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**IN THE FAMILY COURT
AT PALMERSTON NORTH**

**I TE KŌTI WHĀNAU
KI TE PAPAIOEA**

**FAM-2019-054-000589
FAM-2017-092-000322
FAM-2015-092-000914
FAM-2015-092-000507
[2020] NZFC 6519**

IN THE MATTER OF THE ORANGA TAMARIKI ACT 1989

BETWEEN CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN
[MARY PRESTON]
[RICHARD HAYES]
Applicants

AND [KENDRA FRYE]
[PAUL PRESTON]
Respondents

AND [JORDAN FRYE] born on
[date deleted] 2012
[DAMIAN PRESTON] born on [date
deleted] 2015
Children or Young Persons the application is
about

Hearing: 6 – 17 July 2020

Appearances: Ms Finau for the Chief Executive
Ms Nidd for the Applicants [M Preston] & [R Hayes]
Ms Burlace for the Respondent [K Frye]
Respondent [P Preston] no appearance
Ms Fuata’i for the Child [Jordan]
Ms Lohrey for the Child [Damian]

Judgment: 10 August 2020

RESERVED JUDGMENT OF JUDGE J F MOSS
[As to discharge of custody orders, Oranga Tamariki Act, making orders for
day-to-day care of [Damian] (Care of Children Act)]

Introduction

[1] [Jordan] is [seven years] old¹ and [Damian] is [four years] old.² They are half brothers. [Jordan]’s father has died,³ and [Damian]’s father is largely estranged, but he has lived with his paternal grandparents since he was six months old. [Jordan] lives with a caregiver in [location A], where he was placed when he was four. Both boys are in the care of Oranga Tamariki.⁴

[2] The mother looks after two brothers, [Brett] who is [three years] old,⁵ who is a full brother of [Damian]; and [Ed], who is [just over one and a half years] old.⁶ [Brett] has been subject of Oranga Tamariki proceedings but is no longer.⁷ There is no concern for the welfare of these two boys in their mother’s care.

[3] The issue for the Court is whether [Jordan] and [Damian] can return to the fulltime care of their mother. The legal dispute relates to whether the custody order for each boy in favour of Oranga Tamariki will be discharged, and whether an order pursuant to the Care of Children Act (“COCA”), in respect of [Damian], will be made in favour of his paternal grandparents. There is no issue that the paternal grandparents should be granted leave to apply.

¹ Date of birth: [date deleted] 2012.

² Date of birth: [date deleted] 2015.

³ [Date deleted] 2014.

⁴ [Jordan] since [month deleted] 2014 and [Damian] since [month deleted] 2015, at 10 days old.

⁵ Date of birth: [month deleted] 2016.

⁶ Date of birth: [month deleted] 2018.

⁷ Proceedings concluded August 2018.

Historical context

[4] These proceedings have been ongoing since Oranga Tamariki first was involved. The precipitating event in April 2014 which began the litigation occurred when [Jordan] was hurt during an overnight contact with his mother and [Damian]'s father. By then [Jordan] had been living with a non-kin caregiver for seven months. The mother agreed to his placement away from her when his daycare raised concerns about bruises on bottom and face, which were only partially explained. When challenged, the mother and [Damian]'s father were angry and abusive. Oranga Tamariki required an agreement from the mother that [Jordan] would be in their care for a period. [Jordan] went into the care of [Pat]. Seven months later, he was with his mother and step father for an agreed overnight contact and was hurt. At that point the Ministry had intended to transition [Jordan] home to live with his mother. His face and ears were bruised, fingers were scraped or crushed resulting in broken skin. These injuries were non-accidental. At that point, the Ministry sought a declaration and custody order. These were granted.

[5] Months after this event in April 2015, the mother was charged with assault on [Jordan]. She gave birth to [Damian] in [month deleted] 2015. He was treated as a subsequent child, and proceedings were issued. Oranga Tamariki tried to engage with the father, but he was uncooperative, and an FGC which was twice planned could not be held. [Damian] was removed from his parents' care at five days old.

[6] The mother was subsequently convicted of injuring [Jordan] in April 2014 after a Judge-alone trial in May 2016. The mother's relationship with [Damian]'s father was breaking down by then. In [mid] 2016, the mother moved to [location B]. She was then pregnant with [Brett] who was born in [late] 2016. [Brett] remained in her care, although he, too, was a subsequent child.⁸ Declaration proceedings began. A support order was in place until [Brett] was nearly two. The mother accepted supports, attended courses and engaged with Family Start. She sought and obtained a Protection Order against [Damian]'s father. [Brett] is a protected person, although [Damian] is not, as he was not a child of her household.

⁸ Section 18A-D Oranga Tamariki Act 1989.

[7] In August 2016, the mother successfully appealed her conviction for assault on [Jordan]. She presented fresh evidence. The Crown accepted the reliability of that evidence enough to both support her appeal, and then decline to pursue a retrial in the District Court. Proceedings were dismissed. In the appeal, and in evidence before me, the mother deposed that she had left [Jordan] for a few minutes in the house with [Damian]'s father. She went to the dairy. On her return, she said that her partner claimed he had taught [Jordan] a lesson. The mother found [Jordan] shut in a room and hiding behind furniture. She reported he was terrified, injured and clung to her. She got medical care for him. When he returned to [Pat] at the end of the weekend, he was taken to [the hospital]. He was seen as an outpatient, and then made a full recovery physically.

[8] I accept this evidence. I consider that the mother did not cause the injuries to [Jordan]. I accept that the mother was caught in a relationship with her partner where she feared for her life. She started the relationship at a time when she was distressed at the suicide of her husband and was vulnerable. This very poor choice had profound adverse consequences on [Jordan]. She gave oral evidence before me that she was threatened by him that he would kill her if she explained what happened to [Jordan]. He threatened to kill her, choked and attacked her; he banged her head into the windscreen of the car. He insisted on being present when she was dealing with lawyers and Oranga Tamariki. He listened to her evidence in the prosecution related to [Jordan]'s injuries, having previously threatened to kill her if she told the truth. He psychologically and financially abused her. He damaged her house, degrading its value.

[9] She struggled to leave the relationship and did so when her home was sold by mortgagee sale in about April 2016. She deposed that [Damian]'s father would not permit her to pay the mortgage. It is not clear whether the property problems were present at the beginning of the relationship. However, the fact that the mother bought a house in [location B] which is mortgage free, and in which she has lived since she came to [location B] in June 2016 tends to prove she is able to manage her finances and keep a steady household. There is no evidence that the house is poorly kept, which often features in such adverse contexts.

The history of [Jordan]’s care

[10] [Jordan] remained with [Pat] until August 2017, and then moved to live with his [occupation deleted], [Caroline]. [Pat] is currently [Jordan]’s afterschool caregiver, and [Jordan] remains in the care of [Caroline]. The mother had no contact after April 2015. She applied for access in November 2015.⁹ With that application she filed an affidavit recounting the cause for bruising to [Jordan]’s face in September 2014.¹⁰ Although Ms Fuata’i, as counsel for [Jordan], raised concerns about delays in access in March 2016, and although the mother’s bail terms were varied in August 2016 to facilitate access as ordered by the Family Court, there was no access in 2016. The mother applied to discharge the Orders related to [Jordan] in March 2017. The Ministry did not formally respond for seven months. Nor did the Ministry heed the requests of the Court to prioritise contact for [Jordan] with his mother. Despite the Ministry’s involvement by then with [Brett], there was no re-evaluation of the mother’s capacity and risk. There was no further FGC.

[11] A Home for Life decision was made in late 2016 for [Jordan], and in January 2017 Oranga Tamariki reduced contact both with [Jordan] and with [Damian] to four times a year. This occurred despite the mother applying to discharge the orders under the Oranga Tamariki Act (“OTA”). At the time [Jordan] transitioned to the care of [Caroline] (August 2017), the mother’s application to discharge the orders was current.

The history of [Damian]’s care

[12] [Damian] was placed in his grandmother’s care when he was six months old, in about [month deleted] 2016. The mother and the father had one visit with him at the home of the grandmother, when the relationship between the grandmother and the parents was cordial. The grandmother then declined to allow the father to be at her home as he was abusive. Her contact with the mother did continue until late 2016, but this was discouraged by Oranga Tamariki. Quarterly supervised contact was planned but did not happen smoothly. It did not happen at all in 2017. The grandmother was gravely ill in 2017 and is now in remission.

⁹ Pursuant to s 121, Oranga Tamariki Act 1989.

¹⁰ Affidavit of [name deleted], 14 October 2015.

[13] Late in 2018, the second of six psychological assessments was filed. This assessment focussed on [Damian].¹¹ Ms Orr recommended there was no reason to continue to monitor the mother's contact, that the contact needed to increase in frequency to at least fortnightly and preferably weekly, with sharing of information between the mother and grandmother. At that time, [Damian] had an attachment with his grandparents, but it was not seen as secure. It was difficult for him to settle with his mother, after a period when contact had been very infrequent, but Ms Orr referred to his capacity to relate to his mother.¹²

[14] Six months later, Ms Orr reported again and gave prominence to the issues arising from the difficulties in the relationship between the mother and grandmother.¹³ By then, contact had been more frequent, but had been supervised at all times, from February to August 2018. The recommendation that the monitoring was no longer needed had not been acted upon. Nor had counselling between the mother and grandmother on the basis that it would be on a non-confidential basis. This was seen as important because the risk that [Damian] would be adversely affected by the poor relationship between mother and grandmother was high. There had been no progress with the grandmother commencing a relationship with the younger child, [Brett]. It appeared that neither the mother and grandmother, nor the social worker did anything about this. [Damian] lost the opportunity, as a result, of seeing his brother with his grandmother. This important dyad in the texture of [Damian]'s relationships should not be limited to time when [Damian] sees his mother.

[15] From April to August 2018, there were 17 visits, all but two of which occurred in the [location C] area. All remained supervised. The extensive notes from the mother, the grandmother and the supervisor,¹⁴ record a number of themes:

- [Damian] warmed to the regularity and predictability of contact and enjoyed an increasingly reciprocal relationship with his mother.

¹¹ August 2018.

¹² Report of 28 February 2018, bundle page 851 at 34 and following.

¹³ Report of August 2018, bundle p 868, para 22.

¹⁴ Summarised in report of Ms Orr, 26 April 2018, bundle p 875-895.

- [Damian] struggled somewhat with a relationship with [Brett], who was then between 16 and 22 months, but began to learn skills of waiting his turn and being patient with [Brett].
- The grandmother reported significant behavioural worries with [Damian], connected in her mind to access with the mother. The behaviours were often at a time distant from access. She described [Damian]’s externalising behaviour, some aggression, to things and people, wakefulness, resistance to toilet training, and fussiness with food – the records displayed the grandmother’s anxiety about this
- Concern was registered that asthma exacerbation may be stress related. His medical records show that [Damian] had a tough few months with Asthma, but there are no medical notes about stress exacerbation.
- The mother was working with the social worker for [Brett] and with other social supports, and records display no concerning interactions by the mother.

[16] Ms Orr’s report focused on the brief from the Court, which sought advice as to the mother’s capacity and suitability. Although Ms Orr commented in relation to the child’s relationship with the grandparents, that issue was peripheral to Ms Orr’s consideration. At that point, the home with the grandparents was considered to be a home for life. The best summary of this approach is in the assessment of August 2018.¹⁵

[17] Through the end of 2018, contact increased for [Damian], but remained supervised. The structure of contact for [Jordan] changed, and by November it was no longer supervised. [Jordan] was travelling by air, unaccompanied, with significant support and cooperation from [Caroline]. [Jordan] was staying weekends with his mother, and had a nine day holiday, including Christmas Day, in 2018.

¹⁵ Bundle, page 897-898.

[18] By contrast, [Damian]'s contact remained supervised. Each alternate visit occurred at the mother's home. The other visits occurred at the local library. Transport was arranged by a contracted agency, on the basis that the contact would be monitored. He missed a number of the visits by [Jordan], depriving both boys of sibling time. Although [Jordan] was permitted to attend a tangi for a beloved [relative] of the mother in [month deleted] 2019, which was a three or four day event, and involved long distance road travel to the far north, [Damian] was not permitted to be included in any way.

[19] The grandmother raised many concerns, as above and onwards through 2019 which were minor matters individually and together raised a pattern of concern. These matters focused on things such as whether the mother put [Damian] on a clean surface when he was being changed at the library, whether the mother was supplying nappies, how the mother was using the asthma inhaler, and whether he was using a harness which she supplied to control him while on outings.

[20] Between 2017 and 2019, [Damian] was seen by a doctor or at the Emergency Department at the hospital on four occasions for what was described as a dislocated elbow. On the last occasion the notes recorded he was pulled out of the car, and fell, having been pulled by the elbow. The grandmother's evidence was that he had a clicky elbow. It is surprising that he was pulled by the elbow, if this was a known vulnerability. The mother was not advised of these occasions, and nor was she recorded as a guardian or Next of Kin in the medical notes.

[21] In this time the grandmother was also being treated for a life threatening illness. She is now in remission. The treatment she underwent was adverse to her, but she has recovered her health from that. Her quarterly checks are continuing, and she is now approximately three years into her remission. Despite this, given the kind of illness, there is a likelihood that the grandmother's life will be shortened. She and the grandfather had made a Plan B in 2018 in case the grandmother could not continue to care for [Damian], by which [Damian] would move to live with his [relatives] in [location A]. This plan is referred to in passing by Oranga Tamariki. The mother did not factor in the plan. She was not consulted about it. Now, the grandparents alternate plan for the care of [Damian] is that the grandfather would assume that role. He wishes

to do that, and has support from the grandmother's family, and his own family. Again, the mother did not feature in the planning by the grandparents, until prompted in oral evidence.

[22] [Damian]'s attachment to his grandparents, and the quality of his relationship with his mother has been assessed on many occasions, in reports filed between February 2018 and July 2020. As would be expected, [Damian]'s relationship with his grandparents has undergone some changes. There was some concern about incomplete attachment, and whether that is a result of age and stage, or more a result of the permissive style of parenting by the grandparents, is unclear. However, by the date of hearing before me, Ms Orr is clear that the grandmother and grandfather have equivalent primary attachments to [Damian] and he to them. Although the mother's attachment to him and he to her are secure, they are secondary. There are, however, three concerning matters where the placement of [Damian] with his grandparents has secured his day to day physical needs, but has not assisted with strengthening whānau, assuring his identity across his whānau, and thereby, strengthening his mana tamaiti. The particular matters of concern are the very poor relationship between the mother and grandmother, the grandparents' permissive and gatekeeping style of parenting, and the grandmother's health status. Each of these poses a risk to [Damian].

The mother's position between 2017 and 2020

[23] As described above, the mother was pregnant with [Brett] when she arrived in [location B]. She had a further unplanned pregnancy, which led to the birth of [Ed] in [month deleted] 2018. Another baby has complicated the mother's position, which she has found hard to accept. [Ed] is thriving. He and [Brett] appear to have good routines, and a family unit which is stable and doing well.

[24] The mother has assiduously gone about improving her position, accepting that some of her behaviour has been unacceptable for the children. The first time she perceived that was when [Jordan] left her care in September 2014. She had been angry and aggressive. She says she immediately enrolled in an anger intervention course. Since then, she undertaken about six parenting courses, and two longer and home-based family development courses. In addition, she has done a number of self-esteem

and personal development courses, including MAPPS, First Aid, Domestic Violence Prevention, and courses about keeping herself and her babies safe. She has engaged over three plus years with a community agency in [location B], [a kaupapa Māori service], and also with [another iwi governed health and social service provider], which operate under the auspices of the organisation called Jigsaw.

[25] At times, the provision of advice, support, education and assistance to the mother has become confused, because of the number of people engaged with the mother. This was brought to a head during the later months of 2019, when the professional supports met, resolved interagency difficulties, identified the risk and tendency that the mother had to split and divide her team. Since that time, the team has offered services within clear boundaries, and consistently. Ms Orr reported that the mother showed gains in her parenting when most recently assessed.

[26] In addition to all of these matters of personal development, the mother has also achieved a certificate related to [details deleted]. This a field of work she has been engaged in before, prior to [Jordan]'s birth. She is eager to work in this field.

[27] The other field of the mother's evidence derives from the huge number of supervised contact reports, which she herself completed. For each visit, the supervisor and the mother, and any other observer, completed at least one report. During the middle months of 2019, there were sometimes three reports for each visit. Although, of course, the mother reported well on her interaction and management of contact, these reports are useful in identifying different perceptions between supervisor and mother, where things have not gone so well. Counsel for Oranga Tamariki and for [Damian], challenged the mother about her wish to censor the content of supervision reports. The mother denied any attempt to pressure others, but it may be, and indeed is plausible, that the anxiety the mother has plainly felt to prove that she is up to the task of parenting her own children, has also translated into her pressuring others. That has not been because she considered she had things to hide necessarily, but rather that making a good impression was understandably important to the mother. Her personal style is that she does intensely need the people around her to interact with her on her own topics and at her own pace. There is evidence of her needing the supervisors and monitors of contact being asked not to write anything negative about her, and of the

mother herself amending her report about an incident, having not included it when she first completed her report.¹⁶

[28] Difficulties which emerged last year in her relationship with [Caroline], and related to how contact on Skype was going, also demonstrate this. [Caroline] had felt pressured by the frequency and intensity of the mother's text and email communication. Ms Orr wrote to both the mother and [Caroline], suggesting that the mother needed to step back, and consider how her communications were impacting on [Caroline], and commenting that Ms Orr herself thought the degree of contact was intrusive and overwhelming. What is important from the Court's point of view is both that Ms Orr's very helpful intervention was effective, but more importantly, the mother acknowledges that it was effective, and has caused a significant improvement in the relationship with [Caroline], and in the way Skype has occurred.

[29] There is also evidence of the complexities with her relationship with the grandmother, which is characterised by mistrust, defensiveness and hostility. This is not, however, limited to the mother's attitudes and behaviour. This is best illustrated in the report from joint counselling undertaken by [a family support and counselling service].¹⁷ This report tends to establish that the mother was trying her best, and the grandmother brought a somewhat rigid hostility to the process, such that [the family support and counselling service] was not prepared to continue the joint meetings. Oranga Tamariki were concerned that this occurred and that the joint sessions did not proceed. Ms Round considered that the counsellor may have given up too soon.¹⁸

[30] The evidence has also focussed on the mother's efforts to implement the strategies from her learning at courses, and within the therapeutic self-improvement work. She strongly believes that she is well placed to parent all her boys together and believes it is primarily important for them that she does so.

[31] Although it is a proper hypothesis to say that there is some evidence which demonstrates that the mother has been slow to learn obvious skills, the Court's task is

¹⁶ Report of February 2019, when [Brett] hit [Ed].

¹⁷ Bundle 419-423 and 458.

¹⁸ Notes of Evidence, pages 466-467.

not to measure this mother's skills acquisition against a population which has had an untroubled passageway through family and community. Rather, the Court's task is to consider the mother's evidence against the proposition that the children need to be protected from all forms of violence and to be kept safe and their wellbeing and interests protected. Although some of the mother's personal interactions with her support team may have been tedious to them, or uncomfortable, and although the style of the mother's parenting may not be such that there is not room for improvement, or that the children's personal, social and educational development could not do better, all things being equal, the Court's obligation is to carefully assess whether the complaints made in relation to the mother's behaviour are of a sufficient measure, chronicity, and impact to properly justify continued state intervention in a family's private life.

Legal principles

[32] The two sets of applications before the Court engage the primary legislation related to the care of children. The OTA empowers the state to intervene in the private lives of families, and to substitute the state care for children where perceived danger to children is so great that it is necessary for that intervention to occur. The COCA requires the Court to resolve private intrafamilial disputes.

[33] Both Acts require that the primacy is given by anyone exercising a function under either piece of legislation to make paramount the consideration of the best interests of the children. The OTA refers the wellbeing of children, alongside the best interests.¹⁹ The COCA defines the task as giving paramount consideration to the welfare and best interests.²⁰

[34] The difference between wellbeing and welfare was not addressed by counsel, and nor was the difference between the statutory purpose in relation to each piece of legislation. When the Court of Appeal considered the precursor to OTA, Richardson J said, in considering the absence of specific statutory criteria for the exercise of the

¹⁹ Section 4A Oranga Tamariki Act.

²⁰ Section 4 Care of Children Act 2004.

welfare and best interests test, “the power must be exercised in conformity with the purpose which the provision serves in the statutory scheme”.²¹

[35] There are now legislative glosses which assist the interpretation of the term wellbeing and welfare. Within both concepts the primacy of safety and protection from all forms of violence is clear.

[36] Because OTA empowers the State to intervene, and therefore exercise power under the Act to intervene in the private lives of families, the primacy of safety can lead to consideration of a child as an individual. By contrast, COCA does not express the indivisibility from family so strongly. It may be that this arises from the difference between intrafamily disputes in COCA and issues of State intervention in OTA.

[37] The principles in OTA emphasise that a child cannot be considered separate from or cut from ties arising from birth heritage. Section 4A requires that the Court consider mana tamaiti. A child’s mana derives from its whakapapa. The concepts of mana and of whakapapa apply, particularly, to Māori children. However, because the Court is obliged to take into account the principles of the Treaty of Waitangi, and because that Treaty declares a partnership between the then colonial power, England (expressed in the personage of the Queen), and the tangata whenua, I consider that the principles apply equally to children of European descent as children of Māori descent. Whether they apply in a broader multicultural sense is a different question, and not a question which has arisen in this matter.

[38] Although the Court’s growing appreciation of and sensitivity to Tikanga Māori leads to some understanding of the indivisibility of a child from his or her forebears, and from the child’s turangawaewae, because that is where the forebears lie, European culture does not define the links for a child with their family in such a spiritual way. However, psychological theory, genetic and epigenetic studies, and research findings in the field which is roughly explained as nature versus nurture, give credence to the applicability in European society to the proposition that mana tamaiti is at least, in part, found in whānau links for European New Zealand children. These links are to those who have gone before, as much as those who are still with us.

²¹ *Director General of Social Welfare v L* [1989] 2 NZLR 314 at [318] per Richardson J.

[39] In this case, the detail of the Māori heritage for both boys is unknown. Prior the hearing, the mother had identified herself and the boys as European New Zealander. During the evidence, she referred to her Ngāpuhi decent. There is a credible basis for accepting that this is lived and felt connection to Te Ao Māori, given the mother's support from her [relative], and her attendance at his tangi in [month deleted] 2019.

[40] Therefore, when considering wellbeing, whether these boys are European New Zealander or Māori, the Court is obliged to consider them in the context of their whakapapa.

[41] In further considering the concept of wellbeing, the Court must be guided, in my view, by the definition in s 5 of the principles which govern the Court's exercise of powers under OTA. Unless these principles are applied, the wellbeing of a child cannot be assured. The wellbeing of the child can be encapsulated in consideration of the principles. Support for the proposition that the principles in the Act encapsulate what is required for a child's wellbeing is made more specific in s 13. That section reads:

13 Principles

- (1) Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the well-being and best interests of the relevant child or young person (as required by section 4A(1)).
- (2) In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:
 - (a) it is desirable to provide early support and services to—
 - (i) improve the safety and well-being of a child or young person at risk of harm:
 - (ii) reduce the risk of future harm to that child or young person, including the risk of offending or reoffending:
 - (iii) reduce the risk that a parent may be unable or unwilling to care for the child or young person:
 - (b) as a consequence of applying the principle in paragraph (a), any support or services provided under this Act in relation to the child or young person—

- (i) should strengthen and support the child's or young person's family, whānau, hapū, iwi, and family group to enable them to—
 - (A) care for the child or young person or any other or future child or young person of that family or whānau; and
 - (B) nurture the well-being and development of that child or young person; and
 - (C) reduce the likelihood of future harm to that child or young person or offending or reoffending by them:
 - (ii) should recognise and promote mana tamaiti (tamariki) and the whakapapa of the child or young person and relevant whanaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:
 - (iii) should, wherever possible, be undertaken on a consensual basis and in collaboration with those involved, including the child or young person:
- (c) if a child or young person is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle in section 208(2)(g):
- (d) a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child or young person from harm or likely harm:
- (e) assistance and support should be provided, unless it is impracticable or unreasonable to do so, to assist families, whānau, hapū, iwi, and family groups where—
- (i) there is a risk that a child or young person may be removed from their care; and
 - (ii) in the other circumstances where the child or young person is, or is likely to be, in need of care and protection (for example, where a family group conference plan provides for assistance to be given to a child or parent to address a behavioural issue that may lead, or has led, to the child's removal from the family):
- (f) if a child or young person is identified by the department as being at risk of removal from the care of the members of their family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers, planning for the child's or young person's long-term stability and continuity of living arrangements should—
- or

- (i) commence early; and
 - (ii) include steps to make an alternative care arrangement for the child or young person, should it be required:
- (g) a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers only if there is a serious risk of harm to the child or young person:
- (h) if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:
- (i) if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—
- (i) be consistent with the principles set out in sections 4A(1) and 5:
 - (ii) address the needs of the child or young person:
 - (iii) be guided by the following:
 - (A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:
 - (B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:
 - (C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:
 - (D) where practicable, a child or young person should be placed with the child's or young person's siblings:
 - (E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:
- (j) a child or young person who is in the care or custody of the chief executive or a body or an organisation approved under

section 396 should receive special protection and assistance designed to—

- (i) address their particular needs, including—
 - (A) needs for physical and health care; and
 - (B) emotional care that contributes to their positive self-regard; and
 - (C) identity needs; and
 - (D) material needs relating to education, recreation, and general living:
 - (ii) preserve the child's or young person's connections with the child's or young person's—
 - (A) siblings, family, whānau, hapū, iwi, and family group; and
 - (B) wider contacts:
 - (iii) respect and honour, on an ongoing basis, the importance of the child's or young person's whakapapa and the whanaungatanga responsibilities of the child's or young person's family, whānau, iwi, and family group:
 - (iv) support the child or young person to achieve their aspirations and developmental potential:
- hapū,
- (k) if a child or young person is placed with a caregiver under section 362, the chief executive, or, if applicable, a body or an organisation approved under section 396, should support the caregiver in order to enable the provision of the protection and assistance described in paragraph (j).

[42] Considering these principles, in contrast to s 5A COCA, which are the principles related to welfare, I note three things within OTA which are less prominent in COCA. These are:

- there must be an attempt to act by agreement;
- action must be focused on minimising harm to a child's family and the child themselves; and
- intervention must be timely.

[43] These principles have primacy elsewhere in the legislation. Agreement is made prominent in the obligation to hold family group conferences. The obligation to minimise harm to whānau is prioritised within s 7AA OTA, by which the Ministry is obliged to establish processes and services designed to improve the wellbeing of children and young people, focused particularly on social work services, family support services and community-based services. The positive effect on a child's safety and thriving is, in ss 7, 7A and 7AA, intertwined with the wellbeing of whānau, family group, hapū and iwi. This accords with a tikanga based understanding of a child's being.

[44] Thus, the difference in meaning between welfare and wellbeing can become clearer. Wellbeing is a broader concept, based in collective wellbeing, and recognising that children cannot be considered as individual humans. Because, in COCA disputes, the underlying principle that a child is part of his or her family is almost never contested, and because the disputes are intrafamilial, the welfare consideration is adequate. The strength of a child's identity within whānau remains an important principle,²² but there is primacy given to upbringing by parents, as well as continuity, the importance of consultation and cooperation, and the child's cultural, spiritual and language identity.

[45] Counsel have not addressed the differences in the two standards. I asked counsel to consider this, at the outset, but no submissions were provided. Counsel for the two children both submitted that the Court's task in resolving the applications was to apply the principles in *MEM v Chief Executive of the Ministry of Vulnerable Children*.²³

[46] The Judge's formulation of the test has been cited on several occasions, and counsel relied on it as the applicable test. Her Honour said this:

However the test may be articulated, the common thread, unsurprisingly of decisions concerning whether or not to discharge orders under the CYP&F Act, is an analysis of whether care and protection concerns continue to exist. I consider that what needs to be answered is whether care and protections concerns remain, so that the child's welfare and best interests requires

²² Section 5(e) Care of Children Act 2004.

²³ *MEM v Chief Executive of the Ministry of Vulnerable Children* FC Rotorua, FAM-2001-019-000230, 22 June 2009, MacKenzie FCJ.

continuation of the custody order. The focus must necessarily be on the ongoing presence or absence of care and protection concerns, given that the gateway for the making of disposition orders, such as a custody order under the CYP&F legislation, is dependent on findings that a child is in need of care and protection on one of the grounds set out in s 14. The corollary therefore must be that if it is likely that a child is no longer in need of care and protection, then the foundation for orders under the legislation crumbles.

[47] The three tier test encapsulates both the analysis in the first paragraph of the narrative and also the principle behind the decision in *R v Child Youth and Family Services* (“*CYFS*”).²⁴ Her Honour said this:

The ultimate question remains whether the child is likely to remain in need of care and protection if the orders are discharged or varied ... The Court must ask what would be the consequences for the child if the orders were, or were not, discharged; or the likely consequences for the child if the father’s access was, or was not, extended.

[48] The facts in *R v CYFS* are more similar to the issues within this whanau, than with *MEM*. In *R v CYFS* a child had been removed from parents and placed with a great-aunt, the father worked assiduously to improve his position, and after about three years sought to discharge the order. Her Honour considered and weighed the risks and benefits for a young child who was well attached to a great-aunt, and also attached to her father who had made significant gains. By contrast in *MEM*, the Court was considering discharge of orders 12 years after the orders were first made, where the reason for intervention arose because one parent expressed engrained hostility to the other and twined the child into her determination to exclude the other parent. That risk to the child remained unaltered and had been expressed throughout the 12 years in various aspects of the litigation.

[49] Considering these tests, and with respect to my two learned colleagues, it appears that the consideration does not include recognition of the statutory scheme, which must be considered from the stand point that the legislation creates a structure for State intervention in private families. This places on the agency exercising power under the statute, the proper obligation to continue to consider the impact for children arising from state intervention in the private life of their family. This is a factor which

²⁴ *R v Child Youth and Family Services* FC Dunedin, FAM-2004-012-584, 14 December 2006, Emma Smith FCJ.

always is present. It is separate from the challenges to a child's safety and wellbeing in their family.

[50] In marginal cases, where an initial care and protection concern has resolved, and the nature of any remaining concern is different, the Court's task needs to be a thoughtful evaluation, bearing in mind that the state's entitlement to intervention in a family arises only in the case of a serious threat to the wellbeing a child. Where there is no longer a serious threat to the wellbeing of a child, or where in the various options for the care of a child, there are different and complex risks, the gravity of the risks needs to be considered from the standpoint of the care and protection intervention. Thus, in resolving an application to discharge an order under OTA, it appears to me, that it is in error to apply the principle of continuity in care which appears in COCA, which is known by the shorthand term the status quo. And, as discussed below it is an error to compare and contrast two caregiving options before endorsing the one which, from a COCA standard, appears to meet the statutory principles of welfare and best interests.

[51] The application to discharge orders under OTA requires a consideration of the applicant versus the state, not the applicant versus the caregiver. Regrettably, the case in relation to [Damian] has been presented on the basis that this is a contest between mother and grandmother.

[52] I accept that the Court would be shying away from its duty under the principles in ss 5 and 13 OTA, if it did not consider the consequences in discharging orders. But, rendering the evaluation of consequences equivalent to the application of the principles related to wellbeing and best interests adds a gloss which can, in my view, not be sustained when applying the fundamental obligation appearing in s 4A. It cannot be right that the legislation empowers the Court to continue a custody order, where the child's wellbeing and best interests are not served by that continuation. The Court cannot continue a s 101 Custody Order where familial and care structure is better located under COCA. There are however contexts in which a timely transition to COCA orders and excluding state intervention in the family requires a short transition, to minimise the risks to a child's wellbeing which arise as a result of the time in state care, or the challenges of transition.

[53] It is only in this way that the apparently contrary position of Oranga Tamariki, opposing the mother's application and supporting the grandmother's application can be reconciled. However, given the intractable conflict between grandmother and mother, through which there has been an artificial constriction around the mother's contact with [Damian], it may be that a further source of care and protection concerns for [Damian] has emerged.²⁵ This does not appear to have been considered by the Ministry, from the point of view of [Damian].

[54] For [Jordan], these differences and concerns are not evident.

[55] Turning to the COCA application by the grandmother for [Damian], the application can only be considered where orders under OTA are discharged. A positive conclusion in favour of the grandmother's application under COCA cannot be the only reason for the discharge of Oranga Tamariki orders. The evidence does not enable the Court to be confident that the grandmother can enhance matters of [Damian]'s relationships with mother and sibling, and his identity. In this way, the Ministry's ambivalent response to applications to discharge has confounded the presentation in this matter. It appears that Oranga Tamariki has proceeded on the basis that discharge of OTA orders and making of COCA orders will be contemporaneous and the evidence coextensive. Whether that is so, or not, the Ministry has not provided submissions to guide the Court in relation to the different tests to be applied.

[56] Whether orders are made sequentially or contemporaneously, it follows from my analysis of the OTA principles and the clear wording in s 5 COCA, that the COCA application can only succeed if the Court concludes that [Damian] is unsafe in the care of his mother. This requires the Court to adopt a standard of application of the principles which prioritise his safety, but which also excludes consideration of other principles upon which the Court is empowered to act in COCA proceedings, such as the primary responsibilities held by parents. Safety is a principle which can be seen as the first among equals in COCA proceedings. It means more than physical safety. The concept requires significant consideration on a long term predictive evaluation,

²⁵ Section 14AA(2)(c) Oranga Tamariki Act.

rather than short term and understandably polarised thinking, arising from traumatic historical events.

[57] Safety means more than immediate safety. It means being safe from events, risks and influences which may amount to violence as defined in the Family Violence Act,²⁶ and it also requires that a child is protected from short and long term influences and events which will impact adversely on the overall development of a child. What the section does not mean is that a risk of accident or hardship must be excluded. To require this is to exclude from the lives of children the chance to overcome adversity. The principles of safety include facing of risks where responsible caregivers guide, support and assist a child to conquer challenging situations. In this way, a caregiver who does not have the capacity or chooses not to offer this assistance, may be doing something different from ensuring safety. That caregiver may be excluding experience in the care of others where a child may gain essential value, while also needing assistance to manage. If anxiety and fear reduce the capacity of a caregiver to enable a child to experience important relationships, this is not protecting a child's safety. Rather, it is rendering a child vulnerable to disproportionate reactivity when faced with difference, or the thing that the caregiver fears.

[58] It follows from this analysis that a central question for the Court in the COCA application in relation to [Damian] is whether the paternal grandmother is protecting [Damian]'s safety by resisting contact with the mother which is unsupervised, or overnight. The grandmother and Oranga Tamariki social worker both spoke of the need to eliminate the risk to [Damian] that his mother would physically injure him, as had occurred to [Jordan]. To focus only on this aspect of safety is to limit a focus to the immediate protective obligation when ensuring the welfare and best interests of a child. This narrow view may expose other threats to safety.

The mother's development and capacity – her own story

[59] The mother's evidence spans every step of the proceedings. She has been constant in her desire to secure the return of the boys. It is important to consider the mother's evidence because the prospects of success for her applications depend on the

²⁶ Section 5(a) Care of Children Act.

Court concluding that she does not pose a risk to the boys, and, moreover, she can and will commit to parenting one or both of them safely, in the context of her home with the two younger boys. This case is about the mother's capacity to parent. Therefore, themes of criticism of the mother must be considered and resolved.²⁷ She has denied injuring [Jordan] in 2014. Although she was initially convicted of hurting him, that conviction was set aside. It is not possible at this distance to know what occurred. However, her distress at the death of the father of [Jordan] set the tone and effects of the following two years. She has attempted to persuade Oranga Tamariki that any of the concerns can and have been addressed. There was a period when Oranga Tamariki changed the goal in favour of a return home. Prior to this the goal was home for life and contact at three monthly intervals. The change in goal and change back was necessarily confusing for boys and their caregivers.

[60] For [Damian] there was a goal to settle him in his home for life when he was 10 months old. His grandparents were, at that time suggesting that they would look after him until he no longer needed that. But Oranga Tamariki proposed that they apply for home for life status. [Damian] had been removed from his mother's care pursuant to the subsequent child legislation,²⁸ but she had been constant in her desire to have his return. Although the relationship with [Damian]'s father continued for too long, the mother did end the relationship, at some time around the conception of [Brett], and there is no evidence she has reconnected with him. There is little doubt that it will have been difficult for the services and for Oranga Tamariki to establish good relationships with the mother when [Jordan] was first in the Ministry's care. She was highly distressed by the death of the father of [Jordan], and by the danger and violence in the relationship with [Damian]'s father. She brought the effects of profound trauma and adversity in her own youth. However, since the application for declaration has been made there is no evidence that the mother has been a difficult litigant. She has been constant, persistent, reliable with contact, and focussed on her own goal. She has set about years of self-improvement, not only because the Ministry required it, but because she perceived the need for it.

²⁷ Some repetition of topics in the evidence appear here, sadly. These detailed matters require consideration in different ways.

²⁸ Section 18A-D Oranga Tamariki Act. I note that removal of a child is not mandated. Care and Protection proceedings are mandated. There was no evidence that this difference was considered by the Ministry.

[61] Counsel for Oranga Tamariki and for both boys criticised the mother for not leaving [Damian]’s father sooner, and for actively exposing [Jordan] to danger. It was put to her in a variety of ways that she failed to protect [Jordan], in an active way. While it cannot be doubted that her remaining with [Damian]’s father exposed [Jordan] to the injuries he suffered, it is too simple to conclude that she actively failed to protect him.

[62] For a reason which is still unknown to this Court, that information which the High Court found sufficiently compelling to set aside the mother’s conviction, had not been disclosed to Oranga Tamariki and nor had the affidavit evidence been provided to the Court in the litigation related to [Jordan] and [Damian], or to Ms Orr. It is unfortunate, because some of the difficulties which have arisen related to suspicion of the mother’s action in relation to [Jordan], could easily have been put to rest. As Ms Orr commented, the Court ought to have put that matter beyond doubt, prior to the psychological assessment being undertaken. I accept, as did Ms Orr, that the evidence provides a credible account of the circumstances of [Jordan]’s injury, and that the mother acted to ensure his injury was attended to. I reject the suggestion in the evidence through cross-examination by the Ministry, that the mother had prioritised her relationship with [Damian]’s father over the safety of children. I accept the mother’s evidence that she was terrified to leave, that she was constantly monitored by [Damian]’s father when interacting with Courts, lawyers and Oranga Tamariki, and that he threatened to kill her if she talked honestly about the violence and abuse both she and [Jordan] sustained.

[63] It is important to note that although some of the questioning of the mother was scathing, the paternal grandmother, who is no supporter of the mother in many ways, was asked to join the criticism of the mother. Her reply is important:²⁹

Q. Do you feel a level of disappointment with [Kendra] that she didn’t take her children as you said you took your child out of that relationship?

A. No, it’s the opposite, I actually feel rather protective of her because having been through it I don’t want her to go through it like I say again. Hopefully never again, but to go through it, so it’s more of a protective, I am protective of her I think more of it than, yeah.

²⁹ NOE, p 309, line 5-14.

Q. So you can understand how she might have felt when she was in that relationship?

A. Mhm, very vulnerable.

[64] The challenge to the mother's capacity to protect the children from violence, and the risk that the mother was herself violent to the children, was an unhelpful distraction in these proceedings. It had been agreed, prior to the hearing, that the issues centred on psychological risks to the children if they were returned to the mother. The Ministry pursued the issue of the mother's culpability in relation to [Jordan]'s injuries, and the onwards resulting risk of injuring other children, in a way which was both unhelpfully irrelevant, but more importantly so aggressively challenging of the mother, that her uncomfortable position in the witness box was made significantly worse. It is disquieting that this adversely effected the mother's capacity as a witness. The cross-examination portrayed too little knowledge on behalf of counsel of the sequelae of intimate partner terrorism, which is what the mother described, and which is consistent with contemporaneous police and criminal history data.

[65] Another theme which emerged from the mother's evidence, which counsel emphasised, was the mother's poor recall. A number of her supporting witnesses denied that they had experienced her having a poor recall. Most saw her as more reliable about attending meetings and completing actions than they expected, or than they were themselves.³⁰ A careful analysis of her answers that she did not recall something, show that they divide into three separate categories. The first relates to low recall of traumatic incidents. Ms Orr referred to that as being a likely consequence of the trauma. These answers related to timeline details during the relationship with [Damian]'s father, some contextual information related to her own schooling, and early offending while in a Mental Health Hospital. The second category relates to details which, it appears to me, are likely to be forgotten, and are not important. Most pointed is her failure to recall the date when [Brett]'s support order was discharged.

[66] The third category relates to a few matters where it was notable that the mother could not recall. The mother's frequently expressed word pattern was "not that I recall". At times, she appeared to be trying to be polite, or trying to be helpful. At

³⁰ NOE, Ms [Thornton] page 117.

times, it appeared she genuinely had no detailed recall. The two matters where it may be that the mother used her word mannerism to deflect an answer related to her asking a supervisor not to comment on one matter.³¹ The other matter occurred when asked whether she said to a supervisor that [Jordan] would be her helper.³²

[67] The first two categories of incomplete recall are explained and do not assist me to weigh the mother's reliability. The third category is relevant. It is concerning that this apparent lack of transparency, consistent with the observations of Ms Orr must cause caution in reaching a conclusion that the mother would in the future seek assistance and support if the parenting stresses began to mount.

[68] There are other ways in which the mother's truthfulness and capacity to give a full and clear account of herself was challenged. The circumstances of the relationship with the father of her youngest child, was a cause of concern. At the time of conception, the plan for [Brett]'s care included a commitment by the mother to tell Oranga Tamariki if she was entering into a new relationship. The mother's evidence was that [Ed]'s conception occurred from a contraception failure. She told her cousin, [Denise Medina], how surprised she was to find herself pregnant. She advised Oranga Tamariki as soon as she was pregnant, but by then the relationship, such as it ever was, had ended. The mother came in for serious criticism about not informing Oranga Tamariki about the father's identity until a month before [Ed] was born. It was a reasonable expectation given that [Ed] was another subsequent child, technically, and the identity of the father was important in considering whether the Ministry would take steps. However, I note by then that the Ministry did not have formal involvement with [Brett].

[69] In relation to his care, however, it is hard to tell what Oranga Tamariki would have or could have done with the information. The mother concluded that the father was not a good bet, as a parenting partner.³³ He has not become involved. It seems her judgement about his commitment to the role of parent was a fair one. It is optimal for children that both of their parents are involved responsibly in their care. The reality

³¹ NOE, p 28, line 22 and supplementary bundle 2, p 220.

³² NOE, p 31, line 6; and Ms [Russell], the supervisor, NOE 249, line 30.

³³ NOE, p 22, line 23.

is, however, that often fathers of children born after casual sexual contact do not become long term parenting partners. There was never a family group conference called, there was no identified action by Oranga Tamariki in relation to this pregnancy, and by the time [Ed] was born the support order in relation to [Brett] was discharged. Had the concern about [Ed]’s father’s identity had the same level of concern when [Brett]’s support order was discharged, it is difficult to believe that the Ministry would have sought to discharge. In this way the Ministry’s criticism in the evidence before me ramped up an issue which had not previously bothered the Ministry.

[70] By the time [Brett]’s support order was discharged, also, there was a return home goal for [Jordan] and [Damian]. Although the latter was short lived, I can make no sense of the Ministry’s concern that the mother did not identify the father. I do not consider that this amounted to a lack of transparency. What we know, now, about [Ed]’s father is that he was making a pest of himself early in 2019, when [Ed] was a newborn, and the mother went to the police.

[71] If communication within the Ministry was not adequate for the news of the mother’s pregnancy to be given to both the social worker for [Jordan] and the social worker for [Damian], that cannot be laid at the feet of the mother. She took advice, she went to the social worker for [Brett], with Ms [Thornton], an advocate from a community organisation, and told the social worker. The record within Oranga Tamariki is that that conversation occurred about May 2018.

[72] The fact of the mother’s pregnancy properly caused some concern about her capacity to cope, and the wisdom of her judgements. However, it appeared that the mother’s evidence that the pregnancy occurred by contraception failure was either not communicated to the social worker, or not recorded. She had mentioned to a member of her support team that she had had a condom failure. It is difficult to understand why, during the pregnancy, that issue was not checked. It is not a realistic expectation that the mother will not be sexually active ever. It is a realistic expectation that she will plan her fertility. This mother has felt endlessly scrutinised. It appears to me that it is not particularly surprising that she limited the information given to the Ministry. The Ministry may have been fairly concerned that [Ed] is a full brother to [Brett], and

therefore that the relationship with [Damian]’s father had begun again, but that was not made specific.

[73] Ms Orr addressed the concern about the mother’s pregnancy.³⁴ It appears probable that the mother did not disclose a contraception failure to Ms Orr. Ms Orr raises an entirely reasonable concern about the mother’s impulsivity, and lack of understanding of consequences. The relevant question now, for this Court, is whether this impulsiveness remains a risk, whether the mother has enough taught skills combined with enough personal support to continue to embed her skills, enough to avoid impulsive action, which has far reaching consequences. There have been no examples which are obvious to the Court that there have been impulsive errors of judgment with far reaching consequences since the start of the mother’s pregnancy, now more than two years ago. With the history of the mother this is a short time. But she has been successful and impresses with capacity to sustain habits and behaviours.

Oranga Tamariki evidence

[74] The Ministry case was presented by two social workers, Ms Seiuli-Boysen and Ms Round. Because the boys have been cared for in two different regions, they have had two different social workers. The social workers have taken different views and have not coordinated with the third social worker who was involved until August 2018. This lack of cooperation and communication has impacted poorly on the children. An application of the legal principles requires cooperative work in strengthening the family. [Jordan]’s social worker has not seen the mother since the move by the mother to [location B], except for one occasion when she brought [Jordan] by air to [location B]. That was in the early days of his visits to this mother; she commented positively on [Jordan]’s connection with his mother. The social worker has seen [Jordan] with his caregiver, and in chorus with everybody else, is confident that [Jordan]’s caregiver’s contribution to his wellbeing is constant, mature and enormous. However, this level of engagement with the mother, in light of the return home goal during 2019, and the extent to [Jordan]’s connection with his mother as described by Mr Orr in repeated reports, has been insufficient. Because the circumstances by which [Jordan] was injured was not fully explained to Oranga Tamariki, Oranga Tamariki was likely

³⁴ Report of August 2018, bundle 869 at 27.

to continue to be concerned. But concern did not lead to curiosity when the mother filed affidavit evidence that her conviction had been set aside. Cross-examination by counsel, by which the Ministry's point of view in relation to the risks the mother posed, appeared to be relying on outdated data.

[75] This insufficiency of information and of continued cooperative work with the mother highlights a common problem with children who are in Oranga Tamariki care. Because the child is the client of the social worker, and because there does not appear to the Court to be a full understanding of how a child's mana is essentially intertwined with the wellbeing of whanau, the pathway for a child to retain mana tamaiti is narrow and difficult.

[76] The Ministry social worker for [Damian] has been in a position to see much more of the mother, and to consider for herself the benefits for [Damian] of the contact with the mother. Ms Round has seen [Damian] with his mother once in the last 12 months. Again, this is inadequate for a social worker with statutory responsibility as custodian for a child to take a full and rounded position in relation to the future care of the child. [Damian]'s mana is entwined with his whanau, both maternal and paternal. As with the [location A] social worker, Ms Round was proceeding on out of date data, and did not share the view, which had been advised to the Court, and upon which other counsel conducted this case, and upon which the High Court had acted, that [Damian] was not at risk of physical harm from his mother. She did not consider the mother's application with curiosity or recheck her own view in light of the advice of Ms Orr.

[77] Although Ms Round has kept contact with the paternal grandmother caregiver in a helpful way, the whole needs of [Damian] required, in the Court's view, a greater consideration of his wellbeing. There is insufficient evidence that the Ministry has acted on its obligation in terms of s 4(1)(c) and (d) and 4(2) OTA.

[78] Leaving that to one side, the social worker's evidence was, overall, not particularly helpful. While her clear and fixed view about physical risk was well expressed, it was not well based on contemporary data. Ms Round's evidence did not portray an adequate understanding of the importance for [Damian], in his life-course,

of the relationship with his brothers. The availability for [Damian] to have contact with [Jordan], whenever he was available in his mother's care, was not sufficiently resourced. The evidence is incomplete in terms of efforts made for [Damian] to enjoy the relationship he had with his full brother, in the context of the grandmother's care. These are matters which ought to have been progressed, because whatever the outcome of the litigation, the sibling relationships will remain important.

[79] The other part of the Ministry evidence came primarily from two Oranga Tamariki employees who supervised contact in the mother's home, and members of staff at a social agency, [the family support and counselling service], which offers supervision of contact. The two Ministry employees were generally responsible for the long contact visits which occurred at the mother's home in [location B] over a five hour period. These were sometimes with three boys and sometimes with four.

[80] Ms [Tui] supervised on seven occasions between September 2019 and February 2020. Her concerns recorded in the supervised contact reports were:

- A lack of ability to control the boys while on outings.³⁵
- Cluttered play space leading to [Damian] stepping over [Ed] and knocking him down.³⁶
- Mother cutting [Damian]'s fingernails when his grandmother had asked that not happen, because of ingrowing nails.³⁷
- [Brett] being loud, defiant and not responding to the mother's discipline.³⁸
- After an accident when [Brett] slips off [Jordan]'s back, [Jordan] was disproportionately upset, and barricaded him in his bedroom.³⁹

³⁵ Supplementary bundle 2, p 220 – four children.

³⁶ Supplementary bundle 2, p 246, contact 20 December 2019 – three children.

³⁷ Supplementary bundle 2, p 255, contact 21 February 2020 – four children.

³⁸ Supplementary bundle 2, p 256, visit on 21 February 2020 – four children.

³⁹ Supplementary bundle 2, p 256, visit on 21 February 2020 – four children.

[81] During cross-examination, Ms [Tui] confirmed her concern about the general loudness of contact, the degree to which the tone and sound rose in stressful times, and the degree of inconsistency between the mother's verbal instructions and her securing the child's compliance. This particularly related to requiring the children to sit on a particular chair, the thinking chair, which was used a disciplinary measure, akin to timeout.⁴⁰ Ms [Tui] commented particularly that [Brett] struggled to manage his behaviour through this period. [Brett] was then between [two years] and [three years] old. [Brett] was used to being an only child in the household, and the overall impression of the supervision of contact records leads to a conclusion that [Brett] was struggling to manage himself in an age appropriate way, but more so, Ms Orr observed that [Brett] was a high maintenance child. The mother has sought some behaviour management tools through his kindergarten. Ms Orr referred to some of [Brett]'s behaviour as an age and stage thing. She acknowledged that his struggles were also at times related to the additional children. As Ms [Tui] said, [Brett] takes up most of the time with his mother, that her time is mostly focused on [Brett] really.⁴¹

[82] By contrast, when [Damian] was the focus of correction by his mother, he did largely comply with her instructions to sit on the thinking chair, and accepted correction.

[83] On one occasion when [Jordan] dropped [Brett],⁴² when the boys were roughhousing, Ms [Tui] was asked more about the mother's behaviour. She described that the mother initially reacted with eyes bulging,⁴³ and then [Jordan] flinched and turned around and took off to his bedroom. No one was hurt, and [Jordan] emerged after a quarter of an hour or so, but this was a difficult incident for [Jordan]. It is difficult to make sense of his flinch and Ms [Tui] could not offer any comment.

[84] On 6 March 2020, Ms [Tui] supervised the three boys at the mother's home in [location B]. During the five hour visit, the extensive notes taken at the time portrays that [Brett] was on the thinking chair three times, and although he was noisy and protesting, he did settle a bit, and the intervention portrays that [Brett] was beginning

⁴⁰ For example, see NOE p 378.

⁴¹ NOE p 385, line 15.

⁴² 21 February 2020, Supplementary bundle 2, p 255.

⁴³ NOE p 390, line 1.

to learn the thinking chair. Although [Brett] was very challenging, his mother took time to insist on some behaviour, which he was praised for. [Brett] was still intrusive on his mother's times with [Damian]. This is not behaviour which was recorded by the [family support and counselling service] supervisor, Ms [Maxwell], who supervised also in February and March 2020, but she was not later questioned about whether she observed some similar behaviour. She did not record it, nor was she concerned about the quality of behaviour or discipline matters. It is a pity, because it appeared that Ms [Tui] had found the supervision trying. It was not made clear to the Court whether there were differences between Ms [Tui] as an employee of Oranga Tamariki, and Ms [Maxwell], as an employee of [the family support and counselling service], and whether they had different trainings, or expectations, or debriefs.

[85] Overall, the criticism related to inconsistency about maintaining compliance with sitting on the thinking chair. While it is not the Court's area of expertise, [Brett] was very little to be expected to positively respond to that mode of discipline. Others who have observed [Brett] with his mother at music, in her home, and at various interventions with support services, have not raised a concern that [Brett] has been too active or difficult to control. On occasions, others have observed that he has been good at complying with his mother's safety instructions.

[86] The other Oranga Tamariki supervisor was Ms [Russell]. She supervised on 17 occasions between 5 October 2018 and 12 July 2019.⁴⁴ The concerns she noted were as follows:

- [Jordan] being helpful for his mother after getting over arm surgery.⁴⁵
- Some frustration when the boys were demanding things at The Warehouse.⁴⁶
- Inconsistent follow through with timeout.⁴⁷

⁴⁴ Ms [Russell]'s reports appear at the further supplementary bundle and in the second supplementary bundle.

⁴⁵ Supplementary bundle 2, p 297, 31 May 2019 – four children.

⁴⁶ Supplementary bundle 2, p 293, contact on 26 July 2019 – three children.

⁴⁷ Supplementary bundle 2, p 300, visit on 12 July 2019 – three children.

- The mother being distracted by external events, her worries about [Damian]'s multiple dislocations of his elbow and receiving correspondence from her lawyer – the mother became distracted for about 15 minutes but kept herself together.⁴⁸
- Difficulty controlling the boys on an outing.⁴⁹

[87] Ms [Russell] was critical of the mother's degree of engagement with the children, referring to her not spending individual time with each child, and not playing with the children. This evidence was in contrast with all of the other supervisors who referred positively to the mother's engagement with the children, and her capacity to give proportionate amount of time to each child, prioritising the needs of each.

[88] The reasons for the supervision reports is to ensure the recording of events, both positive and negative, during contact. Inevitably, during the course of the hearing there was more concentration on the negative events than the positive events. Of importance, is that on the majority of occasions with Ms [Russell], there were no concerns. On two occasions, Ms [Russell] coached the mother with a strategy which she adopted, and things went well. On one occasion, 22 February 2019, Ms [Russell] and the grandmother made a practical suggestion which the mother did not follow, and the concern was a significant one related to safety, both of [Damian] and [Brett]. The mother was not across keeping them safe in a carpark, and [Brett]'s behaviour was dangerously escalated. That continued for some time, the mother expressed concern that the supervisor would be critical. Also of concern was that the mother reported how [Jordan] had helped during the last visit, and that in future he would be a great help. The mother denied saying this. It is improbable that Ms [Russell] would make this up, and I accept her evidence. I also consider that Ms Orr's observation was helpful to make sense of this, that at times the mother was so defensive about criticism that she could not accept helpful suggestions.

[89] However, on an overall consideration of this evidence, bearing in mind that [Brett] was two and [Ed] a newborn, some things emerged. The dynamics were

⁴⁸ Supplementary bundle 2, p 244.

⁴⁹ Further supplementary bundle, p 167, contact on 22 February 2019 – three children.

difficult. [Brett] struggled with a change from being the older boy to being in the middle. [Brett] was, as has previously been observed, displaying very needy behaviour. The mother made some choices in her planning which did not go well. The mother sought help and learned from the help. In oral evidence, Ms [Russell] was critical that the mother was not playing with the children much and compared her own approach to parenting to that of the mother, in saying that she would have been outdoors kicking a ball with them, rather than just sending them outside. She also commented that [Brett] was very full-on, that [Brett] was at times just tired, or out of sorts, but generally Ms [Russell] was concerned about the mother's inconsistency.

[90] Ms [Russell] was specifically asked about whether the mother's behaviour appeared to rise in terms of her emotional tone. Ms [Russell] said that she only heard her raise her voice but did not see her clench her jaws or fists, or anything like that.⁵⁰

[91] The one occasion of real concern occurred when it seemed that [Brett] had bumped newborn [Ed] who was settling for a feed. The mother was upset, [Ed] was crying, and the supervisor, Ms [Russell], recorded that she lunged at [Brett]. The mother said she did not, that he was standing very nearby, because he had just dropped a toy on the child's head. I accept that the mother was upset. Ms [Russell]'s evidence was as follows:

He was in front of her and then when he raced up and hit [Ed] on the head, she yelled out, [Brett], and I jumped, and she swooped in and grabbed – she lunged at him and grabbed the drill off of him. ... She lunged forward from her seat.⁵¹

[92] Ms [Russell] said that the mother swiped the toy away from [Brett], and with force. The mother then asked Ms [Russell] to hold the baby while she sorted out [Brett] and got a bottle. Ms [Russell] was concerned about the mother's reaction, and her incapacity to manage that event. The mother said there was another pair of hands present, and "I used them at a difficult moment".

[93] The Court is concerned that the language used appears to portray concern at a high level. This event would have been disturbing for everyone. However, [Ed] was not injured, and I am unable to conclude that the mother asking Ms [Russell] to hold

⁵⁰ NOE p 344, line 17.

⁵¹ NOE p 346, lines 7-20.

the baby was so unreasonable that the Court ought to consider it as an exemplar that the mother could not cope. The mother denied lunging – she said that she was in a deep chair, ready to feed [Ed], and that she leaned or stretched forward to move [Brett] away, to keep [Ed] safe. The mother’s actions would have been swift. If the concerns here turn on the intensity of the mother’s reactions, then it is marginally worrying. [Brett] was learning to be a big brother. He had been disturbed and disrupted because mum was often absent while [Ed] was ill as a new-born. It may be that the overall concern about the mother’s physical safety with children infected the judgment of the supervisor. This occurred at a time the social worker believed that the mother was at risk of physically injuring the children.

[94] Of more concern in relation to this event, was that the mother talked about a plan she had that evening to go and spend time with a friend who was [job deleted]. Ms [Russell] described that the mother planned this, because Plunket told her that things would be very full-on when the boys returned, and she needed to have some time for herself. She was planning to go out for a drive with the [friend]. There was no conversation about whether this was a romantic engagement, but Ms [Russell] drew an inference that the mother was romantically interested in this person. Two things are of concern about this. First, the mother talked about this in the presence of the children, when really, she did not need to. The second is that the mother denied any involvement or intention to do this when she gave evidence. I accept Ms [Russell]’s evidence. It appears more likely than not that this planned event ties in with her conversation about a man called [name deleted] who [job details deleted].

[95] This has minor importance as an event where the mother’s plans were discussed in front of the children, but it has no more importance than that. The mother’s denial in evidence also raises some minor concern. However, because [Ed] got bumped, the mother did not, in the end, go.

[96] The other supervisor retained by Oranga Tamariki was [Amber Maxwell], a supervisor was employed by [the family support and counselling service]. Her reports and those of others employed by [the family support and counselling service] span from May 2018 to March 2020. She filed her evidence in support of the mother and was called on her behalf.

[97] Of all of the supervisors, Ms [Maxwell] was involved over the longest period of time. [The family support and counselling service] supervised more visits than any other agency or individual. This appears important, because [the family support and counselling service] were in a position to consider changes in the mother's tone, management of challenging issues and capacity to address the dynamic between the boys. This latter matter appears to the Court to be the most important matter in focusing on the overall issue, which is the mother's capacity to manage an additional child. Ms [Maxwell] supervised the boys in the latter half of 2019, often away from the [the family support and counselling service] professional rooms, generally at [a museum]. She consistently observed good boundaries, safe management across roads and walking to and fro, clear expectations around overexcited play, sharing toys, tidying up and keeping to the toileting routine. This is constant, week by week reporting.⁵²

[98] There are two reports from 2020. One report from 28 February retains the same level of observation around boundaries, routines, parental authority and the happiness of the boys.

[99] The visit on 13 March 2020 notes the mother requiring [Damian] to apologise to the supervisor for being rude and following through until an apology was given. On one other occasion in February 2020,⁵³ Ms [Maxwell] noted the mother's good handling of [Brett] being grumpy. Although the other boys had an ice cream treat, [Brett] was not having a good day, and his mother withheld the treat. Ms [Maxwell] said:

Mum handled the situation really well, sticking to her decision even though he was very upset and continued to be so for the last 10 minutes of the visit.

[100] Ms [Maxwell] was asked in Court about the mother's appropriateness of behaviour in correcting the children, and instructing them, and raised no issues. The supervisor confirmed she appeared to have some plans for management of routines and discipline, that she was organised, and that the children enjoyed their time

⁵² See bundle volume 5, between 597 and 635. There may be reports from Ms [Maxwell] in 2020, but due to complex issues with accessibility to 1500 pages in the bundle, those are not easily retrieved.

⁵³ 14 February 2020, Exhibit Q.

together. In assessment, I note that Ms Orr also confirmed the children's enjoyment of their time together.

[101] During the evidence I asked Ms [Maxwell] directly about the mother's struggles to provide proportionate time to each child. She saw that [Brett] had struggled a bit to get attention from his mother, but that this was not out of proportion.⁵⁴ Ms [Maxwell] also observed that she thought the issue with [Brett] was an age-related thing. Ms Orr also commented in relation to that. The events where Ms [Tui] and Ms [Russell] described that difficulty, all occurred at the mother's home. It is unclear whether that difficulty is primarily a home related one, which the mother manages more directly when they are out, which is plausible.

Witnesses in support of the mother

[102] A number of the agencies who had supported the mother since arrival in [location B] in 2016, filed affidavit evidence. Four gave oral evidence in support of the mother, Ms [Hudson], Ms [White], Ms [Thornton] and Ms [Terere]. Ms [Terere] had been employed to supervise contact through [the family support and counselling service] but had since left [the organisation]. Her evidence was largely consistent with that of [Amber Maxwell]. She raised some concerns about early transition matters, where the grandmother was worried about [Damian]'s safety, or whether he was well, and the degree to which [Damian] became upset. The grandmother also alleged to Ms [Terere] that the mother had been whispering in [Damian]'s ears when changing his nappies. Ms [Terere] was clear that had not occurred.⁵⁵

[103] Ms [Thornton] gave evidence that she had been an advocate between the mother and Oranga Tamariki in her role for the [kaupapa Māori service]. She considered the mother had managed the acquisition of her skills well, that she managed interaction with the Ministry well, and in particular, that she followed the plan in place around [Brett]. There was that involvement with the Oranga Tamariki site in [location B] until August 2018 when the order was discharged. She considered that the mother managed to bring issues of concern to her well and check for reassurance that her

⁵⁴ NOE p 377, lines 20-30.

⁵⁵ Report at bundle volume 5, p 592.

approach is appropriate.⁵⁶ More recently, Ms [Thornton]'s engagement focused on the Whare Tapa Wha model of wellbeing, rather than children issues, which were being managed by others. She had observed the mother with [Brett] and [Ed] at appointments, at times, and held no concerns. Ms [Thornton] addressed the issues around the pregnancy with [Ed] and the need for the mother to take care meeting new people so as to assure the boys safety. Ms [Thornton] was confident that the mother had learned from issues relating to the pregnancy with [Ed] and the need to focus on the boy's safety. Ms [Thornton] was asked about the concern expressed by Ms Orr that the mother had told some information to some people and some to others, leading to a lack of transparency. Ms [Thornton] conceded that that had occurred within the professional group but did not consider that it had occurred within the home-based support group. Ms [Thornton] had met with them, specifically, to assist to establish a timetable for support during the fixture, when she would be in Court for two weeks. Ms [Thornton] however, denied that she had experience of the mother putting pressure on anyone to say or write things that would help her out.⁵⁷

[104] Ms Margot [White] was also called for cross-examination in relation to her evidence. She had been working through the agency Jigsaw.. Under Ms [White]'s responsibility, the mother attended Incredible Years, and made measurable progress using the EYBERG Child Behaviour Inventory. That reported improved child management, improved parental attitudes and behaviours. The mother also completed a one-one-one therapeutic programme called MAPPS, and Wellness Recovery Action Plan (WRAP), a programme called Building Awesome Whānau in August-September 2019 and attended frequent in-home social work and coaching visits from Jigsaw. Ms [White]'s evidence also covered the work done with two others at her organisation – Ms [Womack] who delivered the MAPPS programme and Ms [Dora Gimond] who was a key worker in the Family Start programme.

[105] Ms [White] was unable to find case note references to issues which had worried Ms Orr, about a plan to leave [location B], about a romantic liaison with [her friend] or about a desire to have a daughter. Although these matters were a concern for Ms Orr (see below) the primary data available is not reliable. The documentation of meetings

⁵⁶ NOE p 114, line 30.

⁵⁷ NOE p 122-123.

and consultations is so vast that had these been matters of significant emphasis or focus, they would have been recorded. Ms [White] was clear that the relationship which her organisation had with the mother included dealing with challenges to the mother and her response, and capacity to develop through those challenges

[106] Ms [White] had been in a supervising position at Jigsaw through the relevant period. She had access to case notes from before she was in that position. In her evidence she said:

We talked yesterday about occasions where [Kendra] had reacted and become emotional or, you know, elevated about particular issues and every single one of those occasions we saw as a teachable moment and responded accordingly and so rather than there being a single case note that evidences that, that was an ongoing process which his often the way that change happens, by kind of incremental steps and those opportunities as they arise. So I feel that we can, you know, we hold by our initial report that we have evidence, incremental improvement over a sustained period of time on those issues, yeah, and the reason that [Kendra] sometimes became elevated or upset with us was because we were confronting some of those behaviour issues, so with good outcomes, yeah.⁵⁸

[107] The mother's [relative], Ms [Medina] supported the mother in a personal capacity. She and the mother grew up together, had lost touch over a number of years and had each had relatively parallel struggles with parenthood and with abusive relationships. She reconnected with the mother at the time of the mother's move to [location B]. She lives in [location deleted]. The two [relatives] visit one another when they can, shared Christmas and holiday time, and are in touch about personal and parenting issues. Ms [Medina] was an impressive witness – thoughtful, articulate, compassionate, and, as she impressed me not a person to offer support where she could not do so with integrity. She is employed in a responsible position. Ms [Medina] was asked in some detail about her knowledge of the mother's attitudes related to [Ed]'s father. This theme remained important because that pregnancy suggested that the mother's capacity to make wise decisions while trying to secure the return of [Damian] and [Jordan] was compromised. Ms Lohrey was cross-examining her, and she said this:

Q. After [Kendra] became pregnant with [Ed's father], did she indicate to you whether she was interested in pursuing a relationship with him?

⁵⁸ NOE p 156, line 22.

A. Yeah kind of, like she would have liked to have that whole you know mum, dad, kids, kind of thing, but I think he just didn't fit into what was going on with her at the time as well you know with trying to get the other kids back and that. So she would've wanted to have you know him stick around and probably be man up and take care of them, but it wasn't only just kind of her and the one she was pregnant with, there was like the rest of them too so.

Q. That made it more difficult?

A. Yeah, I think for him to be able to step up and actually be there for her and the children.

Q. What do you understand the reason to be that [Ed's father] isn't involved still with [Kendra] and the children?

A. Because I think she realised that he wasn't, you know, he was kind of more – as time went on and the pregnancy he was more needy and kind of acted like a child too towards her than kind of taking care of them. She was more taking care of him in a way, like, which is something that she didn't really need.⁵⁹

[108] Ms [Medina] was also questioned about her observations about the mother's stress, her coping with stress, challenge and disagreements. Ms [Medina] considered the questions carefully, and firmly stated her opinion that the mother and she could disagree, talk things over, and either find middle ground or agree to disagree. She rejected the suggestion that she was assisting and supporting the mother because of pressure from the mother. She commented that the stress which the mother demonstrates relates to how strongly she wishes to have all her children together with her. She suggested that the mother would feel complete, once all her kids were with her, and that she would manage fine. Ms [Medina] drew an example of how she had struggled within her own whanau to secure the care of her oldest [child], after an abusive relationship had exposed that child to adversities. This is credible evidence. Ms [Medina] has a long history with the mother, understands her traumatic background, and the whanau context for that, and has herself chosen to offer substantial support to the mother. She reflected also on the mother's capacity as an older [relative], to organise, entertain care for and hang out, within the whanau and friend group, when they were all children.

[109] The mother's friend Ms [Emma Shelton] also gave evidence. This was an almost insurmountable challenge for Ms [Shelton]. She presented as overwhelmed and unwell. Since December last year, the mother had almost no contact with [Emma]

⁵⁹ NOE p 174, lines 17-175.

and her husband. The mother said in evidence she perceived that [Emma] had her own issues and needed space. It is obviously true, at least in terms of the Court attendance. But [Emma] did accompany the mother, [Jordan] [Brett] and [Ed] to the tangihana for [a relative] last year. This journey was enormous. It was important for the children, and very important for the mother. Despite the trauma of her upbringing, [the deceased relative] had been a firm stable supporter. [Emma] had offered to drive the mother and children. There is no doubt cast by the Ministry or anyone else that this journey was important for the children. It went well. It was enriching for all, as [Emma] observed it.

[110] There is a residual concern for the Court about how wise it is for the children to become deeply involved with [Emma] and [Dean Shelton]. It seemed to me that the mother's connection with Mrs [Shelton] was stronger than the children's. They have their own needs. They are childless and loved taking a role as "Nana and Poppa". Mrs [Shelton] impressed as having so many of her own needs that the mother may, in due course, experience that her needs outweigh those of the children or the mother for that support from a member of an older generation.

The evidence of the grandparents

[111] Both grandparents swore affidavits and gave oral evidence. They are dedicated to [Damian]. They live [details deleted], where the grandfather works [occupation deleted]. The mother's daughter is close to her mother. She and her husband reside in [location A]. The grandfather has family nearby, in [location B] and in [another close-by location]. They are not biologically related to [Damian].

[112] When [Damian] was an infant the grandparents stepped in and agreed to care for him for as long as was required. Later, the Ministry decided that their care would be his home for life. They accepted this. The grandmother gave evidence that she was required to choose between [Damian] and her links with the mother. She chose [Damian], (as Ms Orr said, correctly). This stark choice was not necessary and was not good for [Damian]. It appears to have entrenched an outdated view of the mother and become a reason for ongoing mistrust, which is fundamental.

[113] When the Ministry decided during the middle of 2019 that there was no longer a return home goal, the grandparents then applied for orders under COCA. As set out above, the applications under COCA can only be considered once the Court has discharged the orders under OTA. The Court must be satisfied that the mother is unsafe to care for [Damian] before the COCA applications can be considered on their own merits. Although the test for discharge of the OTA orders is wider than this, when combining the issue of an application to discharge OTA orders, and thereby finding that the child's wellbeing is advanced, the Court must find that exclusion of State intervention in a child's life poses a risk to the child's safety.

[114] Issues have arisen with the care offered by the grandparents. Ms Orr described these issues as related to permissive parenting. It is not ideal. These concepts are well versed in the Family Court and were not contested. Authoritative parenting is the better approach, and one likely to reduce life course risks of adverse developmental challenges in childhood and adolescence. This is a set of concepts which may have not been familiar to the grandparents. The style of parenting by grandparents often is seen as having these permissive characteristics. Once these issues were pointed out to the grandparents, the grandmother undertook a parenting course. However, both grandparents confirmed in evidence before me that [Damian] rules the roost at their home. Ms Orr has foreshadowed a concern that some of [Damian]'s developmental progress has been slowed, as a result of environmental factors. These are factors at his home. There is no other plausible explanation for significant delays in toilet training and in development of clarity and fluency in speech.

[115] These are not factors which can have been significantly influenced by his mother. Ms Orr is satisfied that there are not genetic contributions.

[116] The issues with [Damian] developing his relationship more with the mother arose because of grand parental reluctance. Given the support the grandparents had from Oranga Tamariki in their stance about contact becoming unsupervised, and in their belief about the dangerousness of the mother, their concerns are not surprising.

[117] The grandmother has not respected the mother's role as Guardian. She was not named on kindergarten enrolment or at the medical centre. These are symbolic matters

and are important. It may be that the grandparents did not understand what they should do. Between them and the Oranga Tamariki social worker, however, these symbolic lapses convey a deeply concerning message.

[118] The mother and grandmother were asked to participate in counselling during the later months of 2018. The aim was to enhance their relationship. Although they attended one meeting, the progress was insufficient for the agency to continue. The grandmother struggled to participate tolerantly or flexibly. The mother managed somewhat better. The grandmother expressed her suspicion during oral evidence that the mother had had an opportunity to influence the counsellor. The social worker considered that the counselling had not gone well, and that the agency should have continued to try more, accepting there was likely to be a degree of hostility at the beginning. The grandmother's evidence portrayed insufficient appreciation of the importance of [Damian]'s mother and siblings. She expressed a wish to develop a relationship with [Brett], who is her grandson, but despite a paternity order naming her son as the father of the child, she does not appear wholeheartedly to accept that her son is the father.

[119] The grandmother's sorrow and shame at the behaviour of the father has undoubtedly influenced her attitude and her behaviour. But this does not bode well for [Damian] either. He did not choose his parents. The grandmother has not any reasonable contact with [Damian]'s father for some time. This unresolved relationship, which must carry grief and shame for the grandmother is an issue in the development of [Damian]'s identity. However, the grandmother's highly engaged relationships with [her daughter and son in law] do offer social and familial richness to [Damian].

[120] Both grandparents impressed the Court with having a relatively straight forward and simple view of the needs of [Damian]. They did not consider he needed a fully expressed relationship with his mother. I did not detect that they considered that the mother added much to [Damian]. This is in contrast with the psychological evidence, which refers to the mother as an important secondary attachment, and to the relationships with siblings as being ones which [Damian] enjoyed. The grandparents appeared to be neutral about whether the relationship for [Damian] and his brothers

continued. There was no commitment by them to making it happen. The occasions on which [Damian] missed spending time with [Jordan] were, considered from the outside, more than a regrettable omission. These were important occasions and should have been prioritised. In a similar vein, though more complex to achieve was [Damian] having the chance to accompany his mother and brothers to a tangihana for [the deceased relative] in the far north. The lack of support by Oranga Tamariki for these relationships has contributed to the fragility of the grandparents' approach.

[121] The grandparents were both questioned about the grandmother's health. She has been in remission from [details deleted], after treatment, for about three years. She said that it was dangerous treatment, which she may not have survived. She did survive. She believes that she has beaten [details deleted], and that she will stay well. She has recently missed a routine [x-ray], because she was too stressed fighting for the custody of her grandson.⁶⁰ Both grandparents were distressed when challenged about her life expectancy. Both believe that she will be fine. Perhaps the statistics do not present such a rosy picture. Undoubtedly this illness will be imposing a shadow on the peace of this household. It is unclear whether this stress affects the attitudes of the grandparents to the mother, or their approach to the parenting of [Damian].

Relationship between the mother and grandmother

[122] Ms Orr has observed that a continuing danger for [Damian] is the impact of the dysfunctional relationship between his mother and his grandmother. There is no doubt that the grandmother has had massive challenges since [Damian] came to her. She has had a life threatening illness. She has needed to address the awful reality of her son's behaviour. She has also needed to come to terms with her interpretation of a communication from Oranga Tamariki that in order for her to maintain the care of [Damian], she needed to eschew a relationship with [Damian]'s mother.⁶¹ The evidence has not been sufficient for me to conclude that that message was given, or in what form. It is sufficient, for the Court's purposes, that the grandmother considered that she received that message, and has acted on it. She has continued to act on it, notwithstanding unequivocal messages from the Court and from Ms Orr, and from

⁶⁰ Letter of oncologist, June 2020.

⁶¹ NOE p 684.

Ms Round and from the counselling which she and the mother attended in 2018, that [Damian] needs her to forge an adequate relationship with the mother. The mother has received the same message.

[123] Ms Round, as social worker for [Damian], said in oral evidence that she has continued to work with the grandmother to build insight into the impact of the relationship difficulties between grandmother and mother on [Damian] and on the grandmother's capacity to be inclusive and relaxed about matters with the mother. She conceded she could see little progress with the grandmother's attitudes, over two years of social work.

[124] This is not easy for either mother or grandmother. However, the evidence satisfies me that the mother has taken steps to be open and understand the proposition that [Damian] needs her to relate well to the grandmother. The report from the counsellor who undertook work to develop the relationships between mother and grandmother demonstrates that the mother was able to start to take positive steps.⁶² It does not demonstrate the same can be said of the grandmother. Ms Round considered that the counselling agency gave up too quickly, that there was bound to be hostility and negativity at first, but that [Damian] needed his mother and his grandmother to persist, with consistent support from the counsellor.

[125] Ms Round identified in her evidence that she perceived that was an urgent need for the relational work to be successful for [Damian]'s benefit. She believed she had done all she could to advance the way in which the grandmother interacts with the mother, so that [Damian] will be protected. Ms Round conceded there had been little progress over two and a half years. Ms Orr has been clear that the outcome for [Damian] if this relationship remains strained, uncooperative and so lacking in reciprocity that [Damian]'s worlds are kept separate, then the consequences for [Damian] mirror those where separating parents remain in a state of high conflict. Given that [Damian] is already vulnerable, because of his removal from his parents, the absence of his father, in utero family violence, it is difficult to understand why

⁶² Bundle p 458.

whānau would continue to assume the risk which arises from the lack of a respectful and reciprocal relationship between mother and grandmother.

[126] It does appear that the grandmother is less well-disposed than the mother to improving the situation. It appears that she has fewer personal resources available to do that. It appears that it remains too difficult for her to conquer her anxiety about the mother's contact with [Damian] to enable him to develop a relationship with his brothers, and with his mother. It appears that her fixed view that the mother poses a physical risk of the child mirrors the expressed view of the Oranga Tamariki social worker that the mother continues to be at risk of physically hurting her son. This bodes poorly for his future.

[127] Although the grandmother said that during the government lockdown for the COVID-19 pandemic response that the relationship with the mother was much improved by day to day chatter, the evidence of the grandmother did not portray an attitude favourable to the mother. She continues to believe that extended care for [Damian] by the mother is not advisable. She continues to believe that contact should be supervised, even although the social worker has now required that it not be supervised. She continues to want to delay [Damian] having overnight contact with his mother.

[128] Although it is a different matter, and a very sensitive one, the inability of the grandmother to perceive that the mother's role in the care of [Damian] will become pivotal if the grandmother is afflicted by her illness again, presents a stark complexity for the Court when assessing the comparative advantages of the care of [Damian]. The family's original Plan B was that [Damian] would live with the grandmother's daughter and son-in-law. This was arranged without consultation with the mother, and appears to have been supported by Oranga Tamariki, notwithstanding the lack of consultation. Although the grandparents now plan that if the grandmother is ill again or not able to care for [Damian] that the grandfather will have him, the reality [his work] means that the grandfather will need a great deal of support. In discussing that support, neither the grandfather nor the grandmother saw the mother as a source of support for [Damian]. The relationships [Damian] has with other members of the whānau have never been the subject of assessment, but the Court has no reason to

conclude that [Damian]’s relationships with other members of the paternal family are equivalent to his relationship with the mother. Although this is such a sensitive topic, [Damian] is clearly very vulnerable if the illness relapses. There needs to be a thorough safety plan.

[129] Ms Orr was at pains to emphasise that past behaviour is a good predictor of future behaviour. In the past, the grandparents have not been diligent enough to ensure that [Damian] is with his siblings whenever [Jordan] is present from [location A]. The sibling group is important. [Damian] has been absent too often. There was little explanation in the evidence which justified the absence from important family gatherings with his brothers. If anything, the grandparents both appeared surprised to be challenged that they had an obligation to prioritise [Damian]’s participation. The grandmother has retarded the progress of the relationship for [Damian] for his mother, contrary to advice. This has led to [Damian]’s position being less predictable, because he has not even spent one night in his mother’s care.⁶³

[130] The picture is further complicated by the position of [Brett], the full sibling of [Damian]. There is a paternity order, naming the grandmother’s son as [Brett]’s father. Despite expressing a wish to be grandparents, the grandmother has taken no steps to establish a relationship with [Brett]. Although the mother has been profoundly criticised for not finding solutions, and not demonstrating that solution finding for her boys is primarily her task, it is deeply concerning that the grandmother has not acted to embed the identity of [Damian] and [Brett] as full brothers by ensuring that [Brett] is developing a relationship with her. I accept her evidence that she would deeply like to have a relationship with [Brett]. Sadly, she has done nothing to commence that. Although it may be that it would have been practically difficult to arrange that, the mother has said that she would welcome development of that sibling relationship with grandparents. She has been determined and active to develop the sibling relationships for her boys in a way in which, in this Court’s experience, is unusual for parents whose children are with Oranga Tamariki. I accept the mother’s evidence that she would welcome the opportunity for [Brett] to develop a relationship with his grandmother.

⁶³ Ms Orr, NOE p 654.

[131] Ms Orr gave evidence that the degree of non-cooperation and hostility were adverse to [Damian]. Ms Round, [Damian]'s social worker agreed, and described the degree to which she had tried by talking with the grandmother, to soften the hostility from that side. Having heard all the evidence it appears to me that the grandmother struggles more than the mother to see that a better relationship is essential, and then take steps to create that. Although the mother has been the focus of attention in terms of her behaviour, and thinking, the grandmother's thinking around [Damian]'s relationships appeared to be concrete, to be dismissive of the mother, and to also be defensive

Psychological assessments

[132] Ms Orr has been asked by the Court to assess various aspects of the psychological functioning of the children and the adults in this matter. Because the assessments were sought under s 178 OTA, the briefs included consideration of adult presentation. This important difference between the power of the Court under s 178 OTA and s 133 COCA has led to more extensive evidence being available to the Court in relation to the psychological dynamics between the mother and her boys.

[133] Each of the assessments had a different focus. These are as follows:

- First report 28 February 2018: Assess [Damian]'s attachments; assess the impact on him of the proposed care arrangements taking into account potential for sibling contact; assess the ability of each of the parties to facilitate relationships between [Damian], his siblings and his extended family.
- Second report 28 August 2018: assess to review if [Damian] is presenting significant distress or difficulties.
- Third report 30 October 2018: primarily focussed on [Jordan], assess Psychological attachments including caregivers, the mother and siblings, [Jordan]'s needs and the mother's ability to meet these, assess the impact on [Jordan] and his relationships of the current access

arrangements, assess the impact on [Jordan] either of the proposed care arrangements – with Oranga Tamariki or with the mother.

- Third report October 2018: the brief for [Damian]; to continue to monitor the relationship development between [Damian] and mother and siblings, to consider the relationship between [Damian] and [Jordan], what are the risks and benefits to [Damian]’s return to his mother now or at a different time in the future, and finally, the underlying question for both boys, does the mother have the capacity or the ability to build the capacity to have one or both boys returned to her care and if this is to be a staged return should one or the other take precedence.⁶⁴
- Fourth report: 5 July 19: to update on the mother’s progress and capacity to parent one or both boys.
- Fifth report 9 June 2020: assess the psychological benefits and risks for [Damian] and [Jordan] should they be returned to the care of their mother and assess the psychological benefits and risks for [Damian] and [Jordan] remaining with their current caregivers, and finally, to assess if either boy should not return to their mother assess care and contact arrangements.

[134] These extensive reports occupy more than 150 pages. They are rich in data and reference to reviewed research. Ms Orr has spent 31.5 hours with [Damian] and 13.9 hours with [Jordan]. Some of this time she saw both boys together. Some of this time was spent in travelling. However, by any estimation the assessment has been time consuming, and highly focussed. This led the Court to be able to have a degree of confidence that Ms Orr has seen what there is to see in these dynamics. In her own summary, the assessment process was primarily about the mother’s capacity to parent more than the two children in her care. The briefs did not delineate between the legal tests – whether the mother posed a risk to the safety of the boys, or whether there were

⁶⁴ The report considering these issues is dated 20 March 2019, p 901.

care and protection issues for all or any of the children in her proposal to parent all of the children together.

[135] What she has not seen is the difference between the mother's coping with two boys and the mother's coping with three or four boys. In assessments 2 and 3, Ms Orr reported a less than complete attachment process for [Damian] with the grandmother and grandfather. This arose from timing, and from their style of parenting, which Ms Orr regarded as permissive. She referred to the need for [Damian] to have time with his mother, and with his brother [Jordan], with whom he has the closest connection, arising from their ages.⁶⁵ Ms Orr cautioned about the risk of missing contact with [Jordan]. She noted in oral evidence she would have expected close to 100 percent of [Jordan]'s visits being shared with [Damian]. About half of [Jordan]'s visits to his mother have been missed by [Damian]. This occurred partly because the grandparents prioritised other activities and partly because there was insufficient planning by Oranga Tamariki social workers.

[136] At March 2019, Ms Orr recorded the real possibility of both boys returning to their mum, with [Jordan] going first.⁶⁶ She described the situation in this way:

Parenting capacity is not a finite concept and it needs to be tested. In my view, the mother has shown increasing capacity and now is the time to start having [Jordan] staying for longer periods over the holidays, also for [Damian] to start longer visits.

With respect to [Damian] I'm recommending that he starts some overnight contacts with his mother, that may be timed around some of [Jordan]'s visits
...

[137] Ms Orr went on to recommend specifics around timing, continued coaching and monitoring and a review. This recommendation was implemented in full for [Jordan], and his time with his mother has gone well, including significant improvement in his Skype contact, which is now satisfying to all. The recommendation was not implemented at all in relation the [Damian].

[138] A year later, in her report of June 2020, Ms Orr did not recommend either boy returning.

⁶⁵ Orr report of March 2019, bundle supplementary p 323.

⁶⁶ Ibid paras 47-50, supplementary bundle pp 322 -323.

[139] In March 2019 Ms Orr considered that the mother was responding to coaching, that she was learning and that she was managing well, generally. She recorded that the mother was engaged with the support of Jigsaw, a parenting and social work community agency, in which Ms [White] was the primary clinician.

[140] By July 2019, Ms Orr's support for return home was more muted, and Oranga Tamariki reverted to the previous goal of placement for each child in homes for life, respectively with the non-kin caregiver, [Caroline] and with [Damian]'s paternal grandparents. The critical point of change appears to focus on the extent to which the mother could embed her learning, in relating to her children, in ways which will enable her to understand their worlds, and to enable them through the structure of her parenting, to become strong and well psychological individuals.

[141] In this report Ms Orr considered [Damian]'s development, and apparent delays. She commented that the delay in speech and in toilet training could be environmental and noted the contribution of a permissive parenting style of the grandparents, some co-ordination issues, and some speech delay. [Damian] was resisting toilet training.⁶⁷ Ms Orr referred to toilet training as "vital".⁶⁸ These environmental issues have been noticed before in the report of February 2018, and the difficulty which [Damian] was having gave rise to concern.

[142] Ms Orr then continued to describe the issues identified by her as follows:⁶⁹

15. It is not [the mother]'s parenting skills/strategies per se but it is her underlying behavioural traits that cause me concern about the potential return of the children. Insightfulness and empathy are two major needed behaviours/attitudes to successfully parent (beyond the skills addressed positively above).
16. Insight refers to an "awareness of underlying sources of emotional, cognitive, or behavioural responses and difficulties in oneself or another person".
17. Insightfulness in term of parenting per se is defined as "involve(ing) three main features: insight regarding the motives for the child's behaviours, an emotionally complex view of the child and an openness to new and sometimes unexpected information about the child".

⁶⁷ He was then [almost four years] old.

⁶⁸ Report of 5 July 2019, para 7, bundle volume 7, p 928.

⁶⁹ Bundle volume 7, p 932.

18. Carriers to insightfulness include the parent who is unable to focus on the child due to their own worries or fears or stress responses; prioritisation of the parent's needs over the child(ren)'s needs; and a lack of planning and consideration so that the family home is a safe, secure and welcoming place where all the children's needs are met.
19. Empathy is understanding a person from his or her frame of reference rather than one's own, or vicariously experiencing that person's feelings, perceptions, and thoughts.

[143] Ms Orr is in a good position to observe these particular traits. The ways in which these matters have appeared to Ms Orr, and have been recorded by access supervisors, by herself and to a lesser degree by the social worker for [Damian], have not been at a level where the Oranga Tamariki social worker considers that state intervention would be required. Put another way, the presence of these traits does not give rise to a care and protection concern.

[144] When asked about insight in evidence, acknowledging that the mother had a good opportunity to prepare for the questions about this, the mother's answers about what her boys would need when and if they returned to her care, displayed some understanding of their emotional world, and its difference from her own, and an understanding of their need to retain substantial connection to previous caregivers, as well, at times, as a moment to moment comforting contact with previous caregivers. She acknowledged that the household would take some time to settle, and that there would be challenges for her as a parent while this happened.

[145] The second behavioural trait which Ms Orr identified, is that of empathy. Similarly, the answers by the mother to questions about how the children would be if they transferred to their care, indicated an understanding of their worlds, accepting that she would not always be the only person able to meet their emotional needs.

[146] An examination of the written evidence, including the discourse in the supervised contact reports written by the mother and others, tends to support the view that the mother has a focused and functional appreciation of issues, rather than a highly individualised appreciation of each child. This may be conditioned by the questions asked within the reports. Counter to that, however, are the observations of the development of the Skype contact with [Jordan]. This was, at times, last year, dull for [Jordan], and frustrating for his mother. Some coaching for his mother has led a

significant improvement, such that [Jordan], his mother and [Jordan]'s caregiver all report that the Skype contact is a delight to [Jordan]. The mother becomes engaged with what is happening for him at school and personally. [Jordan] enjoys reading to his mother and talking about what is happening for him.

[147] Somewhat similarly, the access reports in 2019 related to the mother's contact with [Damian] at [a social services organisation], indicate that she has been highly engaged in the things that [Damian] is interested in, including the tractor, and some imaginary thinking. She has achieved this without disruption from attention needs for [Brett] and [Ed].

[148] The specifics which Ms Orr then records in relation to the mother's lack of insight and empathy relates to the boys being unsettled, tired, and out of sorts after return from their mother's home. Ms Orr refers to her being loud, and her being unable to conceptualise that:⁷⁰

The busyness and noisiness of her home along with [Brett] seeking that he be attended and using (minor) violence to gain an older siblings' attention, all were very different environments than the one where these boys live as single children in a quieter environment.

[149] This proposition was not put directly to the mother.

[150] Ms Orr gave a number of examples of not being insightful. She has had a continuing concern that the mother impulsively makes comments which relate to adult needs and issues, rather than staying focused on the children. Ms Orr commented on the mother's concrete thinking, and how quickly she became evasive, or unable to accept the point of view of an observer. These matters were the subject of cross-examination with supervisors and with the mother.

[151] Of greatest concern to the Court is the risk that the mother will introduce a new partner to the children's lives in a way which is not safe. [Ed]'s father does not appear to have been a safe option, and although the mother quickly realised that and has excluded him, this event supports Ms Orr's proposition. There is mention of the [friend] about whom nothing else is known. In evidence, the mother denied any

⁷⁰ Report of 5 July 2019, para 20(c).

intention of re-partnering. She agreed she had, at times, thought about having another child, but that she now feels her family is complete, and she does not want to have more children. She denied any relationship with the [friend]. The evidence in relation to the mother's actions to protect herself from [Damian] and [Brett]'s father, and also from [Ed]'s father, portray decisive action, persistent behaviour, and in relation to [Ed]'s father, a sensible reaction to call police. The mother described her plan to check the credentials of any potential partner with Oranga Tamariki and police, and to not introduce them to any partner until she had been developing a relationship for six months.

[152] I am not satisfied that the concern about the mother bringing unwise people into the household is at such an intensity that the Court can consider this to be a behavioural trait, in relation to which the mother had not become insightful.

[153] The arrival of [Ed] caused grave concern because of an apparent impulsive and unwise choice to have another baby. Oranga Tamariki and the assessing psychologist considered it raised a grave concern as to the mother's stability I accept Ms Orr's opinion that parenting two very small children, as a solo parent, is indeed a challenging experience. Time has, however, enabled the mother to prove that she was equal to the challenge. The mother's assertion of contraception failure cannot be clearly established. She said they used condoms. Her medical records do not disclose prescription for contraception. The Court cannot be sure about this aspect of the matter. However, [Ed] is fine, and the mother has managed the last 18 months well.

[154] The mother spoke of learning to perceive that people around her have their own needs, and to both draw back from making demands on people, and also to offer assistance. She gave an example her friendship with [Dean] and [Emma Shelton]. That is referred to above. Although she too readily accepted their enthusiastic need to be considered as and referred to as Nanna and Poppa, she has drawn back in the last six months, and accepted the need to do that. Her acceptance may have been increased because of inconsistencies in Mrs [Shelton]'s behaviour towards her,⁷¹ and as a result of Mrs [Shelton]'s presentation to the Court as a witness.

⁷¹ Texting the grandmother about how the mother "flips out".

[155] The third theme by which Ms Orr concludes that there are psychological risks to the boys returning to the mother's care relates to transparency. Ms Orr has seen the mother with the boys or on her own for more than 12 hours over the last three years. As she must, she has interviewed the mother in detail and at length and has gathered vast quantities of information related to the supervision of contact. There have been in excess of 100 supervised contact sessions. Some sessions have two or three reports.

[156] The mother's lack of transparency became a prominent concern in 2018, when Ms Orr recorded a number of impulsive comments where reliability of and completeness of disclosure was also of concern.⁷² Ms Orr had gathered comments from supervisors and community agency staff, which are recorded in her report.⁷³

[157] When cross-examined about the more spectacular of these issues – getting pregnant to a truck driver in order to have a daughter, Ms [White] vaguely recalled something about it, but could find no record in case notes. Ms [Thornton] denied hearing this or relaying it.

[158] In relation to talking to the children around where they live, and about engaging others in conversation about contact and care issues, in ways which are adverse to the children, there is evidence to support Ms Orr's concern. I am satisfied that after Queens Birthday weekend in 2020, [Jordan] went home talking about the Court case and gathering evidence. Although the mother denied these statements, on balance it is more likely than not that [Jordan] understood the imminence of the hearing from his mother and having seen both his counsel and his social worker, and Ms Orr, this was contributing to his worries.

[159] Another example Ms Orr raised was that the mother asked whether she could have an extension to the time, because [Damian] had been late. There had been difficulties at [Damian]'s home that morning. The mother should not have raised it in that way. Her reaction is, however, to some extent, understandable. Ms Orr saw both things as examples of impulsivity and being focused on her own needs in the moment.

⁷² Report of 5 July 2019.

⁷³ Ibid, para 20(d), bundle 933.

She referred to how consistently she had observed the impulsivity, inappropriate conversations, and the lack of agency throughout the time with the mother.

[160] In evaluating the importance of those issues, with the examples given, the Court must consider whether these are sufficient to elevate the concerns about the boys wellbeing and interests to appoint where the State continues to need to intervene. Whether this is a situational matter, relating to stress around Court proceedings, or whether the tendency within the mother which still needs work, is unclear to me. However, this is not either alone, or together with other matters where the level of concern so much challenges the wellbeing of either boy, that it would justify the continuation of State intervention in the family. If this inappropriate involving the boys in adult matters continues, it is likely to divert them from ordinary childhood concerns and may add anxiety and instability. Given their vulnerability, because of previous events, this would be more adverse for these boys than what may be relatively mild matters in a less vulnerable group.

[161] Ms Orr is also concerned that the mother does not take responsibility for her contribution to or obligation to manage matters. She referred to the mother being non-agentive.⁷⁴

[162] In relation to these proceedings, arrangements with Oranga Tamariki, and dealing with the grandmother, it is clear that the mother has real issues in her management. However, in many other matters, it is clear that the mother operates with a high degree of organisation, stability, purpose, and focus on good outcomes for her children. Among these matters are included:

- Home ownership and general financial management.
- Medical care of children.
- Seeking advice and intervention when [Brett] was particularly needy.

⁷⁴ Report of Ms Orr, 5 July 2019, para 20(g), Bundle volume 7, p 935.

- Seeking Oranga Tamariki intervention when she was worried about [Damian]'s elbow having been dislocated a number of times, attending meetings with the people whose support she has found helpful.
- Organising herself on outings for the children.

[163] Whether the mother is able to relieve her defensiveness, and grow her confidence in more general terms, is difficult for the Court to assess. What is not clear is whether if the mother does not improve her reactivity in this field, the stability of the care of her children will be at risk.

[164] Finally, in July 2019, Ms Orr recorded the following opinion about the mother's capacity:⁷⁵

Overall, it is my opinion that the trauma of childhood behaviours have returned as [the mother]'s personal resilience and parenting is being challenged. When stressed she reverts towards or to her previous maladaptive behaviours, sometimes then stopping herself and returning to think about what she has learned. Thus, her skills learning is not yet fully embedded. In addition, overall, she presents as being relatively insightful about [Jordan] and [Damian]'s behaviours; she is non-agentive (in spite of having a person available to advocate for her); and her transparency is called into question. She wants things to happen now, and she does not want to wait.

[165] Since that report, the mother has continued to do other work in skills building and attending course. She has completed the MAPPS programme and proposes to repeat it, with a somewhat different format. She says she is now ready to address the adolescent trauma, with ACC therapy.

[166] Since that report, the more focused behavioural template supervision reports have been filed. Ms Orr commented that [Damian]'s attachment with his grandparents are primary and secure relationships, and his mother is a secondary attachment figure. Ms Orr commented that this is consistent with his life experience and care arrangements.⁷⁶ [Jordan] is now having good contact with his mother, spoke positively of it, and has equivalent primary attachment with his caregiver, his afterschool caregiver [Pat], and with his mother.

⁷⁵ Bundle volume 7, p 936, para 21.

⁷⁶ Report of 9 June 2020, para 27, Bundle volume 7, p 953.

[167] Ms Orr summarised her concern around the mother's capacity to meet the psychological challenges with having additional children in her care. In oral evidence, Ms Orr went further, and said that if after return of children the placement broke down, that would be a severe problem, not only for the child who had returned to the mother's care, but probably for other children.

[168] Ms Orr commented favourably about the interactions she saw during the five hour visit at the mother's home. The household was busy, and noisy, and Ms Orr commented that the mother was delightfully, consistently inconsistent at times, and very consistent at other times. There was an issue about taking a photograph which troubled Ms Orr, because it appeared to her that the mother came very close to losing her rag with [Brett], who would not sit still. She grabbed him roughly, just for a moment, and then comforted and cuddled. After a while, the photograph was taken. Ms Orr identified as follows:

Her face went red, her eyes were staring, her lips and jaw were tight, her fingers and knuckles were white and everything about her was very tense. ... Then [she] turned and stared at 45 degrees towards the ceiling with the same degree of tension in her eyes and her jaw, although her arm had relaxed. The intensity and overbearingness of this response occurred so immediately after the mother was challenged by [Brett] again for not conforming to expectation was of concern to me.

[169] Ms Orr commented that the supervisor did not see or comment on this interaction. She was taking the photographs.

[170] There was a great deal of oral evidence about this. It was a momentary bad event in five hours. The mother denied that she was as uptight about it as Ms Orr saw. However, the mother was not able to identify whether she could have handled the situation differently. While the Court clearly understands how precious these occasions are to the mother, and that she wants to photograph all of the boys together, there were other options while [Brett] was being tricky. The photograph could have happened after lunch. Alone, this moment is not decisive. Placed together with the mother's defensiveness, the children's vulnerability and with the mother's determination to be found capable, it is of concern.

[171] Bearing in mind the test for continuing State intervention in the children's lives, I asked Ms Orr to consider a table of risks for each child, both in terms of severity and likelihood. The consideration related to risks if they did not return to their mother's care, if one did and one did not, or if both did. Ms Orr's primary proposition is that returning both boys now will add a stress loading onto the mother at an exponential level. She said adding one child adds four times the stress. Adding a second child adds 16 times the stress. It is important, from the Court's point of view, also to remember that both of these children are accustomed to being single children in their households, and to living in a quieter environment.

[172] Ms Orr's evidence when working through the tables of risk remained clear. Her clear opinion is that there is too great a risk, not only to [Jordan] and [Damian], but also to [Brett] and [Ed], for both children to return to their mother's care now. Ms Orr is not satisfied the mother has the capacity to manage, and further, that if she does not, the consequence is so severe for all four boys that the risk should not be countenanced. In relation to returning one boy, Ms Orr saw the risks as greater if [Jordan] is returned and [Damian] is not, than the other way around. This derives from her evaluation of risk in both children's caregiving situations, the quality of reciprocity and respectful interaction available from the caregivers, and the capacity within [Jordan] to come to and fro. This is, in part, conditioned by his age.

[173] For [Damian], the greatest change in his being placed with his mother arises from her style of life in the town being so very different from the boy at home on the farm, which is [Damian] is accustomed to. The risk is clearly that his primary secure attachments in his grandmother and grandfather will be diluted if he lives with his mother. Further, his internal capacity, at his stage of development, will be too much challenged, and too little nurtured because of sibling competition and the challenges the mother is facing in running a busy household, together with the behavioural traits which Ms Orr has identified.

[174] Ms Orr gave some evidence in relation to longer term risks for these boys, both if they stay with their current caregivers and also if they go to the care of their mother. For [Jordan], Ms Orr considers that he will carry a static vulnerability, because he was injured as a toddler, and suffered the death of his father at around the age of two.

Considering [Jordan] in his placement with his current caregiver, it seemed to Ms Orr that he might have some relatively minor troubles in adolescence, dabbling with risk taking, but these were not at a level of significant concern. Ms Orr had confidence that [Jordan]'s current caregiver would manage that all right. If, however, [Jordan]'s placement broke down, either because of an external factor, or because he returned to his mother and did not go well, Ms Orr perceived he was likely to be at risk of multiple transitional placements, and a significant period of instability.⁷⁷

[175] For [Damian], if he does not return to his mother, there are some longer term risk factors, arising from having too much control in his current household.

[176] In considering the return of one boy, and not the return of the other, Ms Orr described that [Jordan] faced a risk of taking on roles greater than his age and stage of maturity allows. She referred earlier in her evidence to a danger that [Jordan] would become parentified, and if there was upset in the household, that he could become a somewhat strident authoritarian older brother. Ms Orr was also concerned that the environment at the mother's may not suit [Jordan], because it is noisy, and he is accustomed to a quieter way of life. Ms Orr predicted that it was possible that [Jordan] might find his way back to his current caregiver at an age where it would be difficult to maintain good quality in the relationship, both with the caregiver and with the mother.

[177] For [Damian], if [Jordan] goes back to the mother, Ms Orr predicted some struggle with identity, because his three brothers are with the mother and he is not. That would, in Ms Orr's view, be eased by the fact that he is living with family.⁷⁸ I am concerned that the degree of reluctance in the grandparents' home to nurture his sibling relationships will escalate this risk.

[178] If the situation were reversed, and [Jordan] did not go home to his mother and [Damian] did, Ms Orr anticipated [Jordan]'s curiosity would be greater, but that the quality of his placement would largely mitigate that. For [Damian], she anticipated that [Damian] would adjust, if initial steps towards more contact were taken carefully.

⁷⁷ NOE p 672, lines 1-9.

⁷⁸ NOE p 674, line 25.

Balanced against the lower risk of long term difficulties, because of [Damian]'s age and stage, Ms Orr was concerned that the primacy of his attachment with his grandmother and grandfather would be diluted. They live an hour and a quarter distance drive away. There is also the disturbing shadow of the grandmother's illness.

Conclusion and summary to psychological evidence

[179] On balance, Ms Orr's evidence focused on the degree to which the mother could become attuned to a new combination of boys fulltime, the exponential growth in stress and pressure on the household with children being added in, and the capacity for the mother to sustain wise relationships and routines which would protect and enhance her parenting. The children's safety would, she considered be undermined by return of both [Jordan] and [Damian]. She considered that if the placement would break down, all four boys then they would need care. This would, she said be disastrous. The increase in stress with the return of one boy not both would be far less. There would be some disadvantage to the child not returned. If [Jordan] were not returned, there would be less disadvantage to him than there would be to [Damian] if he were not returned.

[180] The remaining gap in the evidence focussed on the difference in the household between two boys and three boys troubles me. I place considerable weight on the evidence of Ms [White] and Ms [Hudson] who both saw the mother fairly often with both boys and raised no concerns with how she managed with two boys. Ms Orr was concerned that the mother's support group were very invested in her success. But Ms [White] is a social worker with extensive experience, who related her experience of the mother when challenged by her. She saw moments when the mother lost her equilibrium as teachable moments. She considered the mother learned well in those moments.

[181] Ms Orr was asked to make recommendations in relation to effective implementation of whatever the Court's decision is. Ms Orr recommended trauma informed therapy to address obstacles to better functioning between the mother and grandmother, and to consider and grow the individual dyad relationships, once the future structure of care is known. This would involve work with [Jordan] and his

mother, [Damian] and his mother, and potentially within the home with the mother and three or four boys. Given the extent of the intervention by the State in this family's life, it appears to me important that a great deal of care is taken to enable safe implementation and that Ms Orr's advice has much merit. The most important dyad is, in my view, the mother and grandmother. Ms Orr believed this relationship was repairable. She hoped that the mother and grandmother would put their hearts into doing their best to enhance [Damian]'s functioning with his whānau.

Conclusions on the future of [Damian]'s care

[182] In relation to the care of [Damian], I cannot conclude that the risks to his wellbeing are so great that ongoing state intervention is required. I am satisfied that he would be safe in his mother's care. As a result, the mother's application to discharge the OTA orders must succeed. For the reason set out below, there must however be a brief delay before the order is discharged. The Court must then determine whether the applications under COCA by the grandparents are granted. This requires consideration of [Damian]'s welfare and best interests, and the direct comparison between the grandparents and the mother, which is avoided in relation to the OTA application.

[183] Although counsel have argued that the Court must consider the matter from one channel, that is in terms of the principles set out by the Court in *MEM*,⁷⁹ that the Court's task deal with the applications sequentially, first the OTA application, and then the COCA application. I see no prospect of adequate progress by the Ministry to develop [Damian]'s relationships with his siblings and the mother. By contrast, I consider that the mother has established that there are no longer the care and protection concerns which presented when [Damian] was removed from her, and that she has presented such constant growth in learning through teaching and modelling and practicing parenting skills that leaving aside the issue with the relationship with the grandmother, there would be no care and protection concerns justifying the state intervening in the relationship between mother and child. For completeness I note that [Damian]'s father has taken no steps in this matter, and I do not consider his role at

⁷⁹ At fn 23 above.

this point. He is a guardian. The mother has a Protection Order against him. If he seeks active involvement that will be a matter which the mother needs to consider.

[184] Ms Orr's evidence is unequivocal that she is concerned that the risk of both boys returning to their mother's care is too great a risk, because of the exponential increase in stress in the household. Her analysis portrayed more support for the status quo of each child's caregiving arrangement, than for a move for either boy to their mother. She properly raised the concern that if one or both boys went to the care of their mother and that imposed sufficient stress to cause the mother to be unable to care for any of the children in her care. Ms Orr preferred the status quo as, overall, safer for all. When asked whether risks fell equally in relation to a return home for [Damian] and not [Jordan] or, [Jordan] and not [Damian], Ms Orr tended to conclude that there were fewer risks if [Jordan] did not return home, because the quality of his placement with [Caroline] is so high that Ms Orr is confident that the mother and [Caroline] can, between them, better manage the potential difficulties which [Jordan] may face if he is the one not brought up with his brothers.

[185] By contrast, Ms Orr perceived that the grandparents would be more challenged by managing the difficulties which may emerge if [Damian] is not with his mother, but the other three boys are. Additionally, Ms Orr referred to the difference in parenting style becoming more of a problem, once a decision is made that [Damian] not return and [Jordan] should return, because the relatively permissive style in the grandparents' household, versus the more directive and routinised style in the mother's house, leads to a risk of allegations being made that there are difficulties, and a refuse/resist dynamic may develop. It is clear, already, on the basis of the supervised contact material, that the grandmother's level of anxiety about [Damian] participating in the access has been a matter which has required careful and nuanced management. Once this contact is unsupervised, which it will be, this opens both [Damian] and his mother and grandmother to a risk of allegations about unsatisfactory conduct which will divide and splinter. This dynamic is well known to this Court and should be avoided if possible. It is a worse outcome for [Damian] to lose the relationship with his grandparents and with his mother, which becomes the potential if the mother's household arrangements cannot be regarded respectfully by the grandparents.

[186] Considering the mother's risks, which relate to an additional stress because of an additional child, and her struggles with insight and empathy, and a tendency to transact only with friends, supporters and professionals who are unequivocally in her camp, and the risks in the grandmother's household, which are tragic shortening of the grandmother's life, her continuing resistance to the development of the time with siblings, and the more fundamental continuing poverty of regard and communication with the mother, I conclude that the risks to [Damian] are greater in the grandparents care than in the mother's care.

[187] Thus, the only potential remaining care and protection concern arises because the current caregiver, who is approved by Oranga Tamariki, does not respect the relationship of the mother and the child, and does not accept an obligation to grow and nurture that relationship. Bearing in mind the Court's obligations under the OTA, the mother's evidence establishes that [Damian] should be in her day-to-day care. The speed with which the care and protection concerns which have obstructed the development of relationships for [Damian] resolve will depend upon how quickly and in what child-focused way, the realigning of grandparent and parent relationships can be achieved.

[188] In order to achieve that, [Damian] is to remain in the custody of the Chief Executive of Oranga Tamariki, on the basis that Oranga Tamariki facilitates his immediate increase in contact with his mother, so that that relationship can develop. That development should occur in line with the recommendations of Ms Orr. Commencing on the first Saturday after the release of this judgment, contact is to occur from 1.00 pm Saturday until 1.00 pm Sunday. (Given this is the week in which [Damian] [details deleted], it may be that the first overnight visit could occur earlier than Saturday, if a Saturday visit coincides with plans for a [family event]. Ms Lohrey is asked to address this urgently). That is to be the pattern for each of the following four weekends. Contact is then to increase to 1.00 pm Saturday to 4.00 pm Sunday for two weekends. During school holidays (September and October 2020), [Damian] should be in his mother's care for three nights and four days. Part of that time should coincide with [Jordan]'s visit to his mother. Part of the time should occur when [Jordan] is not present. The Court's aim is that [Damian] will begin the task of

establishing and enjoying being one of three children in the family, and also advance his skills with being one of four children.

[189] During term four, contact should continue for three out of four weekends from 9.00 am Saturday until 4.00 pm Sunday.

[190] I accept the advice of Ms Orr that if [Damian] is going to transition to his mother, he should do so during the summer school holidays. [Damian] should attend [a primary school] as it is planned from the time he turns five until the end of the school year 2020. The enrolment at school for the following year will be a matter for the grandparents and mother to agree. The mother and Grandparents should now start to work on the division of school holidays, so that the mother's time with [Damian] is full time, other than contact back to his grandparents, by the time school starts in February 2021. Contact with his grandparents should occur for a full weekend from after school Friday, each alternate weekend.

[191] Although the grandparents' application for a day-to-day care order will be dismissed, the grandparents will be appointed as additional guardians from the date when the final orders under OTA are discharged. That is essential for [Damian], because his father is not engaging in the day-to-day arrangements and decision making for his care. He needs that engagement, and I am grateful that the grandparents are offering to do that.

[192] The Court is aware that Oranga Tamariki has not implemented the progress with contact for [Damian] in line with Ms Orr's reports since late 2018. If the Ministry is not prepared to enable and implement this progressive change in [Damian]'s care, the Court may need to consider immediate discharge of the orders in favour of the Ministry. That would be adverse for [Damian], because there would be no staged transition. He could then be claimed by his mother and move suddenly.

[193] The future structure of the orders under OTA also requires consideration for [Damian]. There will need to be a support order, or an agreed structure with Oranga Tamariki assistance for a period so that there is some support while mother and grandmother address their relationship. The Court will resource the therapeutic work

required pursuant to s 74 OTA. A referral for counselling for the mother and grandmother to repair their relationship is made forthwith, to be undertaken by a psychologist if possible. The design of therapeutic intervention in other relational dyads is a matter on which the Court will seek Ms Orr's advice.

Conclusion related to [Jordan]

[194] [Jordan] has been out of his mother's care since he was 20 months old. He left his mother's care after an adverse series of events, which included the death of his father by suicide, the commencement of the mother's relationship with [Damian]'s father, the uncertainty, upset and turmoil of the household, resulting from both the mother's distress at her husband's death and the commencement of the relationship, and [Jordan] being injured by Mr [Preston] in April 2014. He has been lucky to have two placements which Oranga Tamariki regards as of an extremely high standard. Having heard the evidence of Ms Irving, it is clear that [Jordan] is fortunate to have a caregiver who is able to perceive her foster child's needs separate from her own and manage the inconsistency and lack of consideration of caregivers needs, which the management by Oranga Tamariki has demonstrated. In particular, the change in decisions around reducing access to four times a year, which was contrary to [Jordan]'s needs, the change of goal and then a change back of goal, will inevitably have created significant disturbance for [Jordan]'s caregiver.

[195] Her evidence gave no sign that this had adversely affected her capacity to perceive [Jordan]'s needs, and do her best to meet them. The caregiver's decision not to proceed with the Home for Life COCA application before the determination of the mother's application to discharge Oranga Tamariki orders, is a decision based on the principle which the caregiver stated in her oral evidence. She did not wish to put herself in opposition to the mother. Her principle is admirable and can only have assisted to develop the strong relationship which [Jordan] is aware of between his mother and the foster mother.

[196] [Jordan] has expressed a wish that he can buy a large building, sufficient to house his mother and brothers, his afterschool caregiver, [Pat], and his current foster mother, along with sundry pets and a tiger or two. He is a social boy. He wishes to

retain his friends, and he wishes to stay at the same school. He wishes his mother could move to [location A]. He did not wish to meet me. He has been permitted by his caregiver and by his mother, to express a clear wish not to be embroiled in these proceedings. There is no question but that he is aware of them. He has gone on seeing his social worker, his lawyer and Ms Orr far longer than it would generally take to resolve litigation of this kind. I accept Ms Orr's analysis that [Jordan] is in something of a loyalty bind, that he does not want to hurt anybody, and that he is happy and satisfied in the relationships he has. He has, at times, expressed a wish to stay with his mother and brothers. He has expressed that wish at the end of a long contact visit to his foster mother. There is no doubt that this seven year old has satisfying relationships with the contending adults.

[197] The question is, however, whether he should return to his mother's care. In favour of this approach are the following threads of principle:

- It is important to grow up with family.
- Growing up with your siblings is protective (usually).
- The growth in the relationship with his mother has been remarkable over the last two years, such that the attachment for [Jordan] with his mother is equivalent to that of his attachment to his foster mother.
- The fact of the equivalence is a strength for [Jordan] wherever he lives.
- [Jordan] is settled at school and doing well, and proud of his achievements.
- [Jordan] is used to being an only child with a big family.
- If [Jordan] was with his mother, he would become the oldest of four or, potentially, the oldest of three.
- There is an untested element of risk related to [Jordan]'s mother's capacity to parent three or four boys fulltime, and Ms Orr's analysis comprehensively records where stress points are, and the risks of [Jordan]'s return.

- Whatever the outcome, the future of [Jordan]’s development safely into a young adult appears to be well assured, unless either he goes to his mother, she cannot manage, and that placement breaks down or, alternatively, he loses the placement with his foster mother as a result of some extraneous factor.

[198] On balance, bearing in mind that the Court’s role is to discharge the care and protection orders if care and protection concerns no longer exist and therefore that the child’s wellbeing and interests are promoted, I consider that the discharge of the Oranga Tamariki orders will expose [Jordan] to a care and protection risk, because the risk that his mother cannot cope with parenting him fulltime, whether as one of three or as one of four, is tangible, well defined, based in some of the mother’s history and rendered more visible because if [Jordan] returned to his mother’s care, his loss in terms of a relationship with his foster mother would be profound. In this way, the Court places significant value on the quality of [Jordan]’s placement, and the reality that he carries with him the vulnerability which arises from adverse childhood experience summarised above.

[199] However, I am also clear that should [Jordan]’s contact with his mother become diluted, because of resourcing problems, or attitudinal problems, [Jordan] would likely suffer the risk of a resurgence of care and protection concerns of another sort. The loss of an attachment figure for a child who has already lost a parent, imposes risk on the safe passage to adulthood. Thus, it will be essential for the mother and the foster mother to each have a plan for continuity of their own relationship, and continuity of [Jordan]’s contact. They will need plans for unexpected adversity, which may lead one or other of them to be less available as a strongly expressed and experience parent.

[200] Having come to this conclusion, I decline to discharge the orders pursuant to the OTA in relation to [Jordan]. The mother’s application is dismissed, other than her access application. In terms of the logical future of [Jordan]’s day-to-day care, it may be that an access order under the OTA could facilitate the kind of resource which [Jordan]’s adults need in order to provide adequate contact.

Orders

[201] The following orders pursuant to OTA are made:

- In relation to [Jordan], the mother's application to discharge custody and additional guardianship orders (OTA) is dismissed.
- In relation to [Jordan], the mother's application for access is adjourned, pending a further plan for [Jordan], to be filed by 10 September, addressing the access arrangements and resources for [Jordan].
- A review is to now occur. Plan and report to be filed and served by 10 September 2020.
- In relation to [Damian], the mother's application to discharge the orders under OTA is granted, but the date this order takes effect will require further planning. For that purpose, a plan and report confirming the discharge plan and arrangements for and resourcing for the mother's contact in terms of paragraph [188] above is to be filed and served by 10 September 2020.
- The application for a parenting order under COCA by the grandparents is dismissed.
- The application under COCA by the grandparents for appointment as additional guardians is granted.
- Counselling for the mother and grandmother is ordered s 74 OTA.
- The appointments of Ms Lohrey and Ms Fuata'i are to continue, with a brief to advise and assist with implementation of the orders, and to report to the Court by 10 September.
- A further, and final s 178 report is sought. Ms Orr is asked to advise on the treatment programme, including combinations, duration of intervention, the question of waiver of privilege, and the degree of reporting required from the therapist, either to her or to the Court. This

report is urgent, given the commencement of transition for [Damian]. I ask Ms Lohrey to work with Ms Orr as to timing. The Court will, if need be, resource the treatment intervention by way of s 74 counselling order, until the Ministry is in a position to scope plan for and report on the Ministry's responsibilities.

[202] In order to draw together the planning and intervention, a judicial conference is directed before me on 17 or 18 September 2020. An hour will be required. I regret that if need be other work scheduled on those days may need to be rearranged.

Judge JF Moss
Family Court Judge

Date of authentication: 10/08/2020
In an electronic form, authenticated electronically.