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

NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT WHANGANUI

I TE KŌTI WHĀNAU
KI WHANGANUI

FAM-2017-083-00204
FAM-2020-083-00035
[2021] NZFC 2754

IN THE MATTER OF	ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[RB] [SB] [TD] [AR] [SN] [JS] Respondents
IN THE MATTER OF	CARE OF CHILDREN ACT 2004
BETWEEN	[TD] [AR] Applicants
	[SB] [RB] Respondents

	[SN] Applicant
AND	
	[SB] [RB] Respondents
IN THE MATTER OF	ORANGA TAMARIKI ACT 1989
BETWEEN	[SN] [JS] Applicants
AND	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN [RB] [SB] Respondents
	Child or young person the application is about: [ZB] [date deleted] 2017 [FB] [date deleted] 2018

Hearing:	8, 9, 10, 11, 12 March 2021
Appearances:	A Lyne for the Applicant Chief Executive of Oranga Tamariki – Ministry for Children B Pearce for the Respondent [RB] A Matthews for the Respondent [SB] J Saravanpavan for the Applicants [TD] and [AR] M Bullock for the Applicant [SN] [JS] self-representing Applicant F Devlin as Counsel/Lawyer for the Children
Judgment:	1 April 2021

RESERVED JUDGMENT OF JUDGE D G MATHESON

Introduction

[1] These proceedings concern [ZB] who is [under five] and [FB] who is [under three].

[2] Their mother is [SB].

[3] Their father is [RB].

[4] Their maternal grandmother is [TD]. She lives with [AR].

[5] Their current caregiver is [SN] supported by [JS].

[6] Because of frailties in their parents' parenting competencies, they are the subject of a s 78 interim custody order in favour of the Chief Executive of Oranga Tamariki. That order was made on 22 March 2019.

[7] By consent, a declaration that the children were in need of care and protection, on grounds to be found in s 14(1)(a) and s 14(1)(b) was made on 30 April 2019.

[8] Oranga Tamariki seeks s 101 and s 110 orders in its favour, with the intention being to place the children with maternal grandmother and her partner in the South Island.

[9] The caregivers applied for s 101 and s 110 orders in their own right in September 2019.

[10] In the lead up to the hearing, [SN] added an application under the Care of Children Act 2004 to cover all eventualities.

[11] Maternal grandmother and her partner also applied for orders under the Care of Children Act 2004, in February 2020.

[12] As a result, leading into the hearing, the Court was being asked to determine where these children should live, and who should be in charge of decision making for

them under two Acts. As the hearing progressed, as is often the case, issues distilled and by the end the parties were all agreed that any orders to be made, should be made under the Oranga Tamariki Act 1989.

[13] Evidence was heard over five days. With sensitivity counsel did not seek to cross-examine the parents. Social workers, caregivers, the grandmother and her partner gave oral evidence in addition to written material that they had earlier provided.

[14] Mr Fry, who had provided a s 178 report, essentially on the parents' competencies, was also cross-examined.

[15] An important piece of information was filed by Oranga Tamariki at the commencement of the hearing. That was a Māori cultural report for the boys that Oranga Tamariki had commissioned for its own purposes to comply with its obligations under s 7AA of the Act. The document provided significant background material and contextual richness that has been of considerable benefit to the Court. It was disappointing that the report writer was not available to develop the themes in her report at the hearing.

Background

[16] The mother of the children was brought up in the North Otago/South Canterbury region. She had significant issues to deal with and still does. She suffers from [a physical disability] and epilepsy and has cognitive delay. As a result, she was not easy to parent from a relatively early stage, and a somewhat fractious relationship between she and her mother developed. She spent some time at boarding school and then went on into a supported living hostel in [location B].

[17] At that stage, she met father through the internet. Their relationship developed to such an extent that he moved from [location A] to [location B] to be with her.

[18] Father had been brought up in [location A], and like mother, had struggled at school.

[19] On meeting, both felt that they were emotionally and personally compatible and that each met the others' emotional needs. Considering some aspects of similarity in their emotional and social experiences, this was not surprising.

[20] Contrary to their hopes they were not able to live together at mother's hostel, and for a short time lived on the streets of [location B], until father's father provided money to assist them to relocate to [location A] and set up a home there.

[21] They married in [date deleted] 2016 and within two years they had produced two children.

[22] [ZB] was born on [date deleted] 2017.

[23] Concerns as to their ability to provide adequate care for the child were raised with Oranga Tamariki. The concerns were about [details deleted]. Because of those concerns a place of safety warrant issued on [date deleted] 2017. The warrant was executed, and the child was uplifted for a short time [details deleted]. In the event, Oranga Tamariki, satisfied that the child's care was being supervised by paternal grandfather, returned the child to the family unit.

[24] [FB] was subsequently born.

[25] Sadly, the paternal grandfather, [name deleted], passed away in [date deleted] 2018. As a result of the supervising presence of the grandfather disappearing, a report of concern was received by Oranga Tamariki on 7 November 2018, from a group of professionals who had met to consider ways the family might be supported. The professionals involved included people including representatives from Plunket, the District Health Board and Te Oranganui – an iwi health provider.

[26] Significant supports were put in place, which included regular visits by a number of agencies. However, such was the level of concern as to the parents' frailties it was determined that the situation needed to be monitored by Oranga Tamariki rather than being monitored by the next level down through a Children's Team process.

[27] At the point of the social workers' engagement at this stage, father was quite hostile. That hostility was reflective of his own personal frailties exacerbated by the uplift a year earlier.

[28] Nevertheless, an agreement was reached that the various agencies involved would continue to monitor and in addition a family friend would engage with the home twice a week. Concerns then developed about the children's failure to thrive, and as a result the family friend started providing supplementary food.

[29] By this stage, [SN] and [JS] had also become involved and were providing extra support, advice and advocacy. By this stage the children's daycare was expressing concern about developmental and weight issues and had concerns as to parental capacity.

[30] A change in accommodation resulted in the parents moving the daycare to a nearby playcentre. Parents there were supportive, but expressed a multitude of concerns as to clothing, nappy changing and hygiene. These observations were similar to the themes that had developed from the professional agencies.

[31] These concerns were heightened as a result of the parents own health needs. Father suffers from [a spinal injury] which results in a need to take significant pain relief. Mother has significant seizure issues with her epilepsy.

[32] These are in addition to the cognitive limitations.

[33] The social workers' own observations raised concerns for her as to feeding and supervision, but father was not happy to receive appropriately focused advice.

[34] On 8 March 2019, Dr [H], a well-respected consultant paediatrician at the [location deleted] Hospital, conducted a GATEWAY Assessment. Such was the level of his concern as to the children's failure to thrive, that he admitted them into the children's ward immediately, to facilitate the provision of a high-calorie diet.

[35] On 14 March, a multi-disciplinary team meeting of professionals was convened as a result of the paediatrician's concerns as to weight and development.

Minutes noted that the parents loved their children very much and had done the best they could, but concerns remained as to their parenting capacity. The concerns identified, covered the full spectrum of caregiving.

[36] As a result, Oranga Tamariki determined to take steps to locate alternative caregivers, and on 21 March, made application to the Family Court for an interim custody order, pursuant to s 78. The application was made without notice but was not considered by a duty judge until 22 March.

[37] On the morning of 22 March, before knowing the result of their application, Oranga Tamariki social workers met with support people for the parents. Various proposals for the support of the children and parents were developed. The social workers indicated to the other attendees that they would need to consider various options and report back.

[38] Unsurprisingly, when the non-Oranga Tamariki participants at the meeting were subsequently advised that Oranga Tamariki had obtained a s 78 interim custody order, and that the children were being placed with a caregiver, they were most unhappy.

[39] This was significant particularly given the upset that had surrounded the execution of the place of safety warrant a year earlier.

[40] Thereafter, the children remained in caregiver care in [location deleted] until early 2020 when their caregiver suffered an accident.

[41] In April 2019, agreement was reached that the children were in need of care and protection, and later that month a declaration upon the grounds of s 14(1)(a) and s 14(1)(b) was made.

[42] Although a need for care and protection was acknowledged, arrangements as to final disposition could not be agreed upon and so the Court directed that a s 178 report be provided. The brief for that report was focused primarily on the competencies of the parents.

[43] In late May 2019 a notice of intention to appear in relation to the Oranga Tamariki matters was filed by email, by maternal grandmother.

[44] Subsequently the s 178 report was filed in early July, and on 14 August there was a further Family Group Conference.

[45] On 27 September 2019, the current caregivers made application for appointment as additional guardians and for a custody order in their favour.

[46] In their paperwork they advised that grandmother also wished to be considered as a caregiver. The caregivers identified that they had been turned down as Oranga Tamariki approved caregivers.

[47] The parents indicated support for the "Aunties'" application.

[48] The matter went to mediation, but there was no resolution and on 13 January 2020, Judge Grace tracked the matter to hearing.

[49] It was at this stage that the caregiver suffered injury and Oranga Tamariki arranged for maternal grandmother to come to [location A] to care for the children, which she did through February 2020, at various motels. By this stage grandmother and her partner had been approved as caregivers.

[50] During this period, they filed an application for orders under the Care of Children Act 2004. Mother filed paperwork in support of that at that point. (Although she subsequently withdrew that support.)

[51] Thereafter, the caregivers were approved as respite caregivers and the children were placed in their care pending hearing. This was in late February 2020.

[52] The children have been in their care since.

[53] Since then both parents have been having contact supervised by Barnados.

[54] Grandmother has also had some contact. In addition to the time she had with the children in February 2020, grandmother has had contact in [location A] in June, August, September and November 2020 and briefly, in February 2021. The boys also spent four nights, in July and nine nights in October in grandmother's care in the South Island.

[55] The parents separated in early 2020, and mother went to the South Island for the lockdown period. However, the frailties in her relationship with her mother resurfaced and she returned to [location A].

[56] She then entered into a new relationship and became pregnant and has now been delivered of another child. That relationship was also volatile, and the Court is privy to a number of concerning events arising from mother's violent disposition in that relationship.

[57] With agreement, the child has gone to live with maternal grandmother in the South Island. There has been Oranga Tamariki intervention and proceedings are ongoing.

[58] Father too has re-partnered and his partner is due to give birth later this year.

Position of the Parties

[59] Oranga Tamariki fortified by the conclusions of its cultural report, submits that the children should be placed with their half-sibling in grandmother's care in the South Island, although it should be noted that finalisation of the half-sibling's placement with grandmother is yet to be determined. The position of the Chief Executive is that s 101 and s 110 orders should be made in his favour.

[60] The first and overriding obligation is to consider the safety of the children's placement with a party. It is submitted that it is clear that the children will have a safe, stable and loving home living with the maternal grandparents. There may be a need for a weighing exercise of competing factors of a return to a family member at the expense of breaking a significant psychological attachment. However, it is submitted

that a return to whānau, should occur even when there are no safety concerns with the current caregivers. If not, there is a risk of the children experiencing cultural harm by not living with the maternal grandparents and their family.

[61] The children's cultural wellbeing will be strengthened by being with their maternal whānau, hapū and iwi in the South Island. The concepts of mana tamaiti, whakapapa and whanaungatanga under the Act, strongly support the children living with their maternal grandparents, to have the benefit of living with the whenua within their iwi.

[62] There is a commitment by the maternal grandmother to further develop the children's identity, cultural development and engagement. This is an important step in protecting the children's mana tamaiti and wellbeing.

[63] Appropriate and safe access between the children's parents and their interim caregivers, who are part of the children's family group, would ensure ongoing contact is maintained and strengthened.

[64] Finally, the Ministry submits that its involvement is needed to be able to monitor the placement with the maternal grandparents and also facilitate access between the children and their parents and their caregivers.

[65] Counsel helpfully referred to the relevant legal principles in s 4A, 5 and 13, which by necessity also involves a consideration of the principles under UNCROC. Counsel also referred to a decision of Judge Courtney in Hastings last year, wherein his Honour referred to papers presented by Williams J and Judge Otene.

[66] Counsel raised concerns as to the intensity of the current caregivers engagement with Oranga Tamariki and that they were parent focussed rather than child focussed.

[67] Counsel acknowledged the psychologist's evidence of the strong parental attachment but noted that Mr Fry had not been engaged to consider the maternal grandparent attachment.

[68] Counsel submitted grandmother was committed and challenged father's focus.

[69] Counsel for mother supports the children continuing to be placed with the current caregivers. As a result, her relationship with the children will be better able to be maintained better. She has an easier relationship with the caregivers and her fractious relationship with her mother means that ongoing contact if the children are in the South Island may be difficult.

[70] Father also supports the current caregivers. He notes they provide excellent care. In addition, he will be able to have a more regular and natural relationship with the boys. While remaining in [location A], the boys will be able to have a relationship with their half sibling who is shortly to be born.

[71] He notes that the caregivers are able to engage with the extended paternal family, and remaining in [location A] allows that relationship to continue and develop.

[72] He expresses concerns that if the boys were relocated to South Island, his contact, and that of the extended paternal family will be significantly limited.

[73] From the base of [location A] care, he nevertheless believes that grandmother can have significant access.

[74] Maternal grandmother submits that blood trumps all.

[75] The Court process, and the cultural report have given clarity to grandmother's understanding of her loss of the essence of her heritage. It has activated in her a desire to embrace her whakapapa, mana tamaiti, and whanaungatanga.

[76] She wants to bring up the siblings together which includes the child recently born to mother.

[77] She notes that she is young enough to bear the burden of responsibility for care long-term and has the support of an active partner who is able to provide positive mentoring for the boys.

[78] She avers that she will support ongoing access to the father and mother and current caregivers.

[79] The current caregivers became involved as support people for the parents and the children. They have been caring for the children for the past twelve months and they submit they have a skill set through early education training that is tailor made for the ongoing care of these particular children and their specific needs. There is a family connection with father through marriage, although it is not blood. They nevertheless note that they are regarded as "aunties".

[80] They have the support of the parents and remain staunch advocates for them.

[81] They are able to facilitate regular and meaningful access between the boys and their parents. They are able to facilitate regular and meaningful engagement with the extended paternal family.

[82] Now that the Court hearing has cleared the air and revealed how misunderstandings developed, they are confident at being able to develop access for the maternal grandmother without reserve.

[83] They are versed in appropriate cultural engagement as part of their work and personal lives.

[84] Despite allegations to the contrary they submit there is no evidence of them being inappropriately physical with the children.

[85] Counsel for the children highlighted the various factors raised by all counsel and identified that the children were much loved by all.

The Law

[86] Applications were initially brought under both the Oranga Tamariki Act 1989 and the Care of Children Act 2004, but the Care of Children Act 2004 proceedings have been abandoned by counsel.

[87] In a helpful judgment, *Chief Executive of Oranga Tamariki v AR*, Judge Courtney identified important issues.[1]

[88] Section 4A(1) of the Oranga Tamariki Act 1989 mandates that the wellbeing and best interests of the child are the first and paramount consideration of the Court, when considering the application of the Act. In determining the wellbeing and best interests of the child the Court is to have regard to the principles set out in s 5 and s 13 of the Act:

> **4A Well-being and best interests of child or young person**
>
> (1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

[89] The general principles which apply to any proceedings are set out in s 5:

> **5 Principles to be applied in exercise of powers under this Act**
>
> (1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:
>
> (a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:
>
> (b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—
>
> (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—
>
> (A) treated with dignity and respect at all times:
>
> (B) protected from harm:
>
> (ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

[1] *Chief Executive of Oranga Tamariki v AR* [2020] NZFC 4046 [19 June 2020].

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well-being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

[90] The proceedings relating to these children are under the care and protection provisions of the legislation and as a result the principles relating to care and protection need to be considered as set out in s 13:

13 Principles

(1) Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the well-being and best interests of the relevant child or young person (as required by section 4A(1)).

(2) In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:

(a) it is desirable to provide early support and services to—

(i) improve the safety and well-being of a child or young person at risk of harm:

(ii) reduce the risk of future harm to that child or young person, including the risk of offending or reoffending:

(iii) reduce the risk that a parent may be unable or unwilling to care for the child or young person:

(b) as a consequence of applying the principle in paragraph (a), any support or services provided under this Act in relation to the child or young person—

(i) should strengthen and support the child's or young person's family, whānau, hapū, iwi, and family group to enable them to—

(A) care for the child or young person or any other or future child or young person of that family or whānau; and

(B) nurture the well-being and development of that child or young person; and

(C) reduce the likelihood of future harm to that child or young person or offending or reoffending by them:

(ii) should recognise and promote mana tamaiti (tamariki) and the whakapapa of the child or young person and relevant whanaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:

(iii) should, wherever possible, be undertaken on a consensual basis and in collaboration with those involved, including the child or young person:

(c) if a child or young person is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle in section 208(2)(g):

(d) a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the

extent necessary to protect a child or young person from harm or likely harm:

(e) assistance and support should be provided, unless it is impracticable or unreasonable to do so, to assist families, whānau, hapū, iwi, and family groups where—

(i) there is a risk that a child or young person may be removed from their care; and

(ii) in the other circumstances where the child or young person is, or is likely to be, in need of care and protection (for example, where a family group conference plan provides for assistance to be given to a child or parent to address a behavioural issue that may lead, or has led, to the child's removal from the family):

(f) if a child or young person is identified by the department as being at risk of removal from the care of the members of their family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers, planning for the child's or young person's long-term stability and continuity of living arrangements should—

(i) commence early; and

(ii) include steps to make an alternative care arrangement for the child or young person, should it be required:

(g) a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers only if there is a serious risk of harm to the child or young person:

(h) if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:

(i) if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—

(i) be consistent with the principles set out in sections 4A(1) and 5:

(ii) address the needs of the child or young person:

(iii) be guided by the following:

(A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:

(B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:

(C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:

(D) where practicable, a child or young person should be placed with the child's or young person's siblings:

(E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:

(j) a child or young person who is in the care or custody of the chief executive or a body or an organisation approved under section 396 should receive special protection and assistance designed to—

(i) address their particular needs, including—

(A) needs for physical and health care; and

(B) emotional care that contributes to their positive self-regard; and

(C) identity needs; and

(D) material needs relating to education, recreation, and general living:

(ii) preserve the child's or young person's connections with the child's or young person's—

(A) siblings, family, whānau, hapū, iwi, and family group; and

(B) wider contacts:

(iii) respect and honour, on an ongoing basis, the importance of the child's or young person's whakapapa and the whanaungatanga responsibilities of the child's or young person's family, whānau, hapū, iwi, and family group:

(iv) support the child or young person to achieve their aspirations and developmental potential:

(k) if a child or young person is placed with a caregiver under section 362, the chief executive, or, if applicable, a body or an organisation approved under section 396, should support the caregiver in order to enable the provision of the protection and assistance described in paragraph (j).

[91] Section 11 of the Act provides that in proceedings under it, the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate to their age and level of maturity, unless the Court is of a view that participation is not appropriate having regard to the matters to be heard and considered. Section 11 also provides that the child or young person must be given reasonable opportunities to freely express their views in matters affecting them and any views expressed, either directly or through a representative must be taken into account.

[92] These children, it is agreed by all, are too young to express any views of weight, but they have had counsel throughout who has identified key issues.

[93] The 2019 amendments to the legislation included additions to the purposes of the Act in s 4.

4 Purposes

(1) The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—

(a) establishing, promoting, or co-ordinating services that—

(i) are designed to affirm mana tamaiti (tamariki), are centred on children's and young persons' rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them:

(ii) advance positive long-term health, educational, social, economic, or other outcomes for children and young persons:

(iii) are culturally appropriate and competently provided:

(b) supporting and protecting children and young persons to—

(i) prevent them from suffering harm (including harm to their development and well-being), abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent offending or reoffending or respond to offending or reoffending:

(c) assisting families, whānau, hapū, iwi, and family groups to—

(i) prevent their children and young persons from suffering harm, abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:

(d) assisting families and whānau, hapū, iwi, and family groups, at the earliest opportunity, to fulfil their responsibility to meet the needs of their children and young persons (including their developmental needs, and the need for a safe, stable, and loving home):

(e) ensuring that, where children and young persons require care under the Act, they have—

(i) a safe, stable, and loving home from the earliest opportunity; and

(ii) support to address their needs:

(f) providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act:

(g) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department:

(h) maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their—

(i) family, whānau, hapū, iwi, and family group; and

(ii) siblings:

(i) responding to alleged offending and offending by children and young persons in a way that—

(i) promotes their rights and best interests and acknowledges their needs; and

(ii) prevents or reduces offending or future offending; and

(iii) recognises the rights and interests of victims; and

(iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour:

(j) assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

(2) In subsection (1)(c) and (d), assisting, in relation to any person or groups of persons, includes developing the capability of those persons or groups to themselves do the things for which assistance is being provided.

[94] The concepts of mana tamaiti (tamariki), whakapapa, and whanaungatanga are referred to in many provisions of the Oranga Tamariki Act 1989 including s 4, s 5AA and s 13. They are defined in s 2 of the Act as follows:

2 Interpretation

mana tamaiti (tamariki) means the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.

whakapapa, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend.

whanaungatanga, in relation to a person, means—

(a) the purposeful carrying out of responsibilities based on obligations to whakapapa:

(b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:

(c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection.

[95] Tikanga Māori in turn is defined in s 2, to mean māori customary law and practices.

[96] As Judge Otene noted recently in her Chambers Decision - NZFC 210, the care and protection system has been subjected to ongoing scrutiny, much of it critical in multiple reviews.[2] A concerted reform programme informed in large measure by two

[2] Chambers Decision of Judge Otene in [2021] NZFC 210.

discussion papers and the work of an expert advisory panel lead to numerous amendments to the Act from the period 2016 to 2019.

[97] In addressing the 1989 legislation, Williams J said:

> Words of statutory power were introduced into the new care and protection regime that required a Māori child to be seen within a kin matrix – whanau, hapū and iwi. It required that these layers of the kin matrix should participate in decisions affecting their children; that whanau, hapū and iwi views should be considered by the Act's deciders (often, in the end, [judges]); that connections of whanau, hapū and iwi should be maintained and strengthened wherever possible; and the sustainability of whanau, hapū and iwi should be a matter of judicial concern. Of course all of this was subject to the welfare and best interests of the child… What was revolutionary was the child was not just a child of two parents but a child of an extended family, a village and a tribe. For a country still caught in a natives and settlers paradigm, this was radical.[5]

[5] Address to the New Zealand Family Court Judges' Triennial Conference, Christchurch, 11 October 2017.

[98] His Honour went on to refer to the 2019 amendments stating:

> What is important and exciting right now is that the current Oranga Tamariki reforms present us with another chance to do what Puao-te-Ata-Tu said we should have done in 1989: spark the revolution.

[99] Judge Otene in her Chambers Decision, provides helpful commentary at paragraphs [18] through to [23]:

> ***The 2019 amendments***
>
> [18] The care and protection system has been subjected to ongoing scrutiny, much of it critical, in multiple reviews. A concerted reform programme informed in large measure by two discussion papers and the work of an expert advisory panel led to numerous amendments to the Act in the period 2016 to 2019.[3]
>
> [19] The most significant amendments for present purposes are those that took effect on 1 July 2019. Particularly relevant are those to ss 4, 5 and 13. The s 4 objectives have been replaced with a statement of purposes and the s

[3] *The Green Paper for Vulnerable Children* (Ministry of Social Development, July 2011), *The White Paper for Vulnerable Children* (Ministry of Social Development, October 2012) and Modernising Child, Youth and Family Expert Panel, *Modernising Child, Youth and Family: Interim Report* (Ministry of Social Development, July 2015), and Modernising Child, Youth and Family Expert Panel, *Expert Panel Final Report: Investing in New Zealand's Children and Their Families* (Ministry of Social Development, December 2015).

5 general principles and s 13 care and protection principles are similarly replaced in their entirety.

[20] Certain of the new principles might be taken to diminish the notion of a child's well-being resting with the child's kinship group. For instance, reference to ensuring children have a "safe, stable and loving family home from the earliest opportunity",[4] describing placement with whānau, hapū or iwi as a "preference"[5] rather than to be accorded "priority" where practicable,[6] and specific incorporation of the child's rights under the United Nations Convention on the Rights of the Child ("the Convention on the Rights of the Child").[7] However, they can be set alongside other amendments to principles that might be taken as equally, if not more forcefully, enhancing the policy underlying the legislation at its inception and the intent to address the needs of Māori. Instructive (and non-exhaustively) are the following:

(a) The introduction by statutory definition of tikanga Māori and its concepts of mana tamaiti (tamariki), whakapapa and whanaungatanga and their incorporation in the statutory purposes and principles.[8]

(b) Promotion of the wellbeing of children and their kinship group by practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)[9] and to that end imposition of duties on the Chief Executive specifically in relation to tamariki Māori, iwi and Māori organisations.[10]

(c) Guidance to adopt in decision-making a holistic approach encompassing (non-exclusively) matters of development, educational and health needs, whakapapa, cultural identity, gender identity, sexual orientation, disability and age.[11]

(d) The preservation and strengthening of sibling relationships expressed as a purpose and a principle to guide decision making.[12]

On balance I reiterate an observation made previously that:

Despite the wholesale change an unsophisticated analysis suggests that but for two exceptions the existing objects and principles are carried over to the amended, albeit not always corresponding, provisions. The exceptions for which no equivalents are overtly apparent are the s 5(c)(ii) principle that consideration must always be given to how a decision affecting a child will affect the stability of the family, whānau, hapū or iwi group and the principles in s 13(2)(f)(ii)(A) and 13((2)(g)(ii) emphasising placement of a child in same locality in which he or she was residing. Even so it can be easily appreciated that those matters can be recognised as incidents of the broader principles.

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[4] Oranga Tamariki Act 1989, ss 4(1)(d), (4)(1)(e)(i) and 5(1)(b)(iii).
[5] Section 13(2)(i)(ii)(A).
[6] Former s 13(2)(g)(i).
[7] Section 5(1)(b)(i).
[8] Sections 4(1)(a)(i) and (g), 5(1)(b)(iv), and 13(2)(b)(ii) and (i)(iii)(C).
[9] Section 4(1)(f).
[10] Section 7AA.
[11] Section 5(1)(b)(iv).
[12] Sections 4(1)(h)(ii), and 13(2)(i)(iii)(D) and (j)(ii)(A).

> … engaging an overarching evaluation, my view is that the balance of the principles continue to weigh with heft in favour of the well-being being of children being entwined with the well-being of their whānau and best assured when responsibility for their care rests primarily with their family, whānau hapū or iwi.
>
> [22] As before, these provisions are all subject to a first and paramount principle that is framed now in the new s 4A as the "well-being and best interests" of the child rather than the former "welfare and best interests." "Well-being" is defined in s 2 as including the welfare of the child or young person, suggesting that it is intended to mean more than "welfare". Similarly, the wording "best interests" suggests more than "interests." An expansion of the standard by which to measure matters of administration and application of the Act aligns with the approach found within the other amendments as to the holistic approach to be taken to decision making under the Act, and the incorporation of tikanga Māori.
>
> [23] Appreciation of this historical legislative context suggests that the 2019 amendments demand that decision makers cast the net wider in evaluating well-being.

[100] It is against this legislative framework that I now turn to consider the situation of these two young boys.

Discussion

[101] Having identified that the Court needs to be cognisant of the purposes of the Act and acknowledging that any decision needs to be based on the well-being and best interests of the child are the first and paramount consideration, I now turn to ss 5 and 13.

Section 5(a)(i)

[102] These children are too young to participate and express views of any great moment. But the observations of the s 178 reporter identified strong attachment with their parents and their current caregivers. Further information identifies that they are happy when seeing their parents and are happy in their current care arrangements. I also have evidence that they have been happy in the care of the maternal grandmother.

Section 5(b)Well-being

(i) The child's rights must be respected and upheld:

[103] There are a number of relevant UNCROC articles that are relevant in considering this issue and considering dignity and respect and harm.

[104] Article 9 identifies that "the parties shall ensure that a child not be separated from his or her parents against their will except when competent authorities consider that such separation is necessary for the best interests of the child arising from abuse or neglect." It goes on to state that "the parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child's best interests."

[105] Mr Fry identified repeatedly that the attachment between the parents and children was strong and that this was significant. If the children are to relocate to the South Island, then the access with Father and Mother will be somewhat limited.

[106] If they remain in [location A] their access to both parents would be easier to facilitate. There will be no need for any travel by the children, nor by parents of limited means and with health problems. Mother's access will need to remain relatively restrained with independent supervision, but Father's access can be developed in a much more natural setting. I have no hesitation in finding that the "aunts" are more than able to supervise safe access between Father and boys.

[107] The importance of parental involvement is reinforced in Articles 5, 14 and 18. Both Mother and Father have identified and accepted that they do not have the competence to care for the children and the children would be at risk of harm in an overall holistic sense if they remained in their care. This is a case not of deliberate abuse but of incompetence. Thus, the issue is not one that requires an embargo on access to parents because of any threat of high-level violence or exposure to the ravages of alcohol or drugs.

[108] A considerable amount of energy was expended during the hearing on allegations of smacking levelled at the "aunts". The allegations were generated initially from Mother and then from maternal grandmother.

[109] Mother's material cannot be trusted. She was not available for cross-examination but material from those who were available, and from the cultural report, identifies that any allegations made by her need to be treated with considerable circumspection.

[110] Mother's allegation concerned inappropriate discipline.

[111] Mother also, I note at this juncture, has made allegations about her own mother's disciplining of her. I put to one side these allegations.

[112] There were other specific allegations though about the "aunts".

[113] *Allegation of smacking on the bottom.* The evidence from Aunt [JS] was that she has on occasion had a child over her shoulder, tapping his bottom while singing the well-known ditty of "nick nack paddy whack give a dog a bone…". My finding is that such tapping on the bottom is not abuse. It is an activity of enjoyment and appropriate intrafamilial engagement.

[114] *Allegations of pushing the children.* This is acknowledged. The boys have had a game wherein they would stand in front of the couch with cushions about and would then fall onto it after a little push. The day family members cannot play games such as this is the day we lose sight of the wood for the trees.

[115] *Slapping a child's hand.* There are two incidents that the caregivers have identified. The first incident remembered was an incident when [ZB] repeatedly returned to the stove and reached up to turn an element on. He did not respond to repeated requests and the caregiver, [SN], did tap him on the hand as he was reaching up to the switch. She was concerned he might burn himself or hurt himself. She acknowledges that.

[116] The second incident she recalls was when she slapped his hand away from a wall socket at an extended family member's home. She acted to prevent electrocution.

[117] In explanation for both events she identified that she had been concerned for his safety and a gentle slapping reprimand, slapping the hand away from danger, was

an instinctive approach. She sees on reflection, that picking the child up and removing him from the scene may have been more appropriate.

[118] I do not find that this amounts to physical abuse that causes me any significant concern. Overall, I have been impressed by the integrity of [SN] and the manner in which she was candid in her response. A caregiver intervening to protect a child in this way should not be taken out of the mix of being a caregiving option.

[119] Oranga Tamariki submitted that there was a lack of transparency in disclosure and that therefore identifies a concern about the caregiving competencies. I reject that submission. The explanations were entirely plausible. An internal Oranga Tamariki email was produced which suggested that the caregivers had not made timely disclosures earlier. That email was clearly wrong in part, as Oranga Tamariki's own records showed that [SN] had identified the stove-top incident when the accusations had first been levelled. Her explanation that she remembered the wall socket incident when they were returned to the same environment is plausible. But for her disclosure the Ministry would not have known about it. The Ministry suggestion of lack of transparency is misguided. The incidents themselves were incidents involving safety and response. It was not over the top.

[120] There is also evidence of a reposting of a post about corporal punishment. It was not generated by the caregiver, but I do question why she would repost. She was not convincing in explanations. This was clumsy.

[121] There was also an affidavit filed by the OT supervisor identifying a significant number of family violence incidents involving "Aunt" [JS]. At first blush the affidavit seemed to be suggesting that [JS] is someone in whose home violence was prevalent.

[122] A closer examination, however, revealed that [JS] was the victim of significant abuse in years gone by. It would be wrong to identify anything other than that she was a victim of violence. While her decisions as a victim some years ago may have been questionable in terms of the length of time she remained in any particular relationship, I believe that material should be consigned to history.

[123] In conclusion, I have no concerns as to the safety of the current caregiving environment.

[124] Likewise, I have no concerns as to the safety of the grandmother's home environment.

[125] Unfortunately, the nature of the material filed by Oranga Tamariki has had the effect of winding up the concerns of the competing parties.

[126] For example, there is an unfortunate notation in a s 131 report dated 12 March 2020 which not only identified concerns about [JS]'s home environment, but also concerns about the maternal grandmother's home environment. The latter notation identifies that [SB] (mother) has a childhood care and protection record for substantiated neglect in 1995. That immediately triggered concerns on behalf of the current caregivers about grandmother's caregiving environment, particularly when they had heard allegations from Mother about grandmother. Unfortunately, the s 131 report did not identify that that conclusion was incorrect.

[127] My summation is, not surprisingly, that the competing parties seized upon material that was embellished by Mother in her discussions with both sides resulting in positioning that became fixed. From early days therefore, the competing parties were set up in opposition against each other – when my observation is they have all been looking to the wellbeing and best interests of the children.

[128] The children will be protected from harm in either household.

(ii) The impact of harm on the children and the steps to be taken to enable their recovery:

[129] Fortunately, early intervention assisted by the robust and authoritative determinations of Dr [H] has meant that the impact of any inadequacies of the parents is likely to be somewhat muted.

(iii) The children's need for a safe, stable and loving home should be addressed.

[130] Having identified that I have no concerns as to harm in either household, it is then appropriate for me to discuss each.

[131] The children currently reside in a safe, stable and loving home environment. They have been there for over 12 months and are settled. The arrangements within the home are somewhat unusual. The "aunts" are not in any formal relationship as such other than a mutually supportive one. [SN] has a history and experience in early childhood education and both have skills and experience that will enable them to attend to the needs of these two young boys who do have a robustness at times.

[132] Likewise, Grandmother's home in the South Island offers safety and stability. Grandmother and her partner impressed as witnesses, as did the caregivers, in terms of their commitment to the boys and each other.

(iv) Mana Tamaiti (Tamariki and the Children's well-being) should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi and family group

[133] I have already identified the significant material that has been provided by way of the cultural report. It is clear from that, and from hearing the parties, that if the children are to live with their grandmother, they will be living with someone who is whānau. They will be living with someone who, in growing up herself and in parenting her own children, had no significant engagement with the richness of her cultural heritage. She lives with a partner who himself has no connectiveness with Māori cultural heritage.

[134] But for the process of Oranga Tamariki commissioning a report, Grandmother would have still been cast adrift from significant connection to her cultural roots, although she did give evidence of some tentative steps of enquiry. If there is one positive thing to be gleaned from this court process, it has been the commissioning of the cultural report which has facilitated the consolidation of the awakening of the grandmother's desire to return to the heart of her ancestors. The report writing process

identified a marae and it is anticipated that steps will be taken by grandmother to engage fulsomely, with her iwi.

[135] In reading the report I got the clear impression that the South Island family were excited about the prospect of reconnecting. That will be a wonderful experience for the children to be part of.

[136] Having myself had the benefit and privilege of sitting under the nga pou representing the strong female leaders of Ngāi Tahu at the iwi's meeting house at Bluff, I share in that sense of anticipation and know that such engagement will provide a rich and fulfilling experience that will enhance the children's sense of identity and self-worth.

[137] The significance of family blood is certainly reinforced by the legislation. The comments of Joe Williams J and Judge Otene underline how important it is for children and their family's lives to be sheeted back to the roots of whakapapa.

[138] In contrast the caregivers cannot present a direct bloodline. However, they can identify being a part of the family group for these children and that participation arises from a familial link by marriage.

[139] I also am of a view that the current caregiving team have an appreciation and understanding of the significance of cultural connectiveness. They have a humble but nevertheless working knowledge of te reo, and through engagement with early childhood education have the skillset to develop an understanding and appreciation of the importance of heritage for the children.

[140] My observation over the five days of hearing evidence is that these caregivers are more than capable of being able to develop the boys' awareness of their Māori cultural heritage and have already done so. On the other hand, while Grandmother has identified a sense of loss of her cultural heritage and a willingness to engage in the future, she has not as yet taken any significant steps to engage with the marae. The report has helpfully shown a way forward for Grandmother to connect to the maternal family heritage.

[141] Mr Fry also identified that the Court should not lose sight of the fact that there is also a paternal family. The current caregiver, [SN], is part of that by marriage and gave evidence identifying that she has facilitated ongoing connections with the extended paternal family in the North Island.

[142] It is the submission of the current caregivers that if the children remain living in [location A] it will be easier to access that important part of the family than if the children are based in the South Island, as access occasions to [location A] will become quite cluttered with trying to fit in all of the various important people, including parents, caregivers and extended family.

[143] The cultural report dated 8 March was provided to Oranga Tamariki. It is not a report owned by the Court. I consider that these boys would benefit considerably, if permission were able to be obtained, for the key cultural connections of that report to be available to all who are to be involved in their future care, wherever that may be. It is such an important resource.

(v) Decisions should be made and implemented promptly, and in a timeframe appropriate to the age and development of the children:

[144] It is now two years since the application for an interim custody order was made. Investigations were carried out and Family Group Conference processes developed. The ambiguity of some information about the respective competing households has extended the timeframes but given the importance of each party having their say a substantial period of court time was needed and unfortunately the Covid virus interrupted the flow of that process. It was for that reason that I directed that the hearing proceed and that it not be delayed for further psychological reports or witnesses to be available.

(vi) A holistic approach:

[145] This subsection directs that the children be seen as a whole person.

[146] These children come from humble beginnings. Their parents have cognitive limitations as clearly identified by the psychologist's report. There has been no argument about that. As a result, the current placement is ideal in the sense that the children are in a home with special skills in early childhood education. They are thus in a home in tune with the needs of young children.

[147] The grandmother and partner gave evidence that they felt more than capable of caring for the children. However, Grandmother's partner has no experience of caring for young people long-term. As I noted at the conclusion of the hearing, he impressed me as someone from whom the boys would gain considerably. I do worry though about the capacity of the South Island family unit to cope with three children under four who show signs of having more than usual needs. They impress as competent and well-balanced people, but I do have a worry about them being swamped.

[148] As to whakapapa and cultural identity, I refer to my comments under (iv). I have identified that the grandmother offers a blood-connected family unit with the ability to develop a connectedness to Ngāi Tahu. In looking at the situation of these children holistically though, I think it is important not to jump directly from removal from the parents to alternative care without retaining connectiveness with the parents. While the parents are not competent to provide the day-to-day care, they provide the first link in the chain to their extended family on both sides. Those first links reside in [location A]. Mr Fry saw those as significant links.

[149] Gender, identity, sexual orientation and disability are not relevant at this juncture.

[150] These are young children and at present they are in the home of people who have special skills in early childhood education and development.

(vii) and (viii) are not relevant to this discussion.

Section 5(c):

[151] The discussion under this heading reinforces the importance of family, whānau, hapū, iwi and family group.

[152] Here, the grandmother can offer a home that is connected by blood to the children's maternal heritage and which has the potential to strengthen the children's day-to-day connection with the extended maternal family, hapū and iwi, who through the process of a cultural report fortunately were given an opportunity to present views of the importance of family in the lives of these boys.

[153] On the other side, the boys are being cared for by members of the current family group to whom they are psychologically attached who also have a strong relationship and connection with their immediate blood family in the form of their parents. A decision in favour of that family group will facilitate the ongoing involvement of the parents in the process of caring and nurturing the well-being and development of the children by maintaining the important link with their parents. It will also be within the structure of a family unit with cultural competence to supplement and support the children's engagement with their iwi.

[154] Section 5(c)(vi) identifies that endeavours should be made to obtain the support of the parents for the exercise or proposed exercise of any power conferred under the Act and clearly here the parents support the current placement.

Section 5(d) – the child's place within their community should be recognised.

[155] The children have lived their whole lives, short though those may be, in [location A]. They are thriving in their placement which supports engagement with a culturally appropriate kōhanga reo and through that they have a network of friends and community contacts. They have an ongoing connection with their paternal family and a retention of their care in [location A] would be in keeping with the aspirations of this subparagraph.

[156] To the contrary, the children have had 13 nights only in the North Otago/South Canterbury community.

[157] I turn now to s 13.

[158] *Section 13(2)(a)*. Early support, support services were engaged prior to the s 78 order being made. Those services were engaged to support the parents. The clear statement of Dr [H] promoted more decisive intervention and that intervention has been acknowledged as appropriate.

[159] *Section 13(2)(b)*. Support provided should strengthen and support the child's family, whānau, hapū and iwi, and family group, and recognise and promote Mana tamaiti, whakapapa, and whanaungatanga rights and responsibilities, and wherever possible be undertaken in a consensual way.

[160] It is appropriate here to note that there has been discord amongst those attempting to support these two boys.

[161] The cultural report identifies that maternal grandmother and her partner sought to support the boys for some time, and feel aggrieved their input was, in initial stages, not obtained in an appropriate and timely way.

[162] Having read the file it is clear to me that media attention in relation to place of safety warrant uplift and social media comment and information shared with supporters by the parents, was not necessarily consistent with various concerns that had been brought to the attention of the ministry. It is clear that there were significant issues of concern, and it was right that the Ministry make enquiry.

[163] It seems to me that the child was returned upon enquiry on merit and not as a result of media pressure. It is also fair to conclude that maternal family's information often came from the source of mother, whose own fallibility in relaying information accurately has been subsequently acknowledged by all. The Ministry does have an obligation to cast its net far and wide in terms of accessing the resources of whānau, hapū and iwi and they did do so, although they delayed a little in that process given information they had, in turn, been given about those resources by mother.

[164] It is also apparent that the current caregivers took a robust approach to supporting the parents. I consider the social worker at the time, in giving her oral evidence, was very fair in acknowledging that those who were party to a meeting on the morning of the s 78 uplift, had every right to feel much aggrieved that the Department, in meeting with them, did not disclose that they had already taken steps to remove the children. I acknowledge that the social workers were effectively dancing on the head of a pin, in that they did not feel able to disclose the without notice application to the Court. I fully understand why [JS] and [SN] felt so aggrieved as they had been working to supplement the NGO supports, and had offered their own home as a base for ongoing care. They in turn received disinformation about the extended maternal family in the South Island.

[165] As a result, by the time Family Group Conference processes were enjoined, two potentially complimentary support packages were in conflict even though their initial intention was to support.

[166] It is my hope that the hearing process itself has proven to be somewhat of a watershed for these competing households in that they now have some understanding that each household was motivated solely to support the wellbeing and best interests of the boys.

[167] It is also not surprising that [JS] continued to be somewhat animated in her advocacy, given a view that the Ministry was closing its mind to her as being part of the supportive care package. My assessment is that [JS] is an enthusiastic and dogged advocate. It is easy to understand the conflict that developed between the competing households and that she was to the fore in volatility but the hearing process identified that there was some justification for her grievance based on the disinformation that was flowing.

[168] It is pleasing that the Ministry, engaged in the cultural reporting process to develop its own understanding of the importance of the extended whanau connection in the South Island. I do query though, what steps if any were taken to develop the understanding of the extended paternal family other than those presented by the

caregivers. The Court is required to take a holistic view in the wellbeing and best interests of the children and sometimes a lack of balance is unhelpful.

[169] *Section 13(2)(c).* This subparagraph is not relevant.

[170] *Section 13(2)(d)*. The parents, whilst upset at the uplift, nevertheless appropriately consented to a declaration under s 14(1)(a) and s 14(1)(b) which showed some insight and acknowledgement of their frailties. It is relevant to note that the parents consent to the current care arrangement.

[171] *Section 13(2)(e).* Here the Ministry quite rightly initially engaged with the family and support services with a view to supporting ongoing parental care. The children have been removed from the parents, but the Ministry's ongoing involvement and support is critical to maintain the safety of the care of the children, ongoing access, and the development of the children's engagement and greater awareness of their Ngāi Tahu roots.

[172] *Section 13(2)(f).* There has been planning as to long term care and continuity of arrangements, but the department has been unable to secure agreement as to what are the best long-term care arrangements and this Court hearing has resulted. In its processes the Department has facilitated each competing household having time caring for the children.

[173] *Section 13(2)(g) to (h).* The children were uplifted from their parent's care because of serious concerns as to neglect and those concerns have been acknowledged as justified. It is not possible to return the children to the care of the parents because of the parents' frailties. However, the aspiration of the children continuing to have an ongoing significant relationship with their parents is appropriate. Continued care in [location A] with the current caregivers will facilitate an ongoing relationship of a significant nature with father and will facilitate an ongoing regular contact with mother, if she is able to maintain that. A move to the South Island does not offer the regularity and intimacy of continued access which Mr Fry identified as being important.

[174] *Section 13(2)(i)*. These children need stability, nurture and parenting that is able to meet their special needs. This subjection identifies that the Court should be guided by a preference to placing the children with a member of their family or family group who is able to meet their needs, including a safe, stable and loving home. Both options allow for that as both households fit the definition of wider family with grandmother being whanau and [SN] being family group.

[175] Both households identify a family setting. The [location A] household is more than cursorily engaged with mana tamaiti, whakapapa, and whanaungatanga.

[176] Being with the grandmother will facilitate the children being a part of the overall journey of the whanau reconnecting. However, they will be able, in my view, to be part of that reconnection in either a care environment or an extended access environment.

[177] Where practicable a young person should be placed with siblings. In this case, the children have a half sibling on their mother's side, who is now living with maternal grandmother. The children are about to have a half-sibling on their father's side born to his relationship in [location A]. Placement in [location A] will allow a natural engagement with that child who is about to be born.

[178] In relation to attachment, the children at present have, according to the psychologist, a strong attachment with their parents, and an attachment with the caregivers. I accept that there is the ability for the children, if it has not been established already, to develop an attachment with their grandmother. Mr Fry's evidence of the strong parental attachment though, resonates. The children do feel at home in the [location A] environment in which they currently reside. A move to the South Island will remove the immediacy of that sense of belonging but will allow development of a sense of belonging within their whānau, hapū and iwi.

[179] *Section 13(2)(j) and (k)* are not relevant.

Conclusions

[180] The cultural reporter, in reporting to those who commissioned her report, identified that, in her view, the children should be placed in the South Island. I have reflected at some length about those conclusions but with respect, have formed a contrary view.

[181] Mr Fry was animated in his view that for these boys, it was important to consolidate the very clear and positive attachments with their parents. He saw that as the key. He observed that a child focussed approach puts attachment front and centre in discussing the welfare of these children. He appeared very firm in his view that the children should remain in [location A], because it is in [location A] that they will be best able to continue to engage appropriately with their parents.

[182] The Act is very clear that these children should be seen, given that they have been removed from the immediacy of parental care to be part of an extended family, and should be enabled to develop within the bosom of that family. The cultural report identifies that that family, in terms of its connection to its cultural heritage has lost its way. The cultural report identifies that the family has been lost for several generations. The cultural report identifies an excitement and anticipation of reconnection and I consider these children should be part of that. However, I consider that these children can be part of that from the strength of the current care placement.

[183] I consider that grandmother's partner has potential to be a significant source of mentoring excellence. However, he has no experience of day in, day out parenting, and I am more than a little anxious at the prospect of three under fours being foisted upon him and his partner.

[184] The children currently, are in a stable and secure caregiving package. That package is of relatively humble means, but it is able to attend to the developmental needs of young people through the skill sets of the caregivers.

[185] In their current placement the children also have ready access to their parents. That is significant and important.

[186] I consider that from a base of care in [location A], these children will benefit from having significant holiday time in the South Island, where they can just do bloke stuff with Mr [AR], and also have the opportunity to enjoy the company of their grandmother and whānau on a journey of reconnecting with their heritage.

[187] I believe that their current caregivers have the ability to enhance the lessons and experiences of that journey from their own base of cultural knowledge, which at this time I consider likely to be more significant than that of the grandmother. A blend of the two will allow the development of their cultural knowledge and assimilation.

[188] By remaining in their current placement, they will also continue to access the paternal side of their family.

[189] If the children were placed in the South Island, I do not consider that the maintenance of ongoing meaningful access with their parents would be practical. The Ministry has put together some ideas, but the maintenance of those will be expensive and will also involve a significant logistical exercise in moving people of humble cognitive ability and health frailty around considerable distance.

[190] Monthly connection as opposed to weekly connection, is a poor substitute for the current regime. Given the intensity of distrust and ill-feeling I also feel that father, in travelling south, may very much be a fish out of water and engagement with the children somewhat contrived.

[191] It is likely that mother's engagement with the children in the south will also raise problematic issues given the volatility and unevenness of her engagement with her mother.

[192] Were the children to be in the south it would be a burden for them to travel north more often that school holiday times. Air traffic to [location A] is problematic, and I heard evidence of the time involved in travelling from their grandmother's home through to [location A]. It will be possible for holiday time but will certainly be inappropriate for weekend contact.

[193] If the contact was to be in holiday time, then crammed into that holiday time would need to be access with father, with mother, with caregivers and with extended family. Caregivers would need to be part of the mix in supervising contact still and would also be involved in travelling to the Waikato region and elsewhere.

[194] Facilitating the children's access to all of the significant components of their overall familial groupings is a lot easier from the base of [location A] than it is from the base of South Canterbury.

[195] The cultural reporter suggests that if there were not an intimate whanau connection between these children and their grandmother, then the current caregivers would be appropriate caregivers.

[196] With respect, that assessment parks to one side the very real attachments that these children have with their parents. A placement with the current caregivers is a placement that offers intimate and regular connection with the significant attachment figures for these children, namely their parents. In that sense, the children, through staying with their current caregivers, will be able to continue to have a significant and appropriate level of engagement with the most significant family members that they have, namely their mum and dad.

[197] Although individual personalities may have a role to play in this, I consider that by and large the conflict between the competing groupings has developed to a heightened level as a result of misunderstandings.

[198] My conclusion is that each of the individuals involved in supporting the parents have always had the best interests and wellbeing of the children a heart. I can sympathise with the original social worker as she worked to secure the best possible caregiving option for the children. I can sympathise with the current caregivers for feeling upset at what must have appeared to them to be a two-faced approach by the Ministry. I can understand the maternal family feeling left on the outer.

[199] Given the frailties of the parents and given the intensity of views and given the distance between the parties, and given the need for assistance, I consider that the

parties own determination that orders under the Oranga Tamariki legislation are appropriate is valid. Such is the nature of the situation, a statutory review process is appropriate.

[200] Now that I have reached a conclusion as to where these children should be based, and with whom, I am hopeful that matters will settle down and a comprehensive package developed that allows for the aspirations I have identified.

[201] Accordingly, I indicate that I now signal my intention to make a s 101 custody order, which confirms the current placement here in [location A]. I invite the Ministry to prepare a plan that includes planning for the support of the ongoing care, access for mother, father, extended whanau in the South Island and access for siblings, the appropriate engagement with the children's cultural heritage, arising from the maternal whanau, hapū and iwi and appropriate recognition of the children's right to access the paternal extended family.

[202] I also consider that given the discord, that counselling for the two competing households also be made available.

[203] The cultural report identified significant proposals in relation to developing the maternal family's reconnection with their heritage. The planning should certainly involve those issues.

[204] As to access, in my view, access for father should be weekly, supervised by the caregiver, and for mother there should be access supervised by the Barnados agency.

[205] Access for grandmother should include at least one half of all school holiday periods, including the holidays at the end of the school terms and Christmas periods and such other times as agreed. There should also be provision for grandmother to be able to travel to [location A] for access on fourteen days' notice.

[206] These parents are of humble cognitive ability. As a result, it is appropriate that [SN] and grandmother each be appointed as an additional guardian, pursuant to s 110.

Their input is critical for these children and I believe their importance should be acknowledged in this way.

[207] I consider that the Ministry should have twenty-eight days to develop its plan, and the matter should be listed to be called before me at a suitable time thereafter, for that plan to be considered and orders made.

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Judge DG Matheson
Family Court Judge

Date of authentication: 13/04/2021
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