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

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/

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/

IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2014-055-000176
[2021] NZFC 8742

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[ABBY MAHIMA] [NGAIRE BOONE] [AARON KAUAMO] Respondents
AND	[NIKO FARNHAM] born on [date deleted] 2012 [LUKE FARNHAM] born on [date deleted] 2015

Hearing:	16 April 2021
Appearances:	C Boon for the Chief Executive J Attfield for the Respondents K Kirkwood as Social Worker R France as Lawyer for the Children
Judgment:	1 September 2021

REASONS IN SUPPORT OR ORAL DECISION OF JUDGE K TAN

Introduction

[1] This matter came before me for hearing on 16 April by way of formal proof. At the conclusion of the hearing I informed counsel and the parties that were present that I would be making orders as sought and issued a brief oral decision with the orders. Due to time constraints I informed counsel and the parties that I would issue a separate decision with the reasons for how I got to my decision. This is now those reasons.

The whānau

[2] The children who are the subject of these proceedings are [Niko Kauamo] born [date deleted] 2012 and [Luke Farnham] born [date deleted] 2015. The children are represented by their court appointed lawyer Mr France, who was present in Court. Counsel for Oranga Tamariki, Mr Boon was present with the children's social worker, Ms Kahi Kirkwood. Also present in court was Ms [Abby Mahima] who made the applications to be appointed additional guardian, to have a special guardianship order made in her favour and to have a dispute between guardians determined – a name change for the boy. Her lawyer is Ms Attfield. The children's parents [Ngaire Boone] and [Aaron Kauamo] did not appear. Supporting Ms [Mahima] in the back of courtroom was the children's paternal great-grandfather Mr [Charles Farnham] and his wife [Kaiara Farnham].

[3] I start with the whānau relationships for these children. For [Niko], he has been in the care of Ms [Mahima] since he was two years old. For [Luke], he has been in her care since he was one day old. The children's mother is [Ngaire Boone]. Her mother is [Jacki Boone]. I could not ascertain who her father is. Ms [Ngaire Boone] has whakapapa links to [iwi deleted]. The children's father is [Aaron Kauamo] who has also gone by the surname [Farnham]. His mother is [Kaitlyn Farnham]. His father is [Dylan Kauamo]. On his father's side he is Cook Island Māori. On his mother's

side he is Māori with whakapapa to [iwi deleted]. His mother's father is Mr [Charles Farnham] and he was present in court. His current wife is Mrs [Kaiara Farnham]. The applicant, Ms [Mahima], is Mr [Charles Farnham]'s ex-wife. They remain connected because they have four children and mokopuna together. Ms [Abby Mahima] is also a second cousin to Mr [Dylan Kauamo].

[4] These children have a rich cultural background and a large whānau. The children also have two other siblings that are known. That is, [Tessa Kauamo] born [date deleted] 2008 and [Reid Kauamo] born [date deleted] 2010. [Tessa] and [Reid] are not the subject of these proceedings, but they are currently in the custody of Oranga Tamariki.

Background

[5] On 3 December 2014 in the Papakura Family Court a declaration was made that these children are in need of care and protection. After that the Court made a s 101 custody order and a s 110(2)(b) additional guardianship order in favour of the Chief Executive. These latter orders were made on 6 May 2015.

[6] The children came into the care of the Chief Executive because there were significant concerns about the care that they were getting from their parents which included exposure to or subject of family violence, parental drug use, neglect and both parents being in and out of prison. These two children have been fortunate that when they came into the care of the Chief Executive, they were able to be placed in the embrace of whānau namely with Ms [Mahima], and that that placement has been enduring.

[7] A review of the court file shows that Ms [Mahima] has given excellent care to the children and notwithstanding that at times there have been some behavioural challenges (particularly in the school environment for [Niko]), Ms [Mahima] has been able to more than adequately meet their needs. She has done this not standing alone, but with the support of her own adult children, the aunties of the children, as well as the children's grandfather Mr [Farnham], his wife, and other extended whānau members.

[8] On 25 September 2019 she signed an application seeking to discharge the s 101 and 110 orders in favour of the Chief Executive, for an order appointing her an additional guardian under s 110, and for a special guardianship order giving her exclusive rights as provided for under s 113A of the Act. She also applied to change the children's surnames.

[9] In terms of the service of those proceedings on the parents, the Court received an affidavit of service sworn on 14 February 2020 which confirmed that Barbara Jamieson, who is the manager at Wiri Prison, was served personally with the documents that were to be served on Ms [Ngaire Boone] who at that time was an inmate. There is also an affidavit of service sworn on 10 September 2020 which confirms that the documents were served on [Daniela Farnham] on 20 August 2020. The Court had made a substituted service order stating that service could occur on Ms [D Farnham] given that the whereabouts of Mr [Aaron Kauamo] were not known. This is deemed to be service on Mr [Kauamo]. Neither parent has formally filed any documents in opposition to the applications that have been made. They have not had a lawyer appear on their behalf and they have not been present at court, nor were they present at the hearing before me.

[10] I need to record that notwithstanding that the parents have not formally participated in the court proceedings in terms of the children's mother Ms [Boone], there has been some significant progress in terms of her relationship with Ms [Mahima], and therefore, her involvement with the children. What the court file shows from the review of plans, is that during the time the children have been in the custody of the Chief Executive, her involvement with them has sometimes been sporadic. This is often at times when she has been incarcerated. Ms [Boone] is no longer in prison and currently residing in [location deleted]. Since that time, she has built up a positive working relationship with Ms [Mahima].

[11] When Ms [Mahima] first made her applications in 2019, she was seeking that the access reserved to Ms [Boone] be four times a year. Fast forward to where we are today and there is direct communication occurring between Ms [Boone] and Ms [Mahima] to the point that she is having more regular and frequent contact with

the children and Ms [Mahima] is now asking the Court to reserve to her monthly contact and any other contact by agreement.

[12] At one point in the proceedings there was a note in one of the social workers plans that Ms [Boone] was not happy about the children being in the care of Ms [Mahima].[1] However, at the hearing I was presented with an email dated 15 April 2021 from Ms [Boone] to the social worker Ms Kahi Kirkwood. In that email she apologises for not being at court but wanted to show her full support for:

> Nanna [Abby] to have custody of my children as she is a very caring and loving grandmother to her mokos. As well as my mother [Jacki Boone] to have access with kids when arranged.

[13] She also expressed her thanks to Ms [Mahima] for taking on the responsibility of her children and shows nothing but support for her and her family. While this email is hearsay, I have not been given any reason to doubt its authenticity.

[14] In terms of the children's father, the submissions and paperwork filed indicate to the Court that he is not a regular feature in the children's lives, notwithstanding that they are with his side of the family. He does have contact occasionally when he turns up for family events. However, his contact is not consistent or regular. There has been concern expressed that he moves in a world where gangs are a feature.

Legal matters

[15] Section 113A is the provision of the Act which enables the Court to make a special guardianship order in the circumstances as outlined here.

> 113A Special guardianship orders
>
> (1) The court may make an order under this section appointing a person referred to in section 110(4) as a special guardian of a child or young person only if—
>
> (a) the appointment is made for the purpose of providing the child or young person with a long-term, safe, nurturing, stable, and secure environment that enhances their interests; and
>
> (b) either—

[1] This is recorded in the plan of 18 March 2020.

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

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

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

[16] The effect of such special guardianship order if made is set out in s 113B.

113B Effect of special guardianship order

(1) Where a special guardianship order is made in respect of a child or young person, then, whether the special guardian is a sole or additional guardian and despite anything in this section,—

(a) the special guardian has custody of the child or young person, and—

(i) no order under section 101 may be made in respect of the child or young person; but

(ii) section 114(2)(b) and (c) applies as if the special guardian were a sole guardian; and

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

(2) Where a special guardianship order specifies the access and other rights of any existing guardian,—

(a) no existing guardian may apply for an order under section 121(2)(d) or (e) concerning their access or other rights in relation to the child or young person, but any other parent or person may apply for orders under that section in relation to the child or young person, as if the special guardian were a sole guardian; and

(b) section 122 applies to any access rights specified in the order as if those access rights had been granted by an order made under section 121.

(3) If a person who is appointed as the sole guardian of a child or young person is also appointed as a special guardian, the provisions of this Act relating to sole guardians apply, except that—

(a) sections 134 and 135 (about reviewing plans) do not apply to the court plan that was prepared for the purposes of section 128; and

(b) despite section 117(1)(a), the order ceases to have effect when the child or young person attains the age of 18 years or sooner marries or enters into a civil union.

(4) If a person who is appointed as an additional guardian of a child or young person is also appointed as a special guardian,—

(a) the order must set out which guardianship rights (which may include those set out in section 16(2) of the Care of Children Act 2004) are to be held exclusively by the special guardian and which are to be shared between the existing guardian and the special guardian; and

(b) the order must require that the existing guardian is informed of any decisions made by the special guardian in the exercise of any guardianship rights held exclusively by the special guardian; and

(c) the provisions of this Act relating to additional guardians apply, except as follows:

(i) no existing guardian may apply under section 115 in respect of any guardianship rights held exclusively by the special guardian; and

(ii) sections 134 and 135 (about reviewing plans) do not apply to the court plan that was prepared for the purposes of section 128; and

(iii) despite section 117(1)(a), the order ceases to have effect when the child or young person attains the age of 18 years or sooner marries or enters into a civil union.

(5) Every special guardianship order must require that, if the child or young person to whom the order applies begins to live with anyone other than the special guardian on more than a temporary basis, the special guardian must,—

(a) if the child or young person, immediately before the guardianship order was made, was in the custody of the chief executive or a natural person, advise the chief executive; or

(b) if the child or young person, immediately before the guardianship order was made, was in the custody of an iwi social service, cultural social service, or the director of a child and family support service, advise that service or director, as appropriate.

(6) The obligation on the chief executive imposed by section 7(2)(e) does not apply in respect of a child or young person in respect of whom a special guardianship order is made.

(7) If a child or young person has more than 1 existing guardian, or more than 1 special guardian, this section and any other applicable sections

> must be applied with all necessary modifications to each existing guardian and each special guardian.

[17] When the Court or any person exercises any power or makes a decision under the Oranga Tamariki Act including on a s 113A application the Court must be guided by the s 5 and 13 principles of the Act, and have consideration to the s 4 purposes when adopting as the first and paramount consideration the well-being and best interests of the children.[2] The decision to make a special guardianship order is not to be determined in isolation from these provisions.

[18] There has been some discussion in other cases as to whether what is achieved through the making of a special guardianship order runs contrary to the principles of the Act, in particular those principles that give consideration to the importance of mana tamaiti, whakapapa and whanaungatanga.

[19] The history of how those principles came to be placed in legislation as well as the history of the special guardianship provisions have been comprehensively articulated in the decision of Judge Otene in *Chief Executive v [BH]*.[3] I do not repeat that background here but it provides a useful analysis of the changes made to the principles and purpose of the Act in 2019 and the genesis of the special guardianship provisions.

[20] In Her Honour's decision she also made comments about the effect of a special guardianship order for Māori children as follow [paragraph 39]:

> In conclusion I consider that, for Māori children at the least, special guardianship is fundamentally irreconcilable with principles of wellbeing that speak to mana, whakapapa and whanaungatanga. The conflict is to such a significant extent that the application of those principles will inevitably weigh heavily against the making of an order. This position holds objectively. It does not render a special guardianship order unavailable in relation to a Māori child if the evaluation of these objective circumstances leads to the conclusion that an order is to the child's wellbeing and best interests. But that evaluation must factor the weight of conflict that exists by virtue of essence irrespective of circumstances.

---

[2] Section 4A
[3] [2021] NZFC 210.

[21] She went on to say at [paragraph 41]

> There is limited utility in identifying factors that may weigh to the making of a special guardianship order for a Māori child given that they will be many varied and case specific. Evidence of tikanga consistent with the appointment may be immaterial especially so if the proposed appointees shares a whakapapa with each other. Also relevant is the appreciable risk to the viability of the placement in the absence of the order, or the specification of access and guardianship arrangements that adequately enable the exercise of whanaungatanga responsibilities which might encompass above and beyond the child's parents.

Submissions

[22] The submissions that I have received on behalf of the applicants were that Judge Otene's decision does not render special guardianship unavailable in relation to a Māori child if the evaluation of the subjective circumstances leads to the conclusion that an order is in the child's wellbeing and best interests. It was put forward to me that for these children in their circumstances, it is indeed in their wellbeing and best interest. Their parents have been unable to care for them due to their issues that place the children at risk. There has been whānau involvement in decision making for the placement of these children and they are placed with Ms [Mahima].

[23] The children have lived with Ms [Mahima] for most of their lives and for [Luke] it was shortly after his birth. Further the placement of the children with Ms [Mahima] is supported by the whānau. In terms of meeting the children's long-term safe and stable needs in a secure environment that is nurturing, Ms [Mahima] provides that.

[24] In terms of the children's mana, whakapapa and aspects of whanaungatanga that go to their wellbeing it is submitted that this is all achieved by virtue of this placement. The children are immersed within their kinship group as there is a relationship not only through marriage, but also biologically for the children with Ms [Mahima]. The children's connections with all sides of their whānau are promoted and maintained. A practical expression of how this has operated is the way in which Ms [Mahima] has recently embraced Ms [Boone] since she has been out of prison to ensure that regular contact is occurring between her and the children as is appropriate in terms of safety.

[25] In terms of the submissions made by Mr France for the children, he also submits that in this case the principles of whakapapa and whanaungatanga are not trampled on by the making of a special guardianship order. He also makes the submission that the Court needs to look at the wellbeing of these children holistically and give consideration to their views. The children have expressed views to their social worker that they want to stay with Ms [Mahima] forever. Throughout the five years of his appointment he has regularly visited the children at her home and observed the close relationship that they have with her, and their attachments to her. He submits that they also understand that Ms [Boone] is their birth mother. His submission is that the wellbeing and best interests of the children are best served by the making of the orders and he submits the following factors:

(a) [Niko] has been in her care since aged two years, [Luke] all his life;

(b) Neither child can be returned to their birth parents;

(c) The children maintain close relationships with their paternal whānau and now that Ms [Boone] is back in the community, are developing a relationship with their mother;

(d) The children need certainty and finality for decisions to be made within their timeframes;

(e) The Court has sanctioned plans which have underpinned the placement;

(f) Ms [Mahima] will continue to provide a long-term safe, nurturing stable and secure environment which enhances their interests under s 113A; and

(g) The changes of name sought will enhance and strengthen their connections to both the maternal and paternal whānau.

[26] For Mr Boon who represents the Chief Executive, he confirms that they whole-heartedly support the placement with Ms [Mahima] and the orders that are being made. He also raised the point that given that the order that the Court is being

asked to make is an order that is made under the Oranga Tamariki Act, it remains that the principles of the Act must still have application to these children, notwithstanding the orders being made. He notes s 5 states that any Court that, or person who, exercises any power under this Act must be guided by the following principles and, therefore, submits that Ms [Mahima] as a person who may be exercising powers under the Act in relation to the children needs to still operate within the principles of s 5 and 13.

Analysis

[27] To begin an analysis of the wellbeing and welfare of a Māori child it is necessary to understand that whānau and collective relationships underpinned by whanaungatanga or kinship are at the core of being Māori. The starting point then is that a Māori child must be understood in terms of the broader tikanga context which places the child within their whakapapa and recognises whanaungatanga which embraces whakapapa and focuses on obligations within relationships.

[28] [Luke] and [Niko] are of Māori and Cook Island Māori descent and the way in which their care arrangements are being dealt with is by the whānau as a collective. Whilst it is Ms [Mahima] that is seeking the legal orders in her favour, the evidence before me is that she does not care for the children in a vacuum or on her own and that the day-to-day operation of how she works is whanaungatanga in action in that Ms [Mahima] does not make decisions on her own but has done so with the collective whānau. That is evident by the fact that present and supporting her in court, and thereby supporting the children, was her ex-husband and his current wife. His current wife spoke positively to me of her support of Ms [Mahima] and the children. This demonstrates to me that notwithstanding the end of the marriage between Mr [Farnham] and Ms [Mahima] they are still able to operate as a whānau to make decisions for the best interests of their mokopuna who these two children are.

[29] While I accept that it may be counter intuitive for the Court to make orders which in essence limit the rights of the children's current guardians and parents (by virtue of the effect of a special guardianship order) and it would seem that this cuts across the principles of wellbeing that speak to mana, whakapapa and whanaungatanga there is in my view the ability for those matters to co-exist. That is, that in the right

circumstances the legal framework provided by way of a special guardianship order can sit side by side with the operation of mana, whakapapa and whanaungatanga where whānau have been given the opportunity to be involved in the decision making for their tamariki, where they have been empowered to make the decisions themselves (as opposed to imposed on them) and they have been able to exercise decision making for their tamariki thereby exercising their whanaungatanga responsibilities.

[30] This is what has occurred here. The situation for these children is such that I am of the view the making of a special guardianship order as sought is in the children's best interests and welfare and is consistent with the principles and purposes of the Act including the principles of mana tamaiti, whakapapa and whanaungatanga.

[31] I am also being asked to change the children's name. Dealing first with the name change, I had some discussion with counsel and Ms [Mahima] about what is being sought in terms of the children's name. Names given to children can often be a connector to where they have come from. Initially the application filed sought to remove [Kauamo] as the surname for the children altogether. For Ms [Mahima], she felt that that surname had some negative connotations in terms of gang connections and that the children's father [Aaron] only changed his surname from [Farnham] to [Kauamo] at a time in his life when he was wanting to connect with the gangs. She felt it was negative for the children. However, after further discussion she changed her position and agreed to that name remaining as part of the children's middle name.

[32] It is my view that for these children, any names that they have that provide a connection to any side of their whānau should be maintained for them. Even if for a previous generation that name may have some negative associations it still connects the children to where they are from and who they are. There is the ability for these children to reclaim positive connotations with their name and create a new connection with it that is constructive by virtue of them carrying the name and the optimistic path they will forge in the future. For that reason, I determine it is important for the children to maintain the names which connect them to the different sides of their family.

[33] The name [Kauamo] connects them to their Cook Island whānau, specifically to their father's father's family. The name [Boone] connects them to their mother's

family. The name [Farnham] connects them to their father's mother's side of the family and Ms [Mahima]. For that reason, I determine that in terms of the name change, the names [Kauamo] and [Boone] will remain part of the children's middle names, but [Farnham] will be added as their surname.

[34] On another aspect I was provided with the children's birth certificate and it confirmed that for [Luke] his actual registered birth name was significantly different to what he is known as. His registered birth name is '[Wiremu Boone]'. The information provided to me is that that name was registered three years after his birth but was not a name that anyone was able to say had any whakapapa links to anybody and not one that he has used before. There was information in the affidavit that said in fact his mother often referred to him as [name deleted]. I am satisfied that his name should be changed to be different to what is on his birth certificate, and accordingly I direct his name should be '[Luke Boone Kauamo **Farnham**]**.**'

[35] It is for the reasons set out in this decision that I made on 16 April 2021 the specific orders below:

(a) I appoint [Abby Mahima] additional guardian of the two children under s 110(2)(b) of the Oranga Tamariki Act.

(b) I discharge the existing s 101 custody order in favour of the Chief Executive as well as the existing s 110(2)(b) order in favour of the Chief Executive.

(c) I make an order under s 113A of the Act appointing Ms [Mahima] a special guardian of the children. Her appointment is in addition to the existing guardians of the children (with exception of the Chief Executive who is no longer an additional guardian given that I have discharged that order).

(d) I direct, as the additional guardian, that she has exclusive rights in terms of determining the children's place of residence, medical needs,

education and overseas travel, or relocation including obtaining of passports.

(e) As part of that special guardianship order, access between the children and their parents is recorded as being:

(i) Supervised monthly access on terms and conditions agreed with Ms [Mahima]. That access being conditional on:

1. Each parent providing reasonable notice of their wish to exercise contact.

2. Neither parent shall be under the influence of drugs or alcohol during contact.

(ii) Any further access by agreement with Ms [Mahima].

(iii) If the children relocate to live in Australia with Ms [Mahima] then physical access will not occur monthly, but access by way of Facebook or electronic means or telephone shall continue on a monthly basis, and any physical contact between the parents and the children will occur four times a year during the children's Australian school holidays at times and on conditions as set by Ms [Mahima].

(f) I make an order in relation to changing the children's names. Currently the name recorded on the birth certificate for [Niko] is "[Niko Kauamo]." That name will now change so that it is "[Niko Boone Kauamo **Farnham**]." For [Luke] his name recorded on his birth certificate is "[Wiremu Boone]." His name will now be "[Luke Boone Kauamo **Farnham**]."

_____
Judge KMSH Tan
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 01/09/2021