EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT MANUKAU

FAM-2006-092-001386
[2017] NZFC 8166

IN THE MATTER OF	The Children, Young Persons and Their Families Act 1989
BETWEEN	[MAKIO NIMIYA] Applicant
AND	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI Respondent

Hearing:	2 June 2017
Appearances:	Ms Coburn for the Chief Executive Dr Cooke for [Makio Nimiya]
Judgment:	3 October 2017

DECISION OF JUDGE MAUREEN SOUTHWICK QC

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[1] Dr Cooke, lawyer for [Makio Nimiya], who was born on [date deleted] 1998, seeks costs against Oranga Tamariki arising out of proceedings to review a decision of the Chief Executive, who is sole guardian of [Makio].

[2] The proceedings at issue were filed by [Makio] pursuant to s 116 Children Young Persons and Their Families Act ("the Act"), seeking to review a decision of the Chief Executive in exercising the role of sole guardian of [Makio]. The application was filed on 29 March 2016 and was supported by [Makio] caregiver and by Sarah Ashton (the latter affidavit being filed on 7 July 2016). Ms Ashton was at that time a social worker at the Dingwall Trust – she has particular expertise in the challenges facing young people in the custody of the Chief Executive.

[3] A request of the Chief Executive had earlier been made to pay the $4,200 course costs for [Makio] to undertake study at [the tertiary education provider]. This was a stepping stone to further tertiary education. Attendance at this course had been encouraged by [Makio's] social worker.

[4] The Chief Executive refused to meet the costs, indicating that only travel and stationery costs would be met. The position taken was that [Makio] should take out a student loan. Such an approach was not particularly encouraging of a young person, whose life had been complicated by many challenges.

[5] As a result of this response and after several unsuccessful representations were made to the Chief Executive, the application was filed. The case put forward by those supporting [Makio] was in summary that his situation could not be regarded as analogous to other young persons who might find it realistic to consider a student loan. For [Makio], there is no family, immediate or extended, to turn to should such a plan fail. In the absence of other "advisers" in the role of a parent, the support and guidance of the Chief Executive was of paramount importance to [Makio].

[6] The Chief Executive filed a Notice of Defence in April 2016 and the matter was set down for hearing on 11 August 2016, various directions having been made in the interim in preparation for that hearing.

[7] On 10 August 2016, the Chief Executive changed its position. It is stated in submissions filed that this was because "*upon consideration and in light of evidence subsequently filed by Dingwall Trust, the Chief Executive exercised its discretion to provide the financial assistance sought, due to [Makio's] very unique circumstances and history with Child Youth and family".*

[8] Those very unique circumstances include the fact that [Makio's parent]left New Zealand in or about [year deleted] and [their] whereabouts are unknown. His [other parent] was deported back to [country deleted] in [year deleted], where it is believed [the other parent] has died. [Makio] has one [sibling], who is cared for by [details deleted].

[9] The application notes that the most recent plan filed by the Ministry refers to encouragement and support being given to [Makio] to make "*the most of opportunities presented to build his skills and network to assist with independence".* The issue is whether that encouragement and support should have extended to making his ambitions a reality by paying the course fees.

[10] Ms Ashton's affidavit supports the assistance sought by [Makio]. She refers to the report of the Expert Advisory Group which was tasked with considering the operation of the care and protection system - a report which the Chief Executive must have been well aware of, if not involved in. That report highlighted the importance of the quality of support in transitioning children to independence. It noted that 80% of those taken into care by the Chief Executive left school without NCEA level 2 qualifications. Only 30% of children not in care left with the same poor level of qualification.

[11] It is a fact that the issue of the success or failure experienced in later life by children taken into care is currently and properly under a spotlight. How the Chief Executive carries out the role of custodian and guardian is of critical importance in improving the statistics noted above. Recent policy initiatives reflect this need. For example, s 386A of the Children Young Persons and Their Families (Vulnerable Children) Amendment Act 2014 now requires that the Chief Executive provides assistance to young persons who "have been" under the care of the Chief Executive for a continuous period of three months after that young person's 15th birthday. The amendment of upper leaving age for children in care from 17 to 18 years is also an indication of the significant role of the Chief Executive during this critical time.

[12] The Chief Executive argues that it was the affidavit of Ms Ashton that altered the view of Oranga Tamariki. I do not accept that. Had that truly been the position, it would not have been necessary to allow the case to reach the courtroom door, thereby incurring further delay for [Makio] and more expense.

[13] It is far more likely that the Chief Executive simply neglected to consider the situation fully and in a timely manner. Furthermore the Ministry should not have had to be reminded of the factors raised by Ms Ashton. Those are matters which were well within the knowledge of the Chief Executive – or at least they should have been.

[14] The costs claimed are those of Dr Cooke, who was required to represent [Makio] to assist him and to put his case. He calculates having spent six hours in attendances and preparation – his rate of reimbursement is $155.45 per hour.

The Law

[15] The application for costs is made pursuant to s 203 of the Act, which provides:

> *" In any proceedings in Part 2 of the Act or Part 3A, the Court may make such order as to costs as it thinks fit ".*

A section 116 review application is contained within Part 2 of the Act.

[16] Section 203 confers a broad discretion on the Court. Whilst it has been argued successfully, on occasion, that costs should rarely be awarded given that the paramount interest is the child and not the parties (*MNH v GMK [costs]* [2005] NZFLR 721), there are nevertheless situations where it is justified to seek reimbursement. In this case, costs are not sought by family members said to be affected.

[17] The obligations of the Chief Executive require particular consideration where that person is sole guardian of a child. In that instance the role becomes a particularly weighty one. Accordingly, if the role is carried out in a casual, inefficient and/or less than carefully thought through manner, the Chief Executive should be called to account for that failure.

[18] The definition section of the Act provides that "guardianship" has the meaning given to that word by s 15 of the Care of Children Act 2004. That section provides that guardianship of a child means having, in relation to that child - :

(a) "*all duties, powers, rights and responsibilities that a parent of a child has in relation to the upbringing of the child"* .

[20] Section 16 of the Care of Children Act sets out the manner in which these duties and powers are to be exercised. This includes :

"*contributing to the child's intellectual, emotional, physical, social, cultural and other personal development"*.

[21] What is clear in [Makio's] case is that the Chief Executive stood in the role of a sole parent of this young person with his particular and special needs and with all the duties, powers and responsibilities that that entails.

[19] In *Faulknor v D-GSW* [1994] NZFLR (later approved in *Chief Executive of MSD v Roth* [2015] NZFC 3696) it was held that costs should only be awarded against the Ministry where it has not carried out its duty reasonably and objectively.

[20] In this case, had the Chief Executive considered the s 116 application "reasonably and objectively" at the outset, opposition would not have been offered.

This is particularly so when the fees sought to be paid resulted from the encouragement and support of his social worker and when that social worker should have been well versed in the risks associated with [Makio's] fragile period of transitioning to independence. [Makio] had no other person to turn to for guardianship advice and support - he required a real demonstration of support and backing in order to avoid the risks referred to by Ms Ashton.

[21] Whilst the Chief Executive might argue that it was entitled to hold the opinion that [Makio] could obtain a student loan rather than the course costs being paid by the Ministry, that argument evaporates when it was later conceded that Ms Ashton's views were persuasive as to the likely impact upon [Makio] should that approach be adopted. The problem for the Chief Executive is that Ms Ashton was referring to views and evidence of which the Ministry should have been aware.

[22] The impact upon the young person of the alleged improper actions or "wrongdoing" of the Ministry must also be considered. This was commented upon in *MSD v G*, FC Whangarei, FAM 2006-088-000169, Druce J, 14 April 2008, where it was found that the Ministry's unreasonable delay and wilful failure to pursue matters efficiently had seriously impacted upon the welfare of the child. In the present case, [Makio] was of an age where he experienced the delay, the practical and emotional impact of the Chief Executive's refusal to pay his course costs and the possible consequences this would have upon his already uncertain future.

[23] *In M v A [costs*] [2006] NZFLR 44*,* Judge Smith provides a useful list of considerations which summarise factors which should be taken in to account in awarding costs. Those were:

a) the objectives of the legislation

b) the outcome of the proceedings

c) the material issues

d) the way the parties and their advisers have conducted the proceedings

e) the means of the parties

f) actual costs incurred

g) the overall interest of justice

[24] The objectives of the legislation under consideration are clear. Of particular relevance in this case is s 4(b):

> " *assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect and deprivation".*

Lack of practical support and encouragement for [Makio] should have been understood to be leaving him at risk of harm by way of his perception of this.

[25] Section 5 of the Act refers to the need to take into account the wishes of the child and, in considering those wishes, having regard to the age, maturity and culture of the child. The legislation also requires that an holistic approach should be adopted in making decisions, taking into account the age and identity of the child, cultural connections, education and health.

[26] In this case, [Makio] had relayed his wishes (to make feasible his attendance at [the tertiary course]) to both the social worker and Dr Cooke. He is of an age that dictates that his wishes should be taken seriously.

[27] In terms of [Makio's] "identity", he will struggle to develop such given his loss of cultural and family ties. This further underlines the significance of the Chief Executive diligently carrying out the legislatively defined obligations and duties to [Makio].

[28] Section 7 of the Act refers to the duties of the role of Chief Executive as follows:

> *(1) To take such positive and prompt action and steps as will in the Chief Executive's opinion best ensure :*
>
> *a. That the objects of the Act are attained; and*
>
> *b. That those objects are attained in a manner that is consistent with the principles set out is s 5 and 6"*

In a more general sense, this underlines the significance of the role of the Chief Executive and the manner in which those obligations should be carried out.

Decision

[29] Applying the legislative provisions and precedent to [Makio's] application, the Chief Executive was required to consider it in the context of [Makio's] special needs and circumstances; to avoid the possibility of harm to him as a result of the nature of the decision made; to take action promptly (not leaving a final decision until the day before the hearing) and to consider [Makio's] wishes with a considerable degree of seriousness, given his age.

[30] I add to that list that this young person had the right to expect that the Chief Executive would apply an appropriate level of expertise and knowledge in reaching its decision. In this case that is relevant not only to understanding the tasks associated with transitioning [Makio] to independence but also the practicalities in ensuring that those tasks can be achieved.

[31] In my view, the Chief Executive failed in carrying out these tasks. Every indication is that the initial decision was not carefully thought through in spite of [Makio's] unusual circumstances and the Chief Executive's sole guardianship role. Instead, it was only after a reminder of what should have been within the knowledge and expertise of the Ministry that a concession was made. By that time, fees had been incurred which should not have been incurred.

Accordingly

a) The Chief Executive is directed to pay the sum of $900 towards the costs incurred by Dr Cooke.

b) Those costs are to be paid within 21 days.

Maureen Southwick QC
Family Court Judge