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

NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INORMATION PLEASE SEE WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS

IN THE FAMILY COURT
AT MANUKAU

FAM-2015-004-00449(CYF)
[2017] NZFC 9686

IN THE MATTER OF	The Oranga Tamariki Act 1989
BETWEEN	[SA] [VC] Applicants
AND	[AA] First Respondent
AND	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI Second Respondent

Hearing:	23 June 2017
Appearances:	Ian Telford for the Applicants No appearances for the First Respondent Laitisha Kovaleski for Chief Executive Usha Patel as Lawyer for the Child
Judgment:	30 November 2017

RESERVED JUDGMENT OF JUDGE A G MAHON

Introduction

[1] The applicants seek the following orders in respect of [NP] born [date deleted] January 2016:

(a) An order under s 110(1)(e) appointing them as additional guardians.

(b) An order under s 113A appointing them as special guardians.

(c) An order under s 125 discharging the s101 Custody Order.

[2] [NP] has been in the custody of the Chief Executive since her birth and cared for by the applicants since she was two weeks old. [SA] is the maternal aunt of [NP] and at the date of the hearing [NP]'s mother [AA] had not seen [NP] since the child was uplifted from her following birth. [NP]'s father is unknown.

[3] The purpose of the applications is to progress care arrangements to permanency with the applicants.

[4] The Chief Executive supports the application and in the s 135 review of plan, dated 22 June 2017, recommends:

(a) Discharge of the s 101 Custody Order in favour of the Chief Executive.

(b) Discharge of the Order appointing the Chief Executive as an additional guardian under s 110(2)(b).

(c) Appointment of the applicants as additional guardians under s 110(1)(e) and (2)(b).

(d) Appointment of the applications as special guardians under s 113A.

[5] The mother has taken no steps in the proceedings.

[6] The Chief Executive supports orders being made as sought by the applicants.

[7] Ms Patel on behalf of [NP] submits that even if jurisdiction exists, the applicants have not met the threshold required for appointment as special guardians.

[8] Mr Telford submits there is jurisdiction for making the orders and that the applicants meet the threshold for appointment as special guardians.

[9] An application for a special guardianship order can be made in two post-declaration situations:

(a) When a caregiver seeks an order under the Act rather than progressing to orders under COCA following the different path to appointment of special guardians under that legislation; or

(b) When after a caregiver has been appointed as a guardian under COCA, difficulties arise with the parent or parents meeting the threshold for making a special guardianship order and the caregiver seeks an order to limit the parents' ability to undermine primary care of the child.

[10] It is the caregivers' position that there is jurisdiction for their appointment as special guardianships by the following steps:

(a) As a declaration is made in this case the court has power under s 110(1)(e) to appoint the caregivers as additional guardians (s 110(2)(b)).

(b) The caregivers can apply to discharge orders under the Act because they are members of [NP]'s whanau or family group (s 126(e)).

(c) On discharge the court has the power to make any order under s 83(1) (s 127(c)).

(d) One of the orders the court can make under s 83 is appointment of additional guardians under s 110 (s 83(1)(h)).

(e) As additional guardians, the caregivers then have standing under s 125(1)(g) to seek variation or discharge of that order (s 127).

(f) In exercise of its power of variation or discharge under s 127 the court can make any order defined in s 83(1) or s 84(1)[1] including an order for appointment of special guardian (s 127(1)(ca).

(g) While s 83(1) only refers to the power to appoint a guardian and not "special guardian" under s 110, one of the appointments possible under s 110(4) is of a special guardian under s 113A.

[1] s 84(1) applies to orders made after declaration on the grounds of criminal offending.

(h) An appointment of a special guardian can only however be made if:

(i) It is for the purposes of providing the child with a long term, safe, nurturing, stable and a secure environment enhancing the child's interests (s 113A(1)); and

(ii) either – the child has no other guardian; or

(iii) (as in this case) the appointment replaces, or is addition to, an existing guardian of the child (i.e. the child's mother) (s 113A(1)(b)(ii)).

(i) It is as special guardians, in addition to [NP]'s mother, that the appointment is sought.

(j) Following the appointment of special guardians, the current custody order in favour of the Chief Executive under s 101 must be discharged (s 113B(1)(i)).

[11] Mr Telford helpfully summarised the primary effects of a special guardianship order in paragraph [19] of his submissions as follows:

(a) The special guardian has custody of the child/young person (s 113B(1)(a)) and the order has the cumulative effect of an order for day to day care under COCA (s 113B(1)(a)(ii)).

(b) The order must specify the access and other rights (not being custody of guardianship rights) of each existing guardian of the child (s 113B(i)(b)).

(c) Guardians may not apply for an access order under s 121 once the order is made (s 133B(2)(a)).

(d) Where there are other guardians, the order must set out which rights are to be held exclusively by the special guardian and which are to be shared with existing guardians (s 113B(4)(a)).

(e) The special guardian has a duty to inform existing guardians of decisions made in the exercise of exclusive guardianship rights (s 113B(4)(b)).

(f) Guardians cannot apply under s 115 (dispute between guardians) in respect of any guardianship rights held exclusively by the special guardian (s 113B(4)(c)(i)).

(g) There is no review of plans (s 113B(4)(c)(i)) and the Chief Executive's duty under s 7(2)(e) duty to have procedures to regularly review action taken in relation to the children does not apply (s 113B(6)).

(h) The order ceases to have effect at 18 or if the child enters a marriage/civil union (s 113B(4)(c)(iii)).

(i) If the child ends up living with someone else on "more than a temporary basis" and the child was formerly in Oranga Tamariki or Iwi/Cultural Social Service custody, there is a duty to inform the social worker or director of the service as appropriate (s 113B(5)).

(j) Leave is required to apply to vary or discharge the special guardianship order unless the application is made by the Chief Executive, a social worker, an Iwi or Cultural Social Service or the Director of a Child and Family Social Service, or all parties consent to the granting of the application. Leave is only to be granted if there has been a *significant* change in circumstances (s 125(1)(ga); (s 125(1A) and s 125(1B)).

[12] The issues for the court in this case are:

(a) does the court have jurisdiction to appoint the caregivers as special guardians of [NP]; and if so

(b) have the caregivers met the threshold for such an appointment.

Analysis

[13] The difficulty for the court is that while s 83(1) defines the orders the court can make following a declaration, and s 83(1)(h) includes the ability to appoint a person "guardian" under s 110, s 83 does not refer to a "special guardian". What then is the relationship between ss 83, 110(4) and 113A?

[14] As s 83(1) does not specifically refer to "special guardianship" as an order which can be made under that section does s 110(4) assist as under 110(4) the court can in addition to making an appointment of a sole or additional guardian, "also make an order under s 113A appointing a person as a special guardian of a child".

[15] Section 113A and not s 110(4) is the empowering section. If s 83(1)(h) included appointment of a special guardian as a possible appointment under the

section, there would be no issue. Because s 83(1)(h) is the empowering section however, it is only if the word guardian in s 110(4) can be interpreted as including special guardian that there is jurisdiction to appoint a special guardian in post declaration proceedings.

[16] The difficulty in such an interpretation of s 110(4) is that the terms "guardianship" and "special guardianship" have very different meanings:

(a) Guardianship is defined in s 15 of COCA:

> "**15 Guardianship defined**
>
> For the purposes of this Act, guardianship of a child means having (and therefore a guardian of the child has), in relation to the child,
>
> (a) All duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child;
>
> (b) Every duty, power, right and responsibility that is vested in the guardian of a child by any enactment;
>
> (c} Every duty, power, right and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law".

(b) Section 2 of the Act defines a special guardian as "a guardian of a child or young person appointed under s 110 who is appointed as a special guardian under s 113A"

(c) The different nature of guardianship and special guardianship is clearly apparent from the contrast in the definition of guardian of s 15 of COCA and that of special guardian in s 113B(1)(a) of the Act:

> (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

[17] The different nature of each order has been described in the following manner:[2]

> Special guardianship is, therefore, a form of guardianship that is of a different nature to what has gone before. Whereas joint guardians under the Act and COCA jointly, with no guardian having greater guardianship rights than another, special guardianship, by virtue of its ability to have exclusive guardianship rights (apart from the fettering provision of providing information) is a form of guardianship placed potentially above joint guardians in respect of those matters which are exclusively preserved for the special guardian. It is a new concept, a form of guardianship not envisaged in prior legislation with regards to the operation of guardianship).

[18] The difficulty for the court is then that s 83 neither includes the ability to make an appointment of a special guardian under s 110(4), nor refers in the alterative to an ability to make an order appointing a special guardianship under s 113A.

[19] The only way that the caregivers can succeed in their application is if the court can imply that as a matter of statutory interpretation, when s 83(1)(h) refers to an order under s 110 for appointment of a guardian, the reference is intended to be to both guardians and special guardians, and then the empowering provision of s 113A is linked through s 110(4) to s 83(1)(h).

[20] Can the court then read into that sub section the wording of both types of guardianship? Under s 5(1) of the Interpretation Act 1999 the meaning of an enactment must be ascertained from its text, in light of its purpose. There is no question that the objects in s 4 and principles in s 5 of the Act, and the paramountcy of a child's welfare and interests support a broad, practical and purposeful interpretation of the legislation.

[21] In *Sheehan v Watson* Justice Harrison adopted the criteria identified by Lord Diplock in *Jones v Wrotham Park Settled Estates Limited* of three interlinked criteria to guide a court on determination of whether it is appropriate to read qualifying words into a statute.[3] The criteria are:

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[2] *[CN] v The Ministry for Vulnerable Children Oranga Tamariki* [2017] NZFC 6962 at [28].
[3] *Sheehan v Watson* [2010] 2 NZLR 419 (HC) at [24]; *Jones v Wrotham Park Settled Estates Limited* [1980] AC 74 at 105.

(a) If it is possible to determine from the Act the precise mischief that the Act was to remedy;

(b) If it was an accident that the mischief had not been resolved by the Act's literal meaning; and

(c) If it is possible to say with certainty what additional words would have been inserted by draftsmen and approved by Parliament.

[22] The court in *Sheehan v Watson* was interpreting the Property Law Act 2007, a new Act, the purpose of which is "to restate, reform and codify (in part) certain aspects of the law relating to real and personal property".[4]

[23] The Oranga Tamariki Act is by contrast legislation which has been amended on numerous occasions since 1989 and which includes complex purposes with significant issues in respect of rights of adults and children.

[24] At the time of enactment of s 83 the concept of special guardianship was not envisaged. To read the ability in s 110(4) to appoint a guardian as an ability to appoint a guardian or a special guardian for the purposes of s 83(1)(h), requires reading into legislation a phrase which could not have been intended and/or accidentally overlooked when s 83 was drafted.

[25] The concept of special guardianship with its wide powers to exclude the rights of other guardians to have custody, contact or power of guardianship decisions in respect of a child, was an unknown concept when the Act was enacted in 198; and as Her Honour Judge Rogers observed in *CE v KW*:[5]

> my concern is that to read s 83 as broadly as proposed by Dr Cooke would in effect be asking the court to create a s 83(1)(i) encompassing special guardianship. That of course offends against Lord Diplock's explicit caution that the court should not shift from its proper role of legislative interpreter to that of legislative drafter.

[26] This application must fail on the grounds of jurisdiction.

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[4] Property Law Act 2007, s2.
[5] *CE v KW* [2017] NZFC 4721 at [54].

[27] If I am wrong in that conclusion, then the application does not meet the threshold required for the appointment of a special guardian.

[28] In paragraphs [39] to [42] of his submissions for the caregivers Mr Telford argued that the threshold for appointment of special guardians was met as:

> [39] The Act requires that the order also sets out which guardianship 'rights' are to be shared or retained only by the caregiver. It is argued that in the instant case, the caregivers are taking all responsibility for the care and guardianship of the child until she can live independently. [NP]'s mother has not exercised guardianship since [NP]'s birth. I therefore argue that the suggested legal framework for [NP] more accurately mirrors the practical reality of her care.
>
> [40] By granting most guardianship rights to be held by the caregivers, this does not mean that the mother is cut off. It is therefore *not* akin to adoption. Access will be retained and the Act requires that the guardians are informed when the guardianship rights are utilised. I submit that *informing* the mother when guardianship rights are utilised as opposed to *engaging in consultation* is far more realistic in these instant circumstances.
>
> [41] I accept that it could be argued that COCA orders could be made in the usual way and if the caregivers experience difficulty in the future, they can apply for relief by bringing an application to move from COCA to special guardianship. However, these provisions are cumbersome. Leave is required and can only be granted if all mechanisms under COCA to resolve guardianship disputes have been exhausted before seeking special guardianship (Including an application to remove a parent as guardian).
>
> [42] Therefore, any caregiver would have to endure many months of litigation before being able to bring such an application. I would then argue that if a caregiver was successful in removing a guardian, such an application would be pointless.

[29] Ms Patel submitted that the threshold for appointment has not been met as there is no history of difficulty between the caregivers and [NP]'s mother on any issue relating to [NP]'s care.

[30] Ms Patel pointed out that [NP's siblings – number deleted] are also in the custody of the caregivers. [Sibling 1] is in the same position as [NP] [details deleted. Yet there is no application for special guardianship of [sibling 1], which leads to the potential that if the children's mother made significant changes in her lifestyle and it was in [sibling 1] welfare and interests that she develops a relationship with [the child], she would be prevented from the potential of a relationship with [NP] because of the terms of the special guardianship order.

[31] I agree with Ms Patel's submissions as notwithstanding the significant responsibility the caregivers have accepted with the care of three of the first respondent's children, the effect of their appointment as special guardians of [NP], while not completely removing guardianship rights as an order under s 29 of COCA can, must have that effect.

[32] The threshold for appointment of care givers as special guardians must be higher than mere recognition to caregivers who accept custody of children and the responsibility for their care and guardianship by ensuring that they avoid the potential of Family Court litigation from parents of those children. There is no question such litigation has the potential of financial and emotional pressure on caregivers and can be detrimental for the child. The consequences of a special guardianship appointment on rights of parents is however significant and it cannot have been intended by parliament that such appointments would be made as a matter of routine in the absence of a history of difficulties.

[33] The threshold for removal of a guardian under s 29 is relevant to the threshold for appointment of special guardian. It is a high threshold and an order must not be made unless the court is satisfied:

(a) 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) The order will serve the welfare and best interests of the child.

[34] Judge Callinicos described the conduct required in the following manner in *BLB v RSC*:[6]

> …the conduct of the subject guardian that forms the applicant's case must nonetheless be connected in some way to the welfare and interests of the child. Conduct advanced in support of unfitness may be some action that is generally repugnant to societal mores yet might not be sufficiently connected to the matters of guardianship to merit removal. Such nexus must not be lost from focus.

[35] In *Chief Executive of Oranga Tamariki v HA and NP and GR* Judge Rogers noted at paragraph [66]:[7]

> …I also agreed with Dr Cooke's comparison with the requirements of s 29 of the Care of Children Act in its approach to deprivation of guardianship. What the Chief Executive seems to be saying is that once the Ministry of is not involved, guardianship disputes might arise so it would be prudent to have a special guardianship order in place in advance of any such disputes. I do not accept that submission. A pre-emptive removal of guardianship rights in advance of any actual dispute is inconsistent with any existing statutory or case law approach to guardianship.

[36] I have already declined the applications for want of jurisdiction. While the threshold may not be at the same level as that for removal of guardian, it must be a high threshold. If I am wrong and there is jurisdiction, the application fails in any event as it doesn't reach the threshold for exercise of the discretion for appointment of special guardians.

[37] I anticipate that the caregivers will still be seeking appointment as additional guardians under s 110(4) of the Act.

[38] In the circumstances, however, I make no orders and direct a telephone conference before me at 9.15am on Tuesday 12 December 2017.

A G Mahon
Family Court Judge

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[6] *BLB v RSC* [2012] NZFC 7162 at [14]; approved in *Jane T v Sarah B* [2016] NZHC 2666 at [21].
[7] *Chief Executive of Oranga Tamariki v [KW]* [2017] NZFC 4721.