Ministry for Vulnerable Children (Oranga Tamariki) ("the Ministry") applied on 21 October 2016 to discharge s 101 and s 112 orders in favour of the Chief Executive of the Ministry and seek an order appointing [L H] and [PH] additional guardians pursuant to s 110(4) and as special guardians pursuant to s 113A and s 110(4) of the Children, Young Persons and Their Families Act 1989 ("the Act").

[3] [LH and PH] attended the hearing and support the applications.

Background

[4] [L] and [K]'s parents are [VC] and[MB].

[5] In [month and year deleted] the Ministry was advised by the police that [MB] had been arrested and charged with multiple sex offences against [L] and [K]'s half sibling.

[6] On [date deleted] a s 78 interim custody order was granted for [L] and [K].

[7] On [date two weeks later] a s67 declaration, on the grounds of s 14(1)(a) and (b) of the Act, was made for [L] and [K].

[8] In [month and year deleted] [VC] was sentenced to [sentence duration deleted] imprisonment after being convicted for being cognisant of [MB]'s offending against her [child].

[9] On [date the following year deleted] a s 101 custody order and an additional guardianship order, pursuant to s 110 of the Act, were granted in favour of the Chief Executive of the Ministry for [L] and [K].

[10] In [month and year deleted] [MB] was convicted of serious sexual assaults on [L] and [K]'s half sibling and was sentenced to [number deleted] years imprisonment.

[11] The Ministry's application is supported by an affidavit sworn by Ms Anna Fonua, the Ministry Social Worker assigned to [L] and [K].

[12] In her affidavit dated 21 October 2016, Ms Fonua proposes that some guardianship rights be held exclusively by Mr and Mrs [H] and some to be shared by them and [VC].

[13] The guardianship rights which Ms Fonua believes should be held exclusively by Mr and Mrs [H] are those relating to [L] and [K]'s medical and education needs, as well as the right to determine the appropriateness as to any access between [L], [K] and their father, [MB].

[14] Ms Fonua's position is that [MB] should not have any guardianship rights at all, as he:

> …continues to be manipulative and does not want his children to remain in the care of the Ministry. [MB] continues to show a lack of insight as to why he went to jail and when pointed out by Child, Youth and Family supervisor, Carol Osborne (Ms Osborne) why he was in prison, for sexually abusing a child, [MB] said "yeah, but not my child".

[15] In the hearing before me, Ms Fonua confirmed that contact with [VC] had got even more difficult, as her phone was now disconnected. [VC] has not provided any address and the only knowledge now held is that [location details deleted].

[16] For those reasons, the Ministry has submitted that in regard to health and education decisions, the guardianship rights should be held exclusively by [LH and PH].

[17] While [VC] has been co-operative in the past, the Ministry take the view that it is imperative that a social worker be able to get an immediate response from [VC] when decisions need to be made around the health and education for [L] and [K].

[18] Ms Linton, counsel for [LH and PH], seeks a further sole guardianship rights as to overseas travel and relocation within the North Island by her clients. Specifically they seek:

(a) The right to travel overseas but only to countries that are signatories of the Hague Convention;

(b) That such travel will not interfere with contact arrangements with the children's family;

(c) That confirmation of travel would be provided to other guardians four weeks prior to travel; and

(d) They seek the right to relocate within the North Island but with prior notice to be provided. They undertake they will transport the children back to [location 1 deleted] for contact should that be required.

[19] Ms Linton's submissions make it clear that what [LH and PH] seek is to have the ability to advise the other guardians of any proposed changes for these matters without the need to consult to secure an agreement.

[20] The application by the Ministry has been served on both [VC] and [MB]. They have taken no steps.

The Law

[21] The application by the Ministry applies for firstly, discharges of the existing s 101 and s 110 orders presently held by the Chief Executive of the Ministry. The right to apply for a discharge of those orders is contained in s 125(1)(f) and (g) and s 126(g).

[22] The application refers to a s 112 order but that is an error. S112 merely specifies that a s 110 order may appoint the Chief Executive as a guardian for a particular purpose, as was done here. While s 112 has been exercised, the order is still a s 110 order. I can understand why the application states s 112, as that is the reference on the order issued, mistakenly, by the registry.

[23] The second part of the application is the Ministry seeks appointment of [LH and PH] as additional guardians pursuant to s 110(4) and as special guardians pursuant to s 113A and s 110(4) of the Act.

[24] The relevant sections are:

Section 110:

> **110 Guardianship orders**
>
> (1) Where the court makes a declaration under section 67 in relation to any child or young person, or on an application referred to in section 110A, it may make an order appointing any of the following persons to be a guardian of the child or young person:
>
> (a) the chief executive:
>
> (b) an iwi social service:
>
> (c) a cultural social service:
>
> (d) the director of a child and family support service:
>
> (e) any other person.
>
> (2) A guardian appointed under subsection (1) must be appointed as—
>
> (a) the sole guardian of the child or young person; or
>
> (b) a guardian of the child or young person in addition to any other guardian.
>
> (3) The director of a child and family support service may not be appointed as the sole guardian of a child or young person.
>
> (4) If a person who is appointed as a sole or additional guardian of a child or young person under this section is a natural person, the court may also make an order under section 113A appointing the person as a special guardian of the child or young person (including when the order under this section is made at a hearing under section 127).

Section 110A:

> **110A Application for change of guardianship order**
>
> (1) If a person is, in relation to a child or young person, a permanent caregiver who is not a special guardian, the person may, with the leave of the court, make a combined application for a guardianship

order under section 110 and a special guardianship order under section 113A.

(2) Leave of the court may be given only if the court is satisfied that—

(a) the application is made with the intention of replacing a guardianship order made under section 27 of the Care of Children Act 2004 and all associated parenting orders under section 48 of that Act with the guardianship orders referred to in subsection (1); and

(b) the person has exercised all mechanisms available under the Care of Children Act 2004 to resolve disputes with any parent or other guardian of the child or young person that relate to the circumstances referred to in subsection (4)(a).

(3) An application under this section must be treated as if it were an application under section 125 for the variation or discharge of an order made under Part 2, and, for that purpose, must be served and heard in accordance with Part 3 (with any necessary modifications).

(4) On an application under this section, the court may make the orders applied for only if—

(a) the court is satisfied that—

(i) the person has been unable to effectively exercise his or her guardianship responsibilities or responsibilities to provide day-to-day care to the child or young person under the orders made under the Care of Children Act 2004; and

(ii) that inability is due to the conduct of the parents or other guardians of the child or young person, and that conduct forms a pattern of behaviour; and

(iii) the child's or young person's welfare is being threatened or seriously disturbed as a result; and

(b) following an application under section 29A of the Care of Children Act 2004, the court will at the same time revoke both the person's appointment as a guardian under that Act and any associated parenting orders under section 48 of that Act.

And s 113A:

113A Special guardianship orders

(1) The court may make an order under this section appointing a person referred to in section 110(4) as a special guardian of a child or young person only if—

(a) the appointment is made for the purpose of providing the child or young person with a long-term, safe, nurturing, stable, and secure environment that enhances his or her interests; and

(b) either—

(i) the child or young person has no other guardian; or

(ii) the special guardian either replaces, or is additional to, an existing guardian of the child or young person.

(2) For the purposes of this section and section 113B, **existing guardian** means any person (other than a special guardian) who is a guardian of the child or young person, or who would be a guardian of the child or young person if the court had not made a guardianship order under section 110.

[25] The Ministry submits that to enable a person to be appointed as special guardian, he or she must first be appointed an additional guardian pursuant to s 110 of the Act. Section 110(4) allows the additional guardian to then be appointed as a special guardian under s 113A.

[26] The Ministry submits that the Act allows for an application for an order under s 113A to be made concurrently with an application for an order under s 110. The Ministry quotes section 110A which states:

(1) If a person is, in relation to a child or young person, a permanent caregiver who is not a special guardian, the person may, with the leave of the court, make a combined application for a guardianship order under section 110 and a special guardianship order under section 113A.

[27] The Ministry's position is that due to the inclusion of s 110A in the Act, the Ministry can apply with the leave of the Court to have [LH and PH] appointed as additional guardians and special guardians at the same time.

[28] In my view the Ministry's approach is misplaced.

[29] On my reading of s 110A, the applicant under that section for the orders is the person who is the permanent caregiver. Here that would be [LH and PH].

[30] When you consider s 110A(2) as the basis on which the Court must be satisfied before leave is given for such an application, it is quite clear that [LH and

PH] will not be in the position to make any such application as there has never been a guardianship order made under s 27 of the Care of Children Act 2004 or orders under s 48 of that Act.

[31] The right of the Ministry to make contemporaneous applications for s 110 and s 113A orders is found in s 110(4). To do so there has to have been a declaration under s 67, and here there has been, on 19 March 2014. By s 110(1)(e) "any other person" may be appointed.

[32] In submissions filed by Mr Walker, lawyer for the children, he states that the Act establishes two pathways for the making of a special guardianship order depending whether the applications are made under the CYPFA regime or whether the child is already the subject of orders made under the Care of Children Act 2004. As he notes, the current application before the Court is the former, given that [L] and [K] are currently the subject of a s 101 custody order and a s 112 (sic) additional guardianship order (medical purposes) in favour of the Chief Executive.

[33] Mr Walker submits that on the face of the legislation it appears that where applications are made under the CYPFA regime, that there is a more straightforward path for the making of a special guardianship order as opposed to whether the child or children concerned are already the subject of COCA orders – the latter requiring the permanent caregiver to carry the additional burden of satisfying the Court as to leave requirements in s 110A(2) and there are further requirements set out in s 110A(4). Mr Walker states that the rationale for a seemingly higher threshold for applications made where caregivers have COCA orders as opposed to the CYPFA pathway is unknown. The question which he says has been raised by some commentators (see CYPF Act Update Seminar presented by Dr Allan Cooke and Hana Ellis, April 2016) is whether when going from the CYPFA orders to special guardianship that the Court must similarly be clearly satisfied that there is an appropriate evidential basis to make orders which effectively confer upon caregivers sole guardianship rights in relation to some aspects of guardianship.

[34] He further submits that an issue that will need to be considered by the Court is whether the Chief Executive needs to establish clear evidence of previous disputes

or issues with the existing guardians over guardianship matters and whether, in the absence of such difficulties an order for special guardianship confirming sole decision-making powers is warranted.

[35] The answer to that question must be yes. The decisions to be made under s 110 must be made in line with the objects of the Act set out in s 4, the principles set out in s 5, guiding a decision and bearing in mind the principles in s13. At all times, the welfare and interests of the child or young person are paramount as set out in s 6. In making any decision I must take into account the children's views bearing in mind their age and maturity – s 11.

[36] Altering guardianship arrangements clearly has an effect on the relationship a child or young person has with his or her family, whānau, hapu, iwi and family group and in making such an order there will be inevitably a deterioration in the strength of that relationship if guardianship is held by someone other than the parent or the person to whom the child or young person looks to in a parental role.

[37] Quite why the legislation has spelt out how such a matter is to be approached in s 110A, as opposed to s 110 or s 113A, may possibly never be known, but the care to be taken by the Court in each and every case irrespective of the basis of the application should be to the same high standard. In deciding whether [LH and PH] should have a special guardianship order in the terms sought the requirements of s 113A(1) must be met in respect of both [MB] and [VC].

[38] Section 113B(1) states:

> **113B Effect of special guardianship order**
>
> (1) Where a special guardianship order is made in respect of a child or young person, then, whether the special guardian is a sole or additional guardian and despite anything in this section,—
>
> (a) the special guardian has custody of the child or young person, and—
>
> (i) no order under section 101 may be made in respect of the child or young person; but
>
> (ii) section 114(2)(b) and (c) applies as if the special guardian were a sole guardian; and

> (b) the order must specify the access and other rights (not being custody or guardianship rights), including any terms and conditions that apply to those rights, of each existing guardian in relation to the child or young person.

[39] The extent of the special guardianship order sought in favour of [LH and PH] by the Ministry is as set out above in paragraphs 13, 14 and 18 above.

[40] The effect of what is sought in respect of [MB] removes his guardianship rights in total.

[41] As regards that aspect, the Ministry have submitted that the requirements set out in s 29 of the Care of Children Act 2004 would be the appropriate standard when considering the removal of someone's guardianship rights completely.

[42] Section 29(3) of the Care of Children Act 2004 states:

> **29 Court may remove guardians**
>
> …(3) An order under subsection (1)(a) (that is, an order depriving a parent of the guardianship of his or her child) must not be made unless the court is satisfied—
>
> (a) that the parent is unwilling to perform or exercise the duties, powers, rights, and responsibilities of a guardian, or that the parent is for some grave reason unfit to be a guardian of the child; and
>
> (b) that the order will serve the welfare and best interests of the child.

[43] I have given consideration as to whether using s 113A to achieve the same outcome as s 29 of the Care of Children Act is an appropriate use of that section. My preferred approach would be for a separate application to be made under s 29 COCA. That puts the issue at the forefront of matters rather than being part of an overall application such as this where its effect may not be so easily appreciated by the respondents.

[44] In the particular circumstances of this matter I have concluded that provided the same approach is applied as set out in s 29(3), which I see is required as a consequence of ss 4, 5, 6 and 13 of the Act, then s 113A is available to achieve that result. To require a separate application to be filed at this point while the children

are without any natural guardians carrying out their responsibilities will unnecessarily prolong the proceeding.

[45] The required approach under s29 is well established. In *Jane T v Sarah B*[1] Cull J said at paragraphs [21] and [22]:

> [21] There are a number of authorities which stress the serious consequences of the removal of a guardian from the lives of children. In *BLB v RSC,*[2] Judge Callinicos described the removal of a guardian under s 29 of the Act as a removal of legal rights which "is a serious intrusion into the natural order of things". For that reason, he observed that the legislation has properly set a high threshold test, which is reflected in the words "an order … must not be made unless the Court is satisfied ...". He observed that there are few more emphatic legislative restrictions on the exercise of a judicial power than where an enactment states "must not be made" unless certain prerequisites are made out.
>
> [22] Similarly, in *IMB v BMA*,[3] Judge Murfitt said of the legislative wording in s 29 of the Act:
>
> > Section 29 of the Care of Children Act 2004 empowers the Court to make an order depriving a parent of the guardianship of his child. The restraints contained in s 29 confirm Parliaments intention that this should be a power **exercised rarely**, and only when strict criteria have been established. Section 29(3) directs that such an order *must* not be made unless the Court is satisfied (as to the matters in s 29(3)(a) and (b).

[48] Miller J in *MLM v Chief Executive Ministry of Social Development*[4] was of the same view:

> [24] So far as guardianship is concerned, s 29 relevantly insists that the Court must not deprive a parent of guardianship unless the parent is "for some grave reason unfit to be a guardian" and the order will serve the welfare and best interests of the child. Manifestly this is a high standard, albeit a flexible one since it does not prescribe what reasons will suffice or what degree of gravity is needed. When applying it the Court scrupulously distinguishes between care and guardianship, recognising both that guardianship is a special relationship and that parenting and contact orders can usually manage any risk to the child."[5]

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[1] *Jane T v Sarah B*[1] [2016] NZHC 2666.
[2] *BLB v RSC* [2012] NZFC 7162, [2013] NZFLR 25.
[3] *IMB v BMA* (2007) 26 FRNZ 484 FC at [20] (emphasis added).
[4] *MLM v Chief Executive Ministry of Social Development* [2013] NZHC 1064.
[5] See for example *B v A* (2007) 26 FRNZ 484 (FC).

Decision

[46] Neither parent has taken any steps in this proceeding despite being served back in October last year.

[47] [MB] will not be released from jail for some considerable time. That he is in prison for serious sexual assaults on the children's half sibling while in his care is of particular concern.

[48] [MB]'s response to Ms Fonua quoted above in paragraph 14 makes it clear he has no insight into his offending and he must be seen as a danger to his own children.

[49] [MB] is not permitted contact with any girls under the age of 16 and that is believed to include [L] who is 7 years old. [K] now refers to [PH] as 'dad" and has no recollection of [MB].

[50] The matters above constitute a grave reason which make [MB] unfit to be a guardian of either child.

[51] The removal of [MB] as a guardian will serve the welfare and interests of both of the children and will provide them with a long-term, safe, nurturing, stable and secure environment with [LH and PH] that enhances their interests.

[52] [MB] may still have written contact with [K] for the purpose of maintain a sense of identity sufficient for [K]'s needs.

[53] [VC] last saw the children on 12 May this year. That contact was arranged at short notice because she advised that she was unable to come to [location deleted] in June which was the arranged time for her to see the children. Her next visit is not until later this year. The Ministry is now totally incapable of getting hold of her and she has made no efforts to advise the Minister how communication with her can be held since the telephone number which they had has been disconnected.

[54] [VC]'s conviction and prison sentence for her complicity in [MB]'s offences raises a serious question as to her ability to keep her children safe. Her move to

[location deleted] and subsequently having no way of contacting her must be taken as an indication she does not intend to be involved in these children's lives to the extent necessary to carry out her full guardianship obligations.

[55] The children have been with [LH and PH] since [date and year deleted]. Lawyer for the children has reported the children are doing well at school and that they are settled. They have both told him they enjoy living with [LH and PH] and they want that to be a permanent arrangement. They have not expressed any issue or worry about their current arrangement.

[56] In her affidavit of 21 October 2016 Ms Fonua advised that a case consult was held at Child Youth and Family on 6 July 2015. Professionals involved for the children and [VC] met and discussed their involvement. Her probation officer disclosed [VC] had involvement with a sex offender (not [MB]) who went to prison for sexual offending in [year deleted].

[57] Ms Fonua's view is that [VC] has continued to gravitate towards unsafe people and believes that will put her children at risk of being sexually abused or exposed to other unsafe situations.

[58] The outcome of the case consult was that all professionals were not in favour of the children returning back to [VC]'s care and were of the view there was no realistic prospect of [L] and [K] being cared for by their mother, [VC].

[59] In Ms Fonua's view the welfare and interests of [L] and [K] are best served by them having a permanent living arrangement with [LH and PH] and by a special guardianship order being made to formalise the permanent living arrangement. She was of the view that as special guardians they will provide the children with a long term, safe, nurturing, stable and secure environment that enhances their interests.

[60] The position of Ms Fonua has not changed since the time of swearing that affidavit and was reinforced in her comments to me at the hearing. She advised that she views [VC]'s behaviour as inappropriate.

[61] I accept Ms Fonua's views are well founded.

[62] Lawyer for child Mr Walker is clearly of the view that the orders sought are appropriate and meet whatever standard would be applied by the Court.

[63] It would be almost impractical for [LH and PH] to continue to look after the children without there being a s 110 order in their favour.

[64] The real issue is whether a s 113A order should be made.

[65] I am of the clear view that such an appointment would be for the purpose of providing both these young children with a long term, safe, nurturing, stable and secure environment and that it would enhance their interests. Being special guardians will be additional to the guardianship of their mother. (Their father is still a guardian but without any rights of guardianship).

[66] The special guardianship order must specify the access and other rights including any terms and conditions that apply to those rights of each existing guardian in relation to the children.

[67] Access is to be limited to [VC]. It is to be as set out in the plan last filed, that of 20 February 2017. [VC] is to see her children twice a year being the only travel she can afford from [location deleted] and at other times she may have telephone calls with them at such times as arranged with [LH and PH].

[68] Face to face access is to be on such terms as [LH and PH] permit as to supervision and may be at an approved agency if there is not agreement.

[69] [MB] may send letters and post cards to the children, but for the foreseeable future will have no access.

[70] Pursuant to s 113B(4), the guardianship rights held exclusively by [LH and PH] are as set out in paras [13], [16] and [18] above.

[71] [VC] will share with [LH and PH] other guardianship rights, namely matters as set out in s 16 of the Care of Children Act 2004; name change, change of residence other than within the North Island and matters of culture, language and religious denomination and practice.

[72] [MB] will not be consulted on any guardianship matters. He will however be advised as to the change of residence of [LH and PH] should they decide to move within the North Island.

[73] Orders:

(a) The s 101 and s 110 (incorrectly named as s 112) orders in favour of the Ministry are discharged.

(b) [LH] and [PH] are appointed:

(i) As additional guardians under s 110;

(ii) Special guardians under s 113A. [MB] is to have no guardianship rights. [VC]'s rights (together with those of [MB]) are as to name change, change of residence outside the North Island and matters of cultural, language and religious denomination and practice. [LH and PH]'s exclusive rights are as to the children's medical and educational needs, the right to determine any appropriate access with [MB], the right to travel overseas to countries which are signatories and have ratified the Hague Convention provided the travel does not interfere with contact arrangements and they have provided four weeks' notice of the travel to the other guardians. They also have the right to relocate within the North Island on giving prior notice to the other guardians, on their understanding to return the children to [location 1 deleted] for contact should that be required.

D G Smith
Family Court Judge