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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2019-009-000913
[2020] NZFC 10383

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[AS] Respondent
AND	[TS] born [date deleted] 2019 Child or Young Person the application is about.

Hearing:	17 & 18 November 2020
Appearances:	A Pacurariu for the Chief Executive A Matheson & S Zafar for the Respondent G Murphy as Lawyer for the Child
Judgment:	2 December 2020

RESERVED JUDGMENT OF JUDGE S M R LINDSAY

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[1] [TS], born [date deleted] 2019, is the fourth child of [AS], the respondent. [TS] is a child subject to an application by the Chief Executive for a declaration that [TS] is in need of care or protection pursuant to ss 14(1)(a), 14(1)(b) and 14(1)(c) of the Oranga Tamariki Act 1989 ("the Act"). [TS] was uplifted from his mother's care by social workers the evening of the day he was born. [TS] was placed in the care of family and remains in their care at this time.

[2] The respondent, [AS], asks the Court to decline the application made by the Chief Executive and she seeks that [TS] be returned to her care. Should the declaration nevertheless issue, the respondent seeks that access to [TS] be defined by the Court in an access order pursuant to s 121 of the Act.[1]

[3] The applicant submits that the following grounds of concern exist:

(a) The respondent's failure to disclose personal information;

(b) The respondent's lack of insight into the risk that she has posed and may continue to pose to [TS] if he is in her care;

(c) Social workers believe the respondent is in a clandestine and unsafe relationship with [DI]. The Chief Executive submits that this relationship poses an inherent risk to [TS], even if the respondent merely communicates with Mr [DI] via telephone.

(d) The respondent's relationship history points to her inability to protect [TS] from family violence;

(e) The respondent's inability to put into effect and sustain personal change to improve her parenting;

(f) The respondent's alcohol abuse and the impact that may have on [TS];

(g) A lack of proper engagement with child protection professionals; and

[1] Application dated 27 August 2019 filed pursuant to s 121 of the Act. Defence of application 30 September 2020.

(h) [TS] is likely to be harmed if returned to his mother's care

The Law

General principles

[4] Section 6 of the Act provides that the welfare and best interests of the child or young person shall be the court's first and paramount consideration. The court must also have regard to the principles enshrined in sections 5 and 13 of the Act.

[5] The section 5 principles promote the involvement of family and whanau in the decision-making about a child or young person. Section 5(f) of the Act provides that the implementation of decisions must be within a time frame appropriate to the child or young person's sense of time.

[6] The section 13 principles provide that when a child is in need of care and protection, assistance and support should be provided to enable the child or young person to be cared for and protected within their family or whanau. A child or young person should only be removed from their family or whanau if there is a risk of serious harm to the child or young person.[2]

The current application

[7] The applications were filed on 28 June 2019. This is just prior to the amendments to the Act which came into force on 1 July 2019. The standard of proof on which I must determine the applications are a balance of probabilities.[3]

[8] The first step is for the Court to determine whether [TS] is a child in need of care and protection.

[9] Section 14 of the Act provides the grounds on which a child may be in need or care and protection. The grounds relied upon in the current application are those in s 14(1):

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[2] S 13 of the Act.
[3] S 198 Oranga Tamariki Act.

14 Definition of child or young person in need of care or protection

(1) A child or young person is in need of care or protection if—

(a) the child or young person is suffering, or is likely to suffer, serious harm—

(i) in the circumstances described in section 14AA(1); or

(ii) having regard to the circumstances described in section 14AA(2); or

(b) the parents or guardians or the persons who have the care of the child or young person are unable to care for the child or young person; or

(c) the child is a subsequent child of a parent to whom section 18A applies and the parent has not demonstrated to the satisfaction of the chief executive (under section 18A) or the court (under section 18A(4)(a) or 18C) that the parent meets the requirements of section 18A(3); or

[10] Section 14AA provides:

14AA Circumstances in which child or young person is suffering, or is likely to suffer, serious harm

(1) For the purposes of section 14(1)(a)(i), a child or young person is suffering, or is likely to suffer, serious harm if—

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

(b) the parents or guardians or other persons who have the care of the child or young person are unwilling to care for, or have abandoned, them.

(2) For the purposes of section 14(1)(a)(ii), other circumstances that may constitute serious harm, or establish the likelihood of serious harm, include—

(a) a child's or young person's development or physical or mental or emotional well-being is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, avoidable:

(b) the child or young person has been exposed to family violence (within the meaning of section 9 of the Family Violence Act 2018)):

(c) serious differences exist between the child or young person and the parents or guardians or other persons who have the care of them:

> (d) serious differences exist between a parent, guardian, or other person who has the care of the child or young person and any other parent, guardian, or other person who has the care of them.
>
> (3) For the purposes of applying section 14(1)(a) and subsections (1) and (2), serious harm may occur (without limitation) as a result of—
>
> (a) an incident; or
>
> (b) 2 or more incidents that taken on their own would not be serious enough to constitute serious harm, but the cumulative effect of which is serious enough to cause serious harm; or
>
> (c) the co-existence of different circumstances.

[11] The applicant submits that [TS] is a child likely to be harmed (whether physically or emotionally or sexually), ill-treated, abused or seriously deprived. The applicant submits that [TS]'s removal from his mother's care not long after his birth highlights a new born infant`s vulnerability to the risk his mother's care poses. The applicant submits that the evidence is unequivocal and supports the conclusion [TS] is likely to be harmed in his mother's care. This is drawn from the respondent's history of parenting and her inability to sustain changes which would benefit her children. [4]

[12] In terms of preliminary steps, I observe that a s 78 custody order was made on 28 June 2019. This required the convening of a family group conference ("FGC"). This was held on 6 August, but the parties were unable to agree as to the proper way forward with regards to [TS]'s care.

[13] In terms of the steps now to be taken, s 73 provides:

> **73 Court not to make care or protection order unless satisfied that child's or young person's need for care or protection cannot be met by other means**
>
> (1) The court shall not make a care or protection order (other than an interim order) unless it is satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means, including the implementation of any decision, recommendation, or plan made or formulated by a family group conference convened in relation to that child or young person.

[4] Decision of Durie J in *C v Chief Executive of the Department of Child, Youth and Family Services* (2003) NZFLR 643.

> (2) In deciding whether or not to make a care or protection order (other than an interim order) on the basis of any of the grounds specified in section 14(1)(a)(i) or (ii) (in the circumstances referred to in section 14AA(1)(a) or (2)(a)), the court shall take into account, among other things, any evidence before the court—
>
> (a) that the kind of harm suffered by the child or young person will neither continue nor be repeated:
>
> (b) that a parent or guardian or other person having the care of the child or young person will be capable of ensuring that the kind of harm suffered by the child or young person will be neither continued nor repeated.

[14] The evidence of all three social workers reflects their shared concern that the respondent has not demonstrated she has, nor can, sustain change.

[15] The position advanced by the Chief Executive is the respondent's access should be "*determined in a s 128 plan which would allow for flexibility and would mean that access can be tailored to meet [TS]'s needs*."[5] It is submitted that the current frequency of access has had, and will have, a negative impact on [TS]. Lawyer for the Child favours the approach adopted by the Ministry. Longer term, the social worker proposes the respondent's access be reduced to four two-hourly supervised visits per annum. This would align with the access plans that the respondent has with [TS]'s "at home" sister, [YS], as well as the sister he does not live with, [NS].

United Nations Convention on the Rights of the Child

[16] The United Nations Convention on the Rights of the Child (UNCROC), to which New Zealand is a signatory, confirms internationally recognised child rights. The articles of relevance to [TS], particularly given he is a child subject to an application by the Chief Executive for the Ministry of Children, are as follows:

> (a) Articles 4, 5 and 6 of the Convention provide that the Government must do everything in its power to ensure the Convention is a reality, to respect the role of parents, guardians or family/whanau in providing guidance but also, balanced against that, to ensure children and young

[5] Submissions of Counsel for the Chief Executive at paragraph 19(c) dated 11 November 2020.

people can survive and develop in a healthy way. These Articles must be read as creating fundamental rights.

(b) Article 7 provides that a child has the right to have their identity preserved. [TS]'s placement is identified as a family placement although the respondent did not know Mr and Mrs [B] before [TS] was placed with them. Mr and Mrs [B]'s relationship to the respondent is one of kin, they are her [relatives]?

(c) Articles 9 and 10 provide that a child has a right to live with or stay in contact with their family or whanau. This is subject to contact in no way being harmful to the child. In [TS]'s circumstances, social workers evidenced harm in filing the without notice application for a s 78 interim custody order. Much of the evidence is disputed by the respondent. Beyond [TS]'s legal status or placement by social workers with caregivers, the Convention provides that [TS] has a right to see his family or be reunited with them.

(d) Articles 18, 19 and 20 preserves [TS]'s right to live with, and be raised by, parents or whanau unless he might be harmed in so doing. Every child has the right to be protected from violence, abuse and neglect by parents or caregivers. Given the s 78 interim custody order is in place, the responsibility sits with the Ministry of Children to ensure that [TS] is safe and protected, but also that his family culture is respected and preserved.

[17] The 2019 amendments to the Oranga Tamariki Act 2019 introduced at section 7AA the concept of Mana Tamaiti and Tikanga to the responsibilities of the Chief Executive when assessing the policies and practices of the department that impact on the well-being of children. This approach is intended to reduce disparities by setting measurable outcomes for tamariki and rangitahi.[6]

[6] S 7AA (2)(a) and (b).

[18] The inclusion of the s 7AA principles promotes the significance of the mana of pepi, tamariki and rangatahi in decision making by social workers. It relates directly to Maori, but I interpret this provision being broadly relevant to social worker practice and process. The concept of Mana Tamaiti is significant for children subject to the intervention of the Chief Executive.

[19] Although these proceedings were filed days before the enactment of the amendments to the Act, it seems reasonable that I reflect on this protective overlayer, which reflects the prioritising of a holistic child-focussed practice.

Background to [TS]'s care

[20] The respondent has three older children, [JS] born [date deleted] 2009, [YS] born [date deleted] 2011, and [NS] born [date deleted] 2016. [JS] lives with his father in the North Island. [JS] does not have contact with his younger siblings. [YS] lives in [location 1] and shares the same home with [TS]. [NS] was placed in the care of non-kin. Both [YS] and [NS] are children subject to special guardianship orders. Social workers set the terms of the respondent's access to [YS] and [NS] based on supervised visits occurring four times a year.

[21] [TS] was born [date deleted] 2019. The respondent discharged herself from hospital [shortly afterwards]. Later that night [TS] was uplifted from his mother's care by social workers.[7] [TS] was placed with caregivers who have provided the long-term care of [YS]. A few days after [TS]'s birth a Custody Order was applied for and granted.

[22] Initially the respondent exercised supervised access arrangements for one hour three times a week. Following the FGC in August 2019 access changed to twice weekly visits for 1½ hours. The visits take place at [location deleted]. A resource worker supervises one of the two visits and [TS]'s caregiver supervises the other scheduled access visit. It is submitted on behalf of the Chief Executive that the respondent's access should continue to be supervised and gradually reduced to

[7] Pursuant to a s 39 Place of Safety warrant.

strengthen his attachment with caregivers and ensure less disruption to his care routines.

[23] The respondent has a history of notifications or parenting concerns that go back before [JS]'s birth. At the heart of social workers' concerns was the respondent's "inability to parent safely".[8] At [JS]'s birth, social workers were concerned about the respondent's failure to recognise the risk her brother posed to children. Mr [RS] is described as a convicted sex offender who visited her home and it was understood would attend the birth.[9] There were also concerns about her home environment, social workers describing it as unkept and unhygienic. The respondent was not perceived to engage with support services for any of these issues.

[24] The respondent was [under 16] when she fell pregnant with [JS]. She was a little older than a child herself at that time. The respondent was [under 17] when [JS] was born. At [under 16] years of age the respondent suffered periods of unwellness that meant she did not regularly attend school, but her pregnancy put paid to secondary schooling. The respondent's home was described by social workers as chaotic, unkempt and unhygienic. The respondent's mother was an alcoholic and it seems that the maternal grandmother was not coping and possibly also unwell.

[25] [JS] was [under 10] weeks old when he was uplifted from his young mother's care and placed with his father (and supportive paternal family). Ultimately, [JS]'s father was supported by the Ministry to obtain a parenting order. The respondent exercised weekly access supervised by [JS]'s paternal grandmother up until [JS] turned [under 5] years old. At [under 5 years old] [JS] moved with his father to the North Island. It seems there was little by way of consultation. The respondent was faced with a fait accompli and, with that, her contact with [JS] came to an abrupt halt.[10]

[26] The respondent's evidence is that following [JS]'s uplift, and at only [under 17] years of age, she drank to self-medicate the pain of her loss:[11]

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[8] Paragraph 11 Affidavit of Linda Johnston June 2019.
[9] Paragraph 12 Affidavit of Linda Johnston June 2019.
[10] The respondent has infrequent telephone contact with [JS]. [JS] has no contact with his sisters.
[11] Page 124, Line 23 to 30 Notes of Evidence.

Q So, what sort of emotional toll has that had on you?

A It's been a lot. And that's where most of drinking came from because I didn't know how to deal with it and I didn't have anybody to talk to so drinking was the answer for me.

Q So when did your drinking start?

A When I lost [JS]

Q So when you were [under 17] years old?

A Yeah.

[27] The respondent was cross examined as to whether [JS]'s pregnancy was planned. Given her young age and vulnerability at the time, it is arguable she had little control over her circumstances. At [under 16] the respondent was pregnant, without access to education, without adequate family support and without effective psychological support to prepare her for the rigours of parenting at [under 17] years of age.

[28] [YS] came to the attention of the Ministry prior to her birth. Social workers were concerned the respondent had not made changes to her lifestyle which would adequately support the safety and care of a newborn child.

[29] The respondent was [under 20] years old when she gave birth to [YS]. The year previous the respondent's mother had been diagnosed with [an illness] and died [less than a month] later. For the respondent, this was another profound loss. At the FGC convened to address care and protection concerns for [YS], the respondent agreed to attend [a parenting centre] and undertake a six-week parenting assessment. The respondent was to engage with community professionals including Mothers and Babies, Waipuna, Early Start and Plunket. The respondent completed all her necessary tasks. Later social workers closed the file given there were then no further care or protection concerns for [YS].

[30] Over 2013 and 2014 [YS] was a child subject to "regular reports of concerns".[12] By then the respondent had formed a relationship with [DI]. Over the course of their relationship and up until the birth of their daughter, [NS], they were the subject of some 40 reported family harm incidents. The respondent was [under 25] years old. The details of the family harm incidents are not detailed in these proceedings, other than reference to the incidents indirectly involving [YS] or the respondent when she was pregnant with [NS]. It is a fair observation that the respondent's relationship with [DI] was defined by family violence and alcohol abuse. It was undeniably a harmful relationship.

[31] Social workers investigated reports of concern for [YS] in the care of the respondent and concluded that she had been neglected and exposed to alcohol abuse and domestic violence. There were significant concerns [YS]'s needs were not being met, that she was living in an unhygienic home environment, that she was not being properly fed and that there was excessive alcohol and drug use in the home. Over July 2014 the Ministry received a further series of notifications of concern for [YS].

[32] On 23 March 2015 a FGC was held and it was agreed by the parties that [YS] was a child in need of care or protection. As part of the FGC the respondent agreed to complete a parenting assessment through Methodist Mission and to seek help for her alcohol use.

[33] In July 2015 reports of concern continued to be made about domestic violence in the respondent's home. In early [date deleted] 2015 the respondent agreed with the social worker's request that [YS] live elsewhere pending a reconvened FGC. The respondent later withdrew her support for this informal placement.

[34] The parental assessment undertaken by the Methodist Mission found concerns over family violence in the respondent's home and identified the respondent as having a propensity to be in relationships marred by abuse and neglect. The respondent's alcohol abuse continued to be at issue and she failed to complete recommendations such as engagement with the Bridge program.[13]

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[12] Social Worker affidavit evidence at para 13, page 13, Vol 1 BOD.
[13] Paragraph 38 Affidavit of Linda Johnstone June 2019.

[35] In September 2015 the Chief Executive filed without notice applications for custody of [YS] based on the identified risk of [YS] being exposed to family violence, alcohol abuse and neglect. [YS] was uplifted around [under 5] years of age. By late 2015 the respondent fell pregnant with her third child, [NS].

[36] [YS] was placed in the care of Mr and Mrs [B]. Mr [B] is a distant [relative] of the respondent, but they were not known to one another prior to Mr and Mrs [B] caring for [YS]. [YS] remains in the long-term care of Mr and Mrs [B]. On 23 June 2018 a special guardianship order was made in favour of her caregivers which gave them exclusive guardianship rights in respect of [YS] health, education and travel. The respondent has supervised access with [YS] for two hours four times a year.

[37] Following [YS] being placed with caregivers, there were further incidents of family harm between the respondent and her partner, Mr [DI]. In January 2016 a report of concern was made for unborn baby [NS], the concerns being *"family violence, alcohol and drug use, a lack of basic care, [Ms AS]'s mental health, and [Ms AS]'s parenting capacity and lack of any family support for [Ms AS] or the unborn child*".[14]

[38] During the respondent's pregnancy, professionals from Barnardos, the Methodist Mission, [social service A] and the DHB worked with her. A range of professionals working with the respondent expressed considerable concern at the prospect of the respondent or her partner parenting the unborn child.

[39] In early 2016 the parties continued to be participants in family harm incidents. On at least one occasion the respondent was hospitalised due to this harm.[15] At a FGC convened to address concerns for unborn [NS] the parents claimed they were no longer in a relationship. Concerns continued to be raised about whether the parents were safe to be around children.[16]

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[14] Paragraph 33 Affidavit of Linda Johnstone June 2019.
[15] Paragraph 35 affidavit of Linda Johnstone, page 16 BOD 1.
[16] Paragraph 40 affidavit of Linda Johnstone, page 16, BOD 1.

[40] In [date deleted] 2016 the respondent was the victim of a horrific dog attack in her home. The respondent suffered [details deleted]. The two dogs were [details deleted]. Hospital staff reported concerns over [DI]'s perceived controlling behaviour[17] and there were also concerns about the respondent's ongoing contact with her brother. Post the dog attack the respondent suffered night terrors.

[41] The respondent and her partner reconciled before [NS]'s birth. They expressed a wish to parent their child. Social workers were concerned that neither parent had individually, nor as a couple, properly taken steps to address longstanding concerns that they posed a risk to an infant child. The respondent was perceived as not having engaged with social workers "*although it appears she requested support such as Waipuna, Early Start and Plunket to improve parental capacity.*"[18]

[42] The Ministry applied without notice for a s 78 order to uplift baby [NS] at birth. On 24 May 2016 the order was issued in favour of the Chief Executive.[19] At a FGC held on 7 June 2016 agreement was reached that the unborn child was in need of care and protection.[20] In [date deleted] 2016 [NS] was placed with non-kin caregivers. She remains in their care.

[43] On [date deleted] 2017 the respondent was the victim of another serious domestic violence attack at the hands of Mr [DI]. As a result, Mr [DI] was charged with injuring with intent to injure. He was subsequently sentenced to a term of imprisonment.[21] The respondent's evidence is that this spelt the end of her relationship with Mr [DI].

The first s 178 assessment process – December 2016

[44] In December 2016 Dr Staite completed a court-directed s 178 assessment on the respondent's third child, [NS]. This report was introduced by consent in the September 2019 proceedings and the Family Court directed that the s 178 assessment

[17] Observed at the time the respondent was hospitalised.
[18] Paragraph 42 Affidavit of Linda Johnstone June 2019.
[19] Decision of Judge Ellis granting the s 78 custody order.
[20] Sections 14(1)(a), (b) and (f) of the Act.
[21] Mr [DI]'s criminal history was not before the Court. The family violence summary at pg 44 of Bundle 1 notates the offending. The respondent's evidence is he was sentenced in 2017 for family violence and their last contact was around the time of his release from prison in late 2018).

be updated but with a brief "*to address and assess the issues of concern relating to [AS], having regard to steps taken by her to address those issues of concern."*[22]

[45] In the December 2016 assessment Dr Staite observed the respondent's development had been:

> …impeded in several areas in such a way that her quality of life is being hampered or thwarted. These problem areas are robbing her of a higher quality of life and are highly likely to cause significant adverse effects on her parenting. Her parenting ability is and has been hobbled or impaired by several developmental deficits.[23]

This observation remains current in 2020.

[46] Dr Staite also commented that the respondent presented at the time of his assessment with indicators of depression, anxiety, somatic concerns, mental confusion, addiction issues and tendencies toward addictions, explosive anger, being the victim of longstanding and serious family violence, family of origin or childhood problems and social isolation. There was suspicion over the respondent's credibility which gave rise to a question over whether she suffered some mental confusion, lacked insight or she was obfuscating the truth of her personal circumstances.

[47] Significant concern arose over the respondent's alcohol abuse but also her inability to shield herself, and in turn her child, from domestic violence in her relationship with Mr [DI]. This is a longstanding concern.

[48] Given the extent of the parenting risks identified in the social worker's investigation as well as the respondent's failure to address these issues of concern Dr Staite came to a conclusion, which I must observe has carried quite a degree of significance for both [NS] as well as the social workers now involved with [TS]. Dr Staite concluded that an intensive level of support was required for the respondent to safely parent. Dr Staite made this recommendation to the Family Court:

> Considerable caution needs to be given to the facts (psychological facts, parenting facts, developmental facts [AS] and historical facts) of this case before it is seriously contemplated implementing supports for [AS] to safely

[22] Para 5, Judge Walsh, dated Sept 2019.
[23] Section 178 assessment at page 3, Bundle 3.

> parent [NS]. If [AS] were to be parenting, she would need a surrogate parent with her constantly given the following weakness on [AS]'s part, coupled with [NS]'s needs.

[49] Dr Staite concluded his report: "*I am influenced by that history* "(referencing her past parenting and neglect issues) "*and [AS]'s lack of insight into the links between her own mental health issues and her parenting capacity*."[24].

[50] At a hearing on 22 August 2017 the court found that the respondent was unable to cope with the demands of providing the future day-to-day care of her baby and, coupled with a multiple of risk factors, was unable to parent [NS].[25] The Judge observed:[26]

> (63) It was Dr Staite's unyielding evidence that mother could only parent [NS] with the support of a "surrogate mother'….. If [AS] were to be parenting she would need a surrogate parent with her constantly given the following weaknesses on [AS]'s part, coupled with [NS]'s needs' …

[51] A s 101 custody Order was then issued in favour of the Chief Executive.[27]

[52] At a submission-only hearing on 14 November 2018 the court reviewed a wealth of evidence and heard further from counsel. The court was persuaded on the evidence as to the high level of risk to [NS] in her mother's unsupervised care and in the absence of a "surrogate mother" confirmed the special guardianship order. The court declined to make an access order. The respondent's access with [NS] has been defined by social workers and occurs four times a year for two hours per visit. Access is supervised by [NS]'s caregiver. The respondent's brother, [MS], also joins the respondent on her access visit to spend time with [NS].

[53] The respondent's fourth pregnancy came to light in [date deleted] 2019 and, given the respondent's parenting history, a report of concern was made that same month. In April 2019 an experienced social worker was assigned for unborn baby [TS]. The social worker's starting point arose out of concerns over the respondent's history of alcohol use and her relationship with [DI] (and her inability to protect her

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[24] Concluding paragraph s 178 assessment at pg 11, BOD 3.
[25] Decision of Judge Walsh, Family Court, Christchurch.
[26] Paragraph [63] decision of Judge N Walsh, FC Christchurch, 22 August 2017.
[27] Section 101 custody order made 22 August 2017.

child from an abusive relationship). Ms Johnstone's evidence is she met with the respondent four times over May and June 2019. The social worker was investigating whether the respondent had changed and whether the respondent could sustain these changes. In June 2019 the respondent moved into a property on her own which was suitable for a baby. The home was set up with everything the baby needed. The social worker took no issue with the respondent's homes and noted that both were suitable and the second property met the needs of a baby. The respondent kept a neat and tidy home.

[54] The respondent denies Mr [DI] is the father of her fourth child and she has not confirmed paternity. The respondent denies living with Mr [DI]. She concedes he moved into the previous "[location 1] property" around or after her moving out in late May/June 2019.

[55] On 10 June 2019 the social worker advised the respondent that, in line with the 22 August 2017 decision of the Family Court, the respondent needed to secure a surrogate mother if she was to care for her child. The social worker's evidence explains the respondent had not had those conversations with her family. The social worker recorded the respondent's explanation: "*I don't have anybody. I am not willing to give up my house"*.[28]

[56] On 19 June 2019 the social worker received a call from the respondent's landlord. The landlord rang concerned about the respondent's unborn child. She narrated an environment of alcohol abuse, domestic violence between the respondent and Mr [DI], and rent arrears which she would pursue through the Tenancy Tribunal. The social worker did not establish the timeframe the respondent was said to be in a relationship with Mr [DI] or that he had been living at the same property in [location 1]. The landlord also informed the social worker she understood Mr [DI] had been present in the property at the first in-home social work visit but had hidden.

[57] On the question of the respondent's credibility the social worker conceded she did not consider the respondent to be reliable or credible.

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[28] Paragraph 54, Page 19 Vol 1 BOD.

[58] The social worker's account is on 20 June 2019 she met with the respondent. It is assumed she raised the landlord's concerns with the respondent, however, on clarification of this point there is no file note for 20 June 2019 and the social worker concedes she could not recall if she put these accusations to the respondent.

[59] On [date deleted] 2019 the Ministry urgently applied for and was granted a Place of Safety Warrant. [TS]'s birth that morning and mother's discharge home being the catalyst for the application.

[60] The respondent's evidence is that any concerns raised by her landlord were not raised directly with her. Her evidence is that the first she learnt of the accusations was in the social worker's affidavit evidence dated 28 June 2019, filed in support of the application for a s 78 custody order. By then [TS] had been removed from her care.

[61] The social worker did not document a case note for her attendance at the respondent's home on 20 June 2019. As such there is no record of these serious allegations being put to the respondent nor any record of the respondent's explanations or comments answering the allegations.

[62] The social worker appeared to rely on uncorroborated hearsay evidence (as to whether Mr [DI] hid in the home), had not clarified the timeframes he was said to be in the property, and did not explain to the Family Court that the respondent tenanted one room at the landlord's property and the other rooms were tenanted by a number of other boarders. Significantly, there is no evidence that these serious accusations were squarely put to the respondent prior to the Place of Safety Warrant being sought. Fairness dictates the accusations should have been put to the respondent and the respondent should have been given an opportunity to respond. The notifier was no doubt was well-intentioned, but also still had an unresolved legal issue of her own with the respondent.

[63] The social worker produced a case note of her telephone attendance from 25 June 2019 with the respondent. The case note details the respondent's denials that Mr [DI] had been living with her.

[64] The social worker's affidavit evidence filed in support of the s 78 interim custody order explains that the respondent cuddled [TS] but declined to feed him or provide any items for him. The respondent explains the uplift was late at night and [TS] was sleeping. The respondent did not want [TS] woken up and distressed. The respondent documented that her home was set up with everything a newborn baby needs. It is likely the respondent hoped [TS] would return to her.

[65] The social worker was unable to recall whether the respondent fed [TS] during access visits in those early weeks following his uplift.

> Q. Do you recall how long Mum breastfed [TS] or if she breastfed [TS] following the uplift?
>
> A. I don't recall sorry, I can't remember. And she certainly would have been given the option if she wanted to express milk but I can't remember, I'm sorry.

[66] The respondent's evidence is she was never asked by a social worker her intentions as to breastfeeding [TS].

> Q. Do you recall her talking to you during that phone call about [DI] being in the address?
>
> A. No. It might have happened but I can't remember. I think I was more worried about [TS] at that time.
>
> Q. Did you breastfeed [TS] after he was uplifted?
>
> A. Yeah, I tried it when I was in hospital but he wouldn't latch.
>
> Q. Was there an opportunity to continue with that after he was uplifted?
>
> A. I would have kept going. I would have just expressed but he was bottle fed. He only had like maybe two or three bottles when he was with me and then no-one actually asked if he was breastfed or bottle fed when they picked him up.
>
> Q. There's evidence actually in Linda Johnstone's affidavit that you were offered to feed [TS] before he was taken but you declined?
>
> A. He was asleep when they took him. I picked him up out of his bed. He was out to it. He'd literally just had a bottle before they picked him up.

[67] The social worker's affidavit evidence confirmed there had been no reported family violence between the respondent and Mr [DI] since January 2017. Attached by

way of an annexure to the social worker's June 2019 affidavit evidence is a family violence summary report but unrelated to Mr [DI]. The annexure references the respondent as the victim of serious sexual assault. This evidence sits on its own. There is no wider information or explanation as to its relevance.

[68] The social worker's evidence addressed the steps taken by the respondent to address alcohol abuse concerns. However, the social workers affidavit evidence did not detail the respondent's attendance at an extended family harm programme, nor the long running involvement of [social service A] with the respondent. This engagement was initiated by the respondent and prior social worker. The social worker contact from [social service A] included weekly in-home contact with the respondent. [social service A] was also the link with the referral to Home and Family for the respondent to attend a parenting assessment.

[69] The respondent's evidence is her pregnancy was confirmed at five weeks. At six weeks pregnant the respondent engaged with midwives and gave them a full history of her parenting past. The social worker spoke with the midwives and they explained they were confident the respondent was capable of parenting [TS]. By letter dated 25 June, so following uplift, the midwives confirmed their support of the respondent.[29]

> [AS] has engaged with Early Start and [social service A] (who help people to live violence free) and is not consuming alcohol or drugs. She is living on her own in a flat and each time we have visited the flat has been warm, tidy and well maintained. She has also been very willing to be referred to Home and Family who provide accommodation with 24-hour support for mothers and their children who need additional support or require initial supervision.

[70] The support of [social service A] and the midwives is significant. They were in and out of the respondent's home over the months before [TS]'s birth. Unlike the landlord they could have offered a first-hand account of who was in the respondent's home, the state of the home but also the respondent's health or presentation. The midwives confirmed in writing their confidence in the respondent and their ongoing postnatal support of mother and baby. The midwives also challenged social workers had made limited effort to seek out or consider their views. [30]

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[29] Annexure C of the Respondent's affidavit sworn 27 August 2019 at page 91 Vol 2 BOD.
[30] Annexure C Affidavit of Respondent sworn 27 August 2019 at page 91 Vol 2 BOD.

> We both feel confident in [AS]'s ability to parent her son [TS] and would be involved in the provision of postnatal support to them for the next 6 weeks. We believe any further delays in supporting [AS] in parenting her young son, would have huge impacts for both. We are surprised that there has been little attempt by Oranga Tamariki to speak with us regarding our thoughts on [AS] ability to parent her son, and believe that much of the information which the uplift was based on is not a current reflection of [AS]'s position".

[71] Following [TS]'s uplift, the respondent's midwives were supportive of mother and child attending the Home and Family Unit to undergo a parental assessment. The respondent was in good health. She had acknowledged her depression and sought treatment from her General Practitioner. The respondent had also engaged with Family Start which would activate on baby's birth.

[72] In terms of the courts previous finding that the respondent required a surrogate to properly parent, there is evidence that the respondent did not fully recognise or understand the implications of that finding as to future cases involving her children. Despite this, and given her parenting history, she should have at the very least been aware that there was a real possibility that this would arise again with regards to [TS]'s care.

[73] There is evidence the respondent had credible support from [social service A], her midwives and she was a committed participant to the residential placement with Home and Family.

[74] A parenting assessment is not the same as a parenting surrogate, however, it would have provided more data and time to contemplate whether the respondent had made changes and, if so, whether these were sustainable. It may have also provided the time for the respondent to get family "on board" with the surrogate parent proposal. The social worker had, before [TS]'s birth, made enquiries of the respondent's brother, [MS], to act as a surrogate parent, however, due to a strained relationship between his wife and the respondent, he declined to help. Perhaps Mrs [S]'s view may have softened if the respondent had successfully attended an extended period at Home and Family. This is speculative but evident is the Home and Family supervised parenting programme was the respondents parenting "lifeline".

[75] In 2019 the respondent was now [under 28] years old. Time does not of itself diminish the relevance of the s 178 report writer's recommendation that the respondent needed a surrogate mother or parent to safely parent. However, the respondent's reality is she had no-one who could step into the role of surrogate. The respondent's mother is deceased, and she has never had a relationship with her father and paternal family. Siblings would not meet caregiver approval status or were found to be unsafe. The respondent's family is small and fractured. There are established risk issues, and this is recognised by the respondent, amongst her siblings. The respondent is also socially isolated and, for her own reasons, has not disclosed the identity of [TS]'s father.

[76] Additional information out of the Home and Family supervision of the respondent with her baby may have highlighted parenting deficits or strengths. It may have supported the social worker's concerns or enabled the respondent to advocate she had made positive and sustainable changes. The sustainability of such change would still have been subject to monitoring and assessment. However the respondents attendance with her baby under the supervision of the Home and Family social workers was not considered by [TS]'s social worker to be viable or an alternative care package to support the respondents ongoing care of [TS].

[77] The social worker's evidence at hearing was she is unaware why the referral to Home and Family was not actioned. The respondent is firm that Oranga Tamariki social worker support was necessary for the referral to be actioned. The respondent was eager to attend the Home and Family Unit but without the support of Oranga Tamariki it is difficult to see how she could succeed alone at securing a place at the unit. The social worker's evidence was suggestive that the respondent could attend the Home and Family Unit without her baby, however, without a plan for mother and baby to be together at the unit (at least for periods), this seems an unlikely proposition.

[78] Overall the social worker maintained her view that the 2015 parental assessment was reliable data as to the respondent's parenting abilities and inability to successfully implement and sustain change.

[79] The social worker's fundamental lack of confidence in the respondent to sustain change is an important issue. The wider context of the social work investigation needs to be considered. It appears social workers came to an adverse conclusion as to the respondent's parenting abilities without all the concerns (particularly those identified by the landlord) being put to the respondent. The social worker did not highlight in her affidavit evidence the respondent's engagement with her General Practitioner for treatment of depression. Given historical concerns over the respondent's presentation and well-health, it is fair to assume these enquiries should have been undertaken by the social worker. Further, the social worker did not place weight on the positive account of the midwives nor the active support of [social service A] and the referral for the Home and Family assessment. This information was not in a full sense before the Family Court at the time the without notice application for a s 78 custody order was sought. This oversight is troubling. The Family Court was unaware of the full range of supports available to the respondent and her baby. Potentially there may have been an alternative approach to support the respondent's continued care of [TS]. Time was of the essence, yet these investigative and evidential shortfalls smack of social workers having "made their mind up" or predetermined the outcome.

[80] The Court's finding as to the need for a surrogate parent was delivered in 2017 and in 2019 this appropriately remained squarely within the social worker's focus. However, did social workers fail to consider the possibility the respondent, with the appropriate supports in place, could parent [TS]? Did social work staff go down a path only taking on board the new information of serious concerns about a mother, and whom in earlier births, struggled and been found wanting, but without fully investigating the reported concerns *and* mother's proposal or package of care? And, did social workers fail to appropriately consider the positive accounts of the respondent's engagement with therapeutic programmes and parenting supports that she had put in place before the March 2019 report of concern? There is a strong flavour to the evidence that the social workers have only viewed the respondent through a negative lens and the risk of that is that the respondent and [TS], or the family may have become "institutionalised".

[81] The respondent's parenting history is underscored with profound loss, trauma, significant risk and parental deficit. But I am also left wondering what of the respondent as a first-time young mother at only [under 17] years old experiencing the grief of losing her baby and the condemnation of failing to safely parent. The question might be asked, how could the respondent have succeeded as a young and vulnerable [under 17]-year-old mother given the paucity of family and social support available to her. It begs the question did this experience lay the foundation for what was to come?

The April 2020 s 178 assessment

[82] Dr Staite, in his updated assessment, identified the 2016 parenting concerns still existed in 2020, however, some issues, or risks, are identified as having lessened. Dr Staite observed two access visits and observed positive interaction between mother and child. He did not observe child separation anxiety as [TS] transitioned to his mother.

[83] Over the period since the 2016 assessment the respondent had come to accept she suffers from depression and had sought treatment. The evidence points to medication compliance and being open to medical oversight. Dr Staite also recorded the therapeutic programmes embarked on by the respondent to address her areas of personal and parenting deficit. The feedback was positive, particularly from her midwives. Of concern, however, the respondent has not yet embraced therapeutic personal counselling to address the "demons" of her past.[31] Although the respondent attended three sessions in late 2019, she abandoned therapy after finding that re-living some of her past experiences was too painful.

[84] Dr Staite noted limitations in his assessment, particularly that the respondent had not undergone an updating parenting assessment in respect of [TS].[32] Nor had a home visit been possible. Dr Staite observed the respondent still presented with signs of depression and her inner sense (attribution) of social isolation remains a problem.[33] The risk of this for [TS] is that if the respondent is unable to develop a social network,

[31] A colloquial reference and apt description provided by Dr Staite at hearing.
[32] April 2020 s 178 assessment at page 35.
[33] s 178 assessment at page 41 Vol 3 BOD)

particularly from a place of lack of trust of authority, she models to [TS] the world around them is not to be trusted nor is it safe.

[85] In collating data from the respondent Dr Staite observed contradictory responses to such a degree that he was unable to formulate with confidence a clear picture of the parenting and psychological issues for the respondent. Dr Staite expressed misgivings over the reliability of the respondent's report as to the nature of her relationship with Mr [DI] and alcohol use. The respondent's presentation compounded his concern over her reliability. There is a lingering doubt in Dr Staite's assessment about the success of treatment for depression. Moreover, Dr Staite observed the respondent appeared to repress emotion and use "impression management" strategies. Dr Staite described the respondent as "*presenting as serene in temperament while simultaneously suppressing psychopathology*." Dr Staite's description of the respondent as *"serene"* is apt. There were no signs of anxiety or distress at giving evidence at hearing, her mask did not slip. Another observation of mine is the respondent was not avoidant answering questions, nor elusive at responding to difficult questions or subject matters. Rather, the respondent answered questions in a straightforward manner and provided better detail. The respondent made concessions, even to her detriment, which included acknowledging deceptive behaviour over the incident of family violence in [date deleted] 2020.

[86] The respondent could not source a surrogate parent but she addressed the concerns held by Oranga Tamariki during her pregnancy with [NS] and the risks as identified in Dr Staite's 2016 assessment but also his recommendation to the Court. The respondent answered:

> I realise that one of the main concerns held by Oranga Tamariki and possibly by the Court, is the evidence of Dr Staite that was provided in the case regarding [NS]. He stated that I could never parent [NS] without a surrogate mother to support me. I understand how he came to that view at the time. When I met Dr Staite I was an alcoholic, I was living in a violent relationship, I was not taking any medication for my depression and I was essentially at the lowest point in my life. I probably would have formed that view too. I believe that I am capable of change and that I have implemented significant change in my life. I do not believe that I am the same person that Dr Staite saw at that time. I would welcome a re-assessment of my capacity to parent and I also

> intend to get an independent assessment if this is not arranged through the Court system. I would also welcome any other parenting assessment. [34]

[87] The respondent's evidence reflected a new found level of maturity or insight. However, there are contradictory indictors about the respondent's "whole" presentation. There remains a nagging doubt over the respondent's relationship with [DI] as well as to the true picture of the respondent's alcohol use.

[88] Dr Staite observed:

> Insight is a fluid thing – we can show insight in some areas yet have blind spots in other areas. And this can change from day to day depending on stressors, mood and environmental factors.[35]

[89] Dr Staite in his evidence clarified that had the respondent undertaken a parental assessment it would have provided more data, but it did not, of itself, satisfy that the respondent would provide [TS] with safe care. Evidence of a positive parental assessment of the respondent's parenting is not a silver bullet. It does not amount to a primary evidential plank to support the respondent's care (by then a reversal of care in favour of the respondent) of [TS]. It simply could not. The parenting concerns, psychological and risk issues are complex and there are many strands, some of which hang loose. The failure by Oranga Tamariki staff to support the respondent to undertake the Home and Family parental assessment in 2019 placed limitations on data available to the respondent, social workers and the Family Court as to the whole parenting picture.

The Family harm incident [date deleted] 2020

[90] At [date deleted] 2020 Police were called to the respondent's home. Also present at the home was Mr [DI]. The respondent is described in the family violence occurrence as extremely emotional and highly intoxicated. Mr [DI] is described as mildly intoxicated but cooperative. The narration contains inaccuracies presumably due to Police error at recording the incident. The inaccuracies record the respondent only has two children and the parties do not have a child. The police notation refers to

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[34] Paragraph 13 affidavit of [AS], sworn 27 August 2019, pages 7 & 8, Vol 2 BOD.
[35] Page 39, BOD Vol 3.

the parties in a relationship for a couple of year. In 2020 given social workers suspicion of a continuing relationship between the respondent and Mr [DI] but also the risk of alcohol abuse social workers place a high currency on this report and incident of family harm. The respondent described police staff interviewing them separately. Both indicated to police staff that there had been a verbal argument. Police officers record the parties being intoxicated.

[91] Regardless of the inaccuracies in the report, it is evident that the respondent was inebriated and the pair were engaged in an argument which, for them, inherently carries a risk of violence. It also evidences old triggers still exist and carry the same risk.

[92] The respondent did not disclose this incident to [social service A], nor in affidavit evidence filed the Family Court. The respondent did not provide this information to Dr Staite at the assessment, although she explained there had not been any opportunity at their last attendance. The respondent could have contacted Dr Staite with this information and provided her explanation as to what occurred. That said, the country went into national lockdown, legal advice was difficult to access and within weeks Dr Staite's assessment was finalised and was filed with the Family Court.

[93] The respondent engaged with [social service A] up until April 2020. The family violence incident was brought to the attention of the [social service A] social worker who put the account to the respondent. The respondent denied Mr [DI] was present. The [social service A] staff member knew better. The [social service A] social worker explained to the respondent this incident would undermine her efforts to regain custody of [TS]. The respondent hung up on her [social service A] social worker. The respondent denies she hung up on her [social service A] social worker; or ignored a return phone call. In truth the respondent was avoidant. Following this call [social service A] closed its file and the relationship between the respondent and [social service A] ended.

[94] The respondent's explanation is she had been drinking with her [relative] who lives [nearby]. The respondent had learnt of a friend diagnosed with cancer and this triggered the drinking. As the respondent put out her rubbish in the driveway she

encountered Mr [DI] outside her property. They argued. The police incident report records an argument over Mr [DI]'s dog but the respondent denies this is so. The respondent explains an argument blew up about [NS]. The respondent slammed her door shut and Mr [DI] forced his way inside the home. A verbal argument continued. [Details deleted]. The police arrived quickly at the respondent's home.

[95] The respondent describes a one-off relapse, a chance encounter with Mr [DI], and an argument that otherwise would never have happened.

[96] The respondent concedes she was aware that at some point in time the incident would come to light with [TS]'s social worker, or Family Court professionals. The respondent's explanation as to why she chose not to "front" the issue was out of fear the social worker would cut her access with [TS]. Given the respondent's history of profound loss over the care of her children fear is almost certainly an underlying or driving force both in her good and poor parental decision making. And, almost undoubtedly the respondent became "caught" up in her lie by omission and the respondent may have become immobilised by shame. As Dr Staite commented:[36]

> …I think with [AS], part of what's happened is that the more encounters she has where later she realises that she's dropped the ball, the issue of shame becomes even more pronounced for her and in response to shame people either run or hide or in extreme cases die. And with [AS] with the inconsistent statements for instance what drives that is shame and feeling overwhelmed. At the series of events in the past I would call unstable behaviour that contributed to [AS] isolating and stepping back from the people that can help her the most.

[97] Dr Staite is a kind minded observer he went on to say:[37]

> [AS] lives with this conflict within her to both engage in healthy intimacy but at the same time she tends to pull back from it because of the risks and dangers that have come about in the past when she has been involved in intimacy. When people have abused her and wounded her she's then pulled back and it's been hard to trust given that history that she's had. And for [TS] it means that [TS] potentially is at risk because his mum is not getting the emotional and social psychological supports that she needs. We all need those, and [AS] is no different from anyone else.

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[36] Notes of Evidence Page 158 Lines 6 to 14.
[37] Notes of Evidence Page 159 Lines 11 to 19.

[98] Dr Staite also recognised the high level psychological impact on the respondent of the loss of a child:[38]

> Q…Are you able to comment perhaps on how the less of a child from your care at the young age of [under 17], how that might impact on [Ms AS]?
>
> A There are many ways in which it potentially could have a negative impact. The sense, the sort of destructive, almost crushing impact that that can have on a young mother's feeling of self-worth and efficacy as a woman and mother to have the baby taken, because of weaknesses in parenting, is a very powerfully destructive thing to go through and it does, and I've seen it in countless situations, create a sense of questioning the purpose of one's being and living. Suicidal ideation can be quite strong and indeed the extreme ultimate can occur in response to the power and force of having a baby taken.

[99] The deep-rooted traumas experienced by the respondent are a latent force within, driving her to episodes of explosive anger, self-medicating with alcohol or as described by Dr Staite, to "fill the void" with inappropriate or unsafe relationships. Recovery remains an issue. The respondent's unresolved psychological issues continue to impact on her response to, and judgement of, external situations. This is illustrated by her failure to re-engage with [social service A] (or a similar support group) nor seek out the necessary AA support group. The respondent conceded she "*could have been engaged and stayed engaged with agencies and done counselling; stayed on medication*."[39] It was and remains imperative the respondent pursue one-on-one therapeutic counselling to address the emotional tracks from her childhood and adult experiences of trauma including the loss of the care of her children. I accept there is an urgent need for the respondent to decisively engage in a therapeutic intervention to arrest high risk behaviours but also to support and sustain change.

[100] Dr Staite concludes that, although the respondent has made significant changes, she may not have resolved the full range of her risk factors to parent [TS]. Dr Staite's opinion remains that the respondent needs a "surrogate mother or parent' to support safe parenting of [TS].

[101] Updating evidence presented by current social workers point to Mr [DI]'s Facebook data which indicates his view at least that he is [TS]'s father. It also confirms contact (even if relatively minor) between the respondent and him. I accept the

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[38] Notes of Evidence Page 161 Lines 5 – 16.
[39] Notes of Evidence Page 125 Lines 1 to 2.

evidence of Dr Staite that even a "crack in the door" to enable Mr [DI] to enter the respondent's world carries risk. Social workers rely on this evidence to reinforce their view that a relationship does exist between the pair and, more than this, to support their collective view on the respondent's inability to sustain change.

[102] Until the respondent engages with counselling to understand her past trauma, she remains vulnerable to falling back on old patterns of behaviour or relying on coping mechanisms to numb the pain or to pare back emotional wounds that would only cause further harm. This would include alcohol use or finding harbour in an unhealthy relationship. Dr Staite makes the apt point;

> Traits are not simply resolved by ending a relationship and/or resolving an addiction. Therapy or counselling helps clients resolve problematic traits[40]

Access

[103] Oranga Tamariki has met its commitment to weekly and frequent contact in response to the respondent's defence of the proceedings. Looking to the future the Ministry does not support the making of an access order but advocates the flexibility of access being reviewed and provided for in any s 128 plan.

[104] Lawyer for the child does not support an access order but prefers a flexible approach to access by it being provided in the s 128 plan. Lawyer for [TS] submits this approach would be more responsive to [TS]'s changing needs and reflect his welfare and interests.[41]

[105] The respondent has experienced the force of social workers making far-reaching decisions. The respondent is fearful that should the Court issue the declaration or make the s 101 custody order, her access to [TS] will be reduced. The respondent seeks the certainty of an order.

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[40] Section 133 Assessment, pg 39, Vol 3 BOD.
[41] Paragraph 73 Memo of Ms Murphy dated 10 November 2020.

[106] On behalf of the Ministry it is submitted that the guiding principle set out in s 13(2)(h) provides for [TS]'s care arrangements, being structured to positively support him developing a sense of belonging and attachment:

[107] Section 13(2)(h) provides

> **13 Principles**
>
> …
>
> (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:

[108] The Ministry also submits Article 9(3) of the United Nations Convention on the Rights of the Child is directly relevant:

> ***Article 9***
>
> …
>
> 3. 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.
>
> …

[109] Section 121 of the Act is also relevant. It provides:

> **121 Court may make orders for access and exercise of other rights by parents and other persons**
>
> (1) Where an application is made to the court under section 44 of this Act in respect of any child or young person, the court may make an order granting access to that child or young person to the applicant.
>
> (2) Where the court—
>
> (a) Makes an order under section 78 of this Act relating to the custody of a child or young person [ ]; or
>
> (b) Makes a custody order or an interim custody order under section 101 of this Act in relation to a child or young person; or
>
> (c) Makes an order under section 110 of this Act appointing the chief executive or any other person the sole guardian of a

> child or young [person; or] it may, on making the order, or at any time after making the order, on application made by any parent of the child or young person or any other person, make an order
>
> (ca) makes an interim guardianship order under section 110AA,
>
> (d) Granting access to that child or young person to that parent or other person:
>
> (e) Conferring on that parent or other person such rights in relation to the child or young person as it thinks fit.
>
> (3) Any order made under subsection (1) or subsection (2) of this section may be made on such terms and conditions as the court thinks fit.

[110] Dr Staite provided evidence of positive parenting interaction with [TS] during his two structured observations of the respondent's access. Dr Staite commented: *"This report presents data from my notes from my 2 hours of observations of mother and baby. That data is glowing."*[42] The limitation on this being Dr Staite did not undertake a parental assessment.

[111] It is not insignificant the respondent and [TS]'s caregiver have crafted a positive relationship. Mrs [B]'s commitment to [TS]'s access, but also the informally arranged sibling access, should not go without recognition.

[112] The evidence as to the impact on the caregivers and their relationship with [TS] is heard through the evidence of social workers. The evidence reflects the caregivers support a more limited access arrangement. Although consultation is necessary, ultimately the decision-making as to the most appropriate future access arrangements sits with the social worker as opposed to a caregiver. The social worker's view as to the appropriate frequency of future access is at odds with the view held by the respondent. The social workers support a radical reduction in access whereas the respondent hopes for more access time.

[113] In late March 2020 the national lockdown brought the respondent's access with [TS] to a grinding halt. Access was reinstated beyond level 2 in June 2020. On first returning from access visits [TS] is described by Ms [B] and the resource worker (both

[42] Page 3 of the s 178 assessment or at page 35 Vol 3 BOD.

supervise access) as distressed. As might be expected once the routine of regular access was reinstated [TS]'s unsettled behaviours have diminished over time. [TS]'s caregiver has generously been a part of access arrangements and in doing so supported both mother and child. It cannot have been easy for either the respondent or [TS]'s caregiver. Overall the respondent's access with [TS] is described as positive and child-focused and there is no complaint levelled at the respondent arising out of her access visits. The respondent has kept to the regular twice weekly commitment of the access arrangements. And it is plain the respondent loves her access time with [TS]. The respondent describes [TS] as having a relationship with her. Dr Staite commented that on arrival for access [TS] is smiley and attentive towards his mother. It appears that [TS] responds to his mother. The respondent acknowledges [TS] is healthy and well cared for.[43]

[114] The respondent's evidence suggests she has a bond with [TS] and there is evidence to support, particularly given the frequency of access, an establishing attachment between [TS] and his mother.[44] The evidence of social workers, and reports filed by Lawyer for Child, also point to mother and child overcoming the break in access (March to June 2020 due to lockdown restrictions) and forging on with a positive and loving time during access visits. Overcoming the hurdle of the hiatus in access was possible in large part to the support of Mrs [B]. It is significant the respondent and [TS]'s caregiver have crafted a positive relationship.

[115] On the issue of access, Dr Staite did not support an abrupt reduction in access and his evidence gently questioned whether to reduce mother's access, even on a gradual basis, was in [TS]'s best interests. Not unreasonably, Dr Staite cautioned against any formulaic or policy-based decision making on access.

Discussion

[116] The respondent submits the decision by social workers, to uplift her newborn baby was "deterministic" and made without taking into account personal change and

[43] Paragraph 15 Affidavit of respondent sworn 27 August 2019.
[44] NOE Dr Staite.

her commitment to care for [TS].[45] The respondent recognises past care or protection concerns but claims social workers focussed solely on her history of parenting risk without proper regard to her personal change. The respondent submits social workers failed to properly consider [TS] and his individual circumstances.

[117] The respondent is a mother desperate to parent her child. The respondent has experienced trauma, profound loss, disconnection from family and intense social isolation. My observation is that her isolation is a "trait" of her character. This is consistent with Dr Staite's assessment of the respondent. However, the respondent's presentation most likely represents the sum of her experiences as a child, young person and adult. The respondent experienced adversity as a child and trauma. And, over her lifetime she has experienced profound loss and dysfunction. The conclusion I come to is that it must be difficult for the respondent to put trust in family, friends, or even child protection professionals.

[118] The respondent's presentation to social workers in June 2019 did not include a proposal for a parenting surrogate. However she had sought out and attended programmes to address her experiences of family violence, and two different alcohol abuse programmes. The respondent had faced her mental health issues by seeking medical treatment for depression and was treatment complaint and/or subject to ongoing monitoring by her General Practitioner. It appears that finally the respondent had experienced some support; that of her [social service A] social worker, her midwives and a [relative] living nearby. There was a long period of no reported family harm involving Mr [DI] or nor any reported alcohol abuse. The respondent had made a home for her and baby. Significantly the respondent had been receptive to and was willing to attend the Home and Family programme. Undoubtedly this represented the respondents "parenting lifeline".

[119] I am concerned by what I perceive as "evidential gaps" in the social work investigation prior to the without notice application for a s 78 order being sought. On balance I believe social workers did not fully engage with the respondent. Most likely they favoured their own assessment without proper regard to the respondent's

[45] Closing submission of counsel for the respondent.

explanation on the allegations of concern raised by the landlord. I come to this view given the respondents explanation should have been properly recorded. I acknowledge the social worker was under pressure, particularly given the impending birth of [TS], however it appears there was an alternative and safe package of care for mother and baby.

[120] An alternative option of safe care available to mother and baby, which should have been identified to the Family Court, was the possibility of her attendance at the Home and Family Parental Unit. This six- week programme could have been extended by agreement and in reality, an extension would have been reasonable. This parenting programme does not represent a surrogate parent, but it was a more than an adequate start in the right direction. The provision for 24-hour supervision ensured [TS]'s safety and the respondent had additional active support available to her in the form of the [social service A] social worker and her midwives. The respondent's successful completion of the Home and Family Parental Assessment may have favoured a different outcome in relation to [TS]'s long term care arrangements.

[121] I accept for the social workers a question mark remained over the respondent's veracity as to her alcohol use and relationship with Mr [DI]. It probably did not assist that "in the mix" for social workers was a perception at last, of a lack of transparency over [TS]'s paternity. However, child protection professionals failed to contemplate the possibility that [TS] is not the child of Mr [DI]. There is evidence of another sexual relationship. The social workers have provided recent evidence indicating Mr [DI] accepts paternity of [TS]. However, the best evidence of paternity is diagnostic testing.

[122] A robust social worker investigation and a balanced approach by the social work team calls for a "whole child" approach when assessing the viability of a parent's ability to provide safe care. The respondent had previously been found wanting by social workers with the removal of children from her care and special guardianship orders issued in respect of two of her children. However, the respondent was trying to demonstrate she had changed, and could sustain change. There is no room for a

single-minded social worker to focus on only one outcome, favouring Care or Protection orders paving the way to an application for a Special Guardianship Order.[46]

[123] [TS] has had three social workers over his young life and all reject that the respondent is able to sustain change. The psychological issues faced by the respondent are complex. I also do not doubt that the uplift of [TS] from the respondent's care further exacerbated the respondent's mental health issues and adversely impacted on her decision making in 2020. However, the fact remains red flags are evident in 2020. The most problematic is the [date deleted] 2020 incident involving Mr [DI]. Allied to this is the respondent's failure to disclose the incident to the Family Court or her social worker. There is also the respondent's failure to attend AA sessions and her decision to disengage from her [social service A] social worker. Putting aside whether I accept the contact between Mr [DI] and the respondent on [date deleted] 2020 was a blue moon event, there is evidence at least of one online contact with [DI]. I agree with Dr Staite that even minimal contact with Mr [DI] poses a risk to the respondent. And finally, even in the face of contested Family Court proceedings the respondent has not engaged with [TS]'s social worker, Ms Langrick. This also aligns with the respondent's disengagement with [social service A].

[124] [TS] is now settled in a stable care arrangement and over the 17 months of his young life he has been busy forming psychological attachments with his caregiver family. It goes without saying that the trauma and loss suffered by the respondent is unfair. However, the focus must be on [TS]. I am concerned the respondent's psychological fault-lines remain evident. I accept the respondent has made genuine efforts to change, but there is evidence she has been unable to sustain change. And I come to this conclusion acknowledging [TS]'s uplift at birth was another traumatic experience for mother and baby, and another major psychological setback for the respondent. However, I accept that there is an inherent risk for [TS] if he were now to be returned to his mother's care. I also find it is in [TS]'s best interests that orders in favour of the Chief Executive be contemplated.

[46] S 73 Oranga Tamariki Act.

[125] The respondent is criticised for a lack of insight in challenging [TS]'s placement or status pursuant to the Oranga Tamariki Act. While I accept that a reversal in [TS]'s care and placement is not in [TS]'s best interests, it is also important to acknowledge the reasons why the respondent felt compelled to challenge these proceedings. It is clear the respondent is desperate to parent [TS]. It is equally apparent; the respondent seeks to maintain a relationship with her son.

[126] This is not a case where the respondent is unaware of [TS]'s needs. She has supported [TS]'s placement and acknowledges the wonderful positives for [TS] in his safe and loving home. The respondent acknowledges [TS] is thriving in his placement and she is grateful for the relationship that she can have with her children, even if it is on a limited basis. The respondent also accepts that [TS]'s caregivers are dedicated to her children and they lavish them with love.

[127] On the question of long term access arrangements the applicant submits the focus should properly be on [TS]'s attachment with his caregivers and his continued safe and stable placement with them. With regards to access, the applicant submits that the purpose of access is not to build a relationship in which day-to-day care may eventually become a viable option.

[128] On behalf of [TS] his counsel submits it is a balancing act for the caregivers. They must balance their personal lives, home life, and the care of two children with that of the respondent's expectation or request for additional access. [TS]'s older sister has a limited access with the children's mother. On this basis the Ministry submits that it would be unrealistic in practice for [TS] to have a more generous access arrangement than [YS]. A concern also arises as to whether disparate access plans for the children might confuse the children.

[129] However, there is no evidence from the specialist s 178 report writer as to the risk that regular or frequent contact would have on [TS]. There is also no evidence that there is a psychological benefit for [TS] if the respondent's access is limited to only four times a year. In fact, the s 178 specialist report writer favoured a continuation of access provided it is safe, regular and child-focused. I am of the view that the evidential foundation supports the respondent's access must be maintained

rather than reduced. I consider this consistent with the need to focus on [TS] and his needs and, in light of the s 178 report, there is evidence to support that continued access is appropriate for his development.

[130] The respondent's path to the Family Court to challenge the Chief Executive's role in [TS]'s care has been long, hard and lonely. [TS] needs his mother to be offered effective support.

[131] While I conclude that [TS] is a child in need of care and protection, I am firm in my view that there is a responsibility on the Ministry to provide support to the respondent and to ensure that key stakeholders involved in this case do not allow an "institutionalised" mentality to fracture its obligations to properly investigate and aid the support of the respondent. [TS]'s welfare and best interests are paramount. However, [TS] needed his mother to be given an opportunity to answer all allegations placed before the Ministry and an opportunity to demonstrate effective change. Put another way, if the respondent was perceived by social workers as an unsafe parent doomed to fail again, then it begs the question how could the respondent persuade them she could sustain change? The answer best lies in the holistic and child focussed approach that requires an open minded, transparent and robust social work investigation. All of which should be undertaken before the uplift of a child together with all evidence being placed before the Family Court.

[132] I appreciate social workers operate in a complex, dynamic and highly fraught environment of presenting care and protection concerns. And, the respondent's actions, particularly over 2020 may even support the earlier view of social work staff that the respondent not only lacked transparency, but also credibility. However, this is a case where opportunities were, and progress was, overlooked. I have observed already that any one of these opportunities might have meant a different outcome for the respondent the completion or engagement of the respondent with the Home and Family programme and the ongoing support of midwives and [social service A] social workers. It seems possible the positive steps towards parenting may have engendered wider family support and an opportunity to source a surrogate parent. While this shall remain an unknown, I am satisfied that, at the very least, these opportunities ought to have been considered properly.

[133] It follows that I make the declaration that [TS] is a child in need of care and protection and in doing so decline to return [TS] to the care of the respondent. I am satisfied, however, that it is in [TS]'s best interests and welfare that an access order is made. [TS] has a right to have a relationship with his mother and to establish his identity in terms of family connections. I also conclude there is a responsibility on the Ministry that more must be done to assist the respondent in making positive and long-lasting changes in her life and as a parent.

Orders and Directions

[134] I make the declaration [TS] is a child in need of care and protection. The grounds being made out to satisfy s 14(1)(a) (b) and (f) on the basis his mother is not unwilling but unable to care for [T].

[135] I direct the filing of updated affidavit evidence by the respondent as to any steps taken to engage with AA counselling, re-engage with [social service A] or to commence personal counselling. Evidence is to be filed and served by 12 January 2021.

[136] I adjourn the proceedings to enable the Chief Executive to file a s 186 initial report and a s 128 plan seeking disposition orders. The plan and report are to be filed by 18 January 2021, the extended time frame for filing takes into account the holiday period as well as the filing of the respondent's evidence. Lawyer for [TS] is to file her report two weeks thereafter and I ask the registry to please confirm a date before me when practicable.

Access

[137] On the issue of the respondent's access with [TS] I make an interim access order on the existing terms of access. I intend to make a final access order, but I invite social workers to put forward access proposals. There is also a clear need for social worker intervention to properly support the respondent to succeed in exercising access with [TS]. I urge Ms Langrick, a social worker not yet well known to the respondent,

to apply her considerable experience and people skills to work alongside the respondent.

[138] I also ask the Chief Executive to contemplate the respondent is supported in a referral to Home and Family for the purposes of the respondent engaging in a parental assessment. The benefit of her engagement in Home and Family is this could provide short visits on a regular basis and it is monitored. Should the respondent not meet the criteria of Home and Family then an alternative parental assessment should be sourced.

[139] There is a clear need for certainty in the respondent's access with [TS] and the terms of contact to be evidence based. [TS]'s placement is said to be a family placement, that he is placed with kin. A kinship care arrangement would ordinarily provide for some generosity in the frequency of access visits beyond four times a year. I conclude social workers have an important role to play in supporting [TS]'s caregivers in being reassured and to appreciate the value of the respondent's ongoing contact with [TS].

[140] [TS]'s access is not to support a transition in care away from his caregivers. More data is required for the Court to consider the structure of future contact and the extent of any supervision that may be required. The applicant has relied on the respondent's parenting history in seeking the declaration. Likewise, the respondent looks over her shoulder and her experiences of reduced access with her children and the erosion of attachment and the strength of her parental relationship are live in her mind. I discern for the respondent to remain engaged in [TS]'s childhood, and it is essential for [TS] this is so but also for their relationship to have a strength and authenticity to it, that a structured and regularised access plan needs to be specified in the terms of an order.

[141] These proceedings are complex and at the heart of the application is a baby uplifted at birth. Having heard the evidence, it is also appropriate I continue to case manage the proceedings.

[142] I extend the brief of Dr Staite to please contemplate a psychologist with a skill set to match the therapeutic needs of the respondent. This information is to be provided to counsel for the respondent. There is no jurisdiction for me to direct this cost be borne by Oranga Tamariki however I hope Oranga Tamariki will consider offering effective support to any therapeutic steps taken by the respondent to maintain her parenting role and relationships with [TS] and her children. From the respondent's perspective I suspect had she been offered more support (and I note as early as [under 17] when she lost the care of her first baby) her outcomes may have been very different.

S M R Lindsay
Family Court Judge

Signed at Christchurch on 1 December 2020 at am/pm.