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

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

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

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2015-044-000234
FAM-2018-004-000104
[2022] NZFC 11180

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989 AND THE CARE OF CHILDREN ACT 2004
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY OF CHILDREN Applicant
AND	[MELISSA PATERSON] First Respondent/Second Applicant
AND	[JARED MATENGA] Second Respondent/Third Applicant
AND	[SHANNON ANDREWS] (aka Ms or Mrs A) Third Respondent/Fourth Applicant

Hearing: 29, 30, 31 August, 1, 2, 5, 6 & 7 September 2022

Appearances: H Reuben & M Rainbow for the Chief Executive
J Mason for the Respondent [Paterson]
H Arthur for the Respondent [Matenga] via AVL (in person on 7 September 2022)
M Headifen for Respondent [Andrews]
J Anderson Lawyer for Child

Judgment: 1 November 2022

RESERVED DECISION OF JUDGE A M MANUEL

Introduction

[1] This case is about 7 year old [Tama Matenga].[1] His mother is [Melissa Paterson]. His father is [Jared Matenga]. His caregiver is [Shannon Andrews] (previously referred to in this case as Ms or Mrs A). [Tama] has lived with Ms [Andrews] since he was about 10 months old. She is not related to him. He has seen his mother about four times a year. He has not seen his father since he was a baby.

[2] Ms [Paterson] wants [Tama] to live with her. The Chief Executive, who has a custody order under s 101 of the Oranga Tamariki Act 1989 (OTA), supports the move. So does Mr [Matenga]. Initially Ms [Andrews] was reluctantly willing to agree. She later decided to leave the decision up to the Court. Lawyer for the Child is ambivalent about the move. [Tama] himself wants to remain with his caregiver. He is generally a happy child who has been unsettled by the dispute.

[3] Essentially the Court is asked to decide whether:

(a) [Tama] should move to live with his mother (and have contact with his caregiver and start contact with his father) or;

(b) [Tama] should stay with his caregiver (and have more contact with his mother and start contact with his father).

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[1] [Tama Matenga], born [date deleted] 2015.

[4] [Tama]'s mother and caregiver live a distance of about two and a half hours away from each other. His mother lives south of Auckland and his caregiver lives to the north. There is also some distance between the two women in terms of their relationship. It is difficult. Because of this shared care arrangements are not an easy option.

[5] A move to his mother's care would involve a major upheaval for [Tama]. He would be leaving his main caregiver, home, school, family connections (his caregiver's family have become his family), church, friends, community and his dog.

[6] In his mother's care he would have a new main caregiver, home, school, siblings (his three year old half-sister [Teresa] lives in the home and his 22 year old half-brother [Kevin] is a regular visitor), friends, community and cultural connections and [pets] . His life would be turned upside down.

[7] The bonding between Ms [Andrews] and [Tama] is said to have "the psychological significance and gravity of mother and child."[2] There has been no opportunity for [Tama] and his mother to establish or maintain a secure caregiving bond.

[8] Ms [Paterson] has a history of "significantly maladaptive parenting behaviour",[3] which explains why [Tama] has not grown up in her care. There is now no evidence that "any of her past caregiving issues are still present."[4] She is a caring mother towards [Teresa], who has high and complex medical needs. [Tama] has a "strong positive affinity and yearning for his mother and his maternal half siblings."[5] "There is no reason to believe that [Tama] would not develop a secure attachment with his mother if he was given the opportunity to do so."[6]

[9] Peter Watts, the Court-appointed psychologist in this case, stated:

> In my opinion the main psychology challenge (sic) to [Tama] returning to the care of his mother relates to his presenting attachment to Ms A. [Tama] presents as having a primary caregiving attachment to Ms A. Given the

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[2] Watts report March 2021, at para 36, p 391 Bundle of Documents (BOD).
[3] Watts report March 2021, at para 51, p 393 BOD.
[4] Watts report March 2021, at para 51, p 393 BOD.
[5] Watts report March 2021, at para 57, p 392 BOD.
[6] Watts report March 2021, at para 57, p 395 BOD.

> length of time [Tama] has been in this age care (sic) and the nature of the relationship their attachment is best understood as that of a natural mother and child. Accordingly, it would be inherently distressing for [Tama] to be removed from Ms A's care and … [Tama] is a boy who presents with reactive attachment wounds.[7]

[10] Dr Watts confirmed that there was a possible clinical pathway for a move to Ms [Paterson]'s care but offered no assurance that it would be successful. He said the decision "sat on a knife edge." [8] However, while Dr Watts could not predict that the move would ultimately be best for [Tama], his opinion was it would be best to give him the opportunity to move to his mother's care at this time in his life. In other words the move should be trialled.[9]

[11] Dr Watts referred to clinical research to the effect that:

> There is now a broad foundation of clinical research indicating that if at all possible, children should be raised within their family of origin. The research examining placement outcomes for children who have come to the attention of care and protection services has shown that while children in kin-based placements tend to experience more social and financial disadvantage than those in non-kin care, in the longer-term kin-placed children tend to experience better psychological outcomes. They are more likely to experience less behavioural problems and mental health issues, while also experiencing a greater sense of perceived wellbeing. It has also been noted that kin-based placements tend to last longer and be more stable.[10]
>
> (research references omitted).

[12] [Tama] is a child of Cook Island Māori, Māori (with lineage to the iwi of [deleted]) and Pākehā descent. [Tama]'s mother is Pākehā. She was born in Australia and came to New Zealand in her early 20s. She has embraced the Māori culture and is involved at [Marae A]. [Tama]'s father is Cook Island Māori and Māori. He was born in the Cook Islands and came to New Zealand as a five year old. He is strongly connected to his culture. [Tama]'s caregiver is of [European] descent. Her family has lived in New Zealand for four generations.

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[7] Watts report March 2021 at para 58, p 395 BOD.
[8] Notes of Evidence (NOE) p 325, l 23-28.
[9] NOE p 335, l 15-28.
[10] Watts report March 2021, at para 50, p 393 BOD.

Background

[13] Proceedings have been before the Court for [Tama]'s whole life in one way or another. When [Tama] was a baby the Family Court made a declaration under s 67 of the OTA that he was a child in need of care and protection[11] followed by a s 101 of the OTA order placing him in the custody of the Chief Executive.[12] In [mid-2015] when he was less than a month old he was removed from Ms [Paterson]'s care. They were reunited in [2015 – some two months later] at a residential mother and child programme. In [date deleted – a month after being reunited] 2015 the programme provider recorded her as failing to acknowledge the risk Mr [Matenga] posed to [Tama]. In [late-2015] Mr [Matenga] was believed to be in the near vicinity of the programme residence and [Tama] was removed from Ms [Paterson]'s care. In [early-2017], when he was just shy of 2 years old, [Tama] was returned to her care but removed again after about a week. This coincided with Mr [Matenga] being released from prison. After this Ms [Paterson] had no more than limited supervised access to [Tama].

[14] Over the past year access has been a little more frequent and took place (with [Kevin] and [Teresa] present) in December 2021 and February, May, June, July and August 2022. On the August 2022 visit [Tama] had access at Ms [Paterson]'s home for the first time.

[15] Mr [Matenga] has no direct access with [Tama]. He sends items to him from time to time such as at Christmas and on [Tama]'s birthday. He receives monthly reports and photographs from Ms [Andrews].[13]

[16] In February 2019 the High Court found, in an appeal judgment, that the essential concern that led to [Tama] being removed from his mother's care had less to do with her ability to parent him or any fear that she may be violent or abusive towards him than the nature of her relationship with Mr [Matenga]. There was a history of family violence. Mr [Matenga] was violent towards her before and after [Tama] was born. Despite being given every encouragement to cut all connection with Mr

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[11] In June 2015.
[12] In August 2015.
[13] Wood affidavit of August 2022, at paras 13-16.

[Matenga] she maintained contact. At times the contact was limited because Mr [Matenga] was either in prison or avoiding police.[14] The Chief Executive's concern was that she did not recognise the violence Mr [Matenga] perpetuated towards her and the damaging effect of it on [Tama] if he was present. Apart from one threat to kill [Tama] which Mr [Matenga] made in a telephone call from prison to Ms [Paterson], he was not violent towards [Tama]. However, neither parent was seemingly prepared to accept that exposure to violence risked damaging [Tama]. This was at the heart of the opposition to [Tama] being returned to his mother's care.[15]

[17] In June 2018 a seven day hearing took place in the Family Court to decide (inter alia) whether [Tama] should move to his mother's care. The Chief Executive opposed. Mr [Matenga] was in support. He was in prison at the time and attended the hearing by AVL. He was due to be released from prison the following month, in July 2018.

[18] The Family Court declined to move [Tama] to Ms [Paterson]'s care.[16] The risks posed by her were identified as a criminal conviction history involving violence-related offending, superficial change in parenting and development of awareness of the effects of violent relationships, a history of concerns around parenting, ongoing contact with the father, a lack of transparency and an inability to assess risk due to openness.[17] The risks identified to [Tama] by his father were said to be an extensive history of violence-related criminal offending, threats to kill [Tama], threats to harm others such as the mother and social workers, demonstrated disregard of Court orders and impulsive behaviour.[18] The Family Court held that Ms [Paterson] would "mislead, craft and hide information to suit her cause" and there was "a current risk of her having ongoing contact with Mr [Matenga]."[19] While the risks presented by Mr [Matenga] were "more overtly identifiable" and related to "risks of physical and emotional harm," the risks relating to Ms [Paterson] were "more insidious and at times had been masked." They involved a "lack of honesty and hence inability to accurately be able

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[14] *Paterson v CE, Matenga* [2019] NZHC 444 at [23].
[15] At [24].
[16] *CE v [Paterson] & [Matenga]* [2018] NZFC 4795.
[17] At [87].
[18] At [86].
[19] At [129].

to assess risk" and were "interrelated and corelated to her connection with Mr [Matenga]."[20]

[19] Ms [Paterson] appealed to the High Court. She was unsuccessful.[21] She sought leave to appeal to the Court of Appeal but her application for leave was abandoned.

[20] [Tama]'s parents never accepted the outcome of the decisions in 2018 and 2019. As soon as the mother was legally able to do so, she applied again to the Family Court to move [Tama] to her care.

[21] In August 2020 the Family Court identified the primary issue as "*whether there is any possibility that [Tama] will return home into his mother's care given the length of time he has been with his current caregiver*" and directed a psychologist's report under s 178 of the OTA. The result was Dr Watts' March 2021 report in which he identified a clinical pathway for [Tama] to be returned to the care of his mother.[22]

[22] Until then the Chief Executive had staunchly opposed a move to the mother's care. Only a few months before, in an affidavit of December 2020, the then social worker Laura Costello had stated:

> …
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> If [Tama] was further exposed to further negative life events or care disruptions, this would be expected that they would have longer term, negative impact on such things as [Tama]' neuro-cognitive development, ability to regulate his emotions and capacity to bond with caregiving adults. [Tama] is safe and well cared for by Mrs A.
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> …
>
> [Tama] is settled in his placement with Mrs A and they have a strong and loving bond. [Tama] has now started school and is doing well. Oranga Tamariki believe remaining permanently with Mrs A ensures [Tama]'s safety and is in his wellbeing and best interests now and the future[23]

[23] After the March 2021 report arrived however the Chief Executive did an about turn and began to support a return to the mother's care. This coincided with a Waitangi Tribunal report on an inquiry into claims concerning the disproportionate number of

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[20] At [130].
[21] Save that a restraining order against her was discharged.
[22] Watts report March 2021, at para 49, p 393 BOD.
[23] Costello affidavit of December 2020, at paras 30 and 38, pp 23 & 25 BOD.

Māori children in state care[24] and the Department revising its policy about permanent placements.[25]

[24] This was understandably met with dismay by Ms [Andrews], who was providing exemplary care for [Tama]. She maintained her opposition to a move, wavering only briefly just before the hearing. Ms [Andrews] explained that she had read and understood the clinical research regarding kin and non-kin care arrangements, and had felt resigned or compelled to agree to a move given the stance of the Chief Executive and the ongoing reviews of plan promoting this.[26] Yet it was Ms [Andrews]'s heartfelt belief that the move would inflict further trauma on [Tama]. He had suffered trauma from his disrupted attachments in the past, with a number of changes in his placement before he was two years old, including unsuccessful attempts to place him in his mother's care. Ms [Andrews]'s view was that [Tama] would not cope with the transition and that his mother would struggle to parent him when he was highly distressed.[27]

[25] Ms [Andrews] gave evidence that [Tama] was a child who had episodes when he became overwhelmed by emotion or events, which he took out on those nearest to him by punching, kicking and throwing things.[28] In April 2022 one episode had lasted about three days and resulted in [Tama] breaking her finger.[29] She had sought and completed training in trauma-based parenting and believed this was essential for coping with [Tama] when he was highly distressed. Simply hugging and holding him did not suffice, because he did not want physical contact when he was highly agitated.

The Orders and Applications

[26] There are currently a number of Court orders in place and applications before the Court.

[27] The orders currently in place include:

[24] WAI 2915 Waitangi Tribunal Report 2021.
[25] In early 2021.
[26] NOE p 142, l 12-29 and p 205, 1 1-15.
[27] NOE p 210.
[28] NOE p 146, l l3-32.
[29] NOE p 147, l 1-17.

(a) August 2015 - custody order in favour of the Chief Executive, with a condition added in April 2021 that *"[Tama] is to remain placed with Mrs A pending further order of the Court …"*

(b) Early 2016 - final protection order in favour of Ms [Paterson] against Mr [Matenga];

(c) July 2018 – interim access order in favour of Ms [Paterson];

(d) July 2018 – interim access order in favour of Mr [Matenga];

(e) July 2018 – final restraining order against Mr [Matenga].

[28] The applications before the Court include:

(a) By the Chief Executive:

(i) September 2019 – application to appoint the Chief Executive and Ms [Andrews] as additional guardians;

(ii) August 2022 – application to discontinue the above application;

(iii) August 2022 – application to discharge placement condition.

(b) By Ms [Paterson]:

(i) September 2019 - application for access;

(ii) July 2020 - application to discharge custody order;

(iii) July 2020 - application for parenting order under the Care of Children Act 2004 (COCA);

(iv) August 2022 - notice of discontinuance seeking to discontinue the above applications;

(v) September 2022 – oral application under COCA to resolve dispute between guardians. (This related to a dispute between [Tama]' parents as his guardians about whether he should attend church and church-related activities).

(c) By Ms [Andrews]:

(i) September 2022 – application for access (if the proposed move went ahead).

` (d) By Mr [Matenga]:

(i) August 2022 – application for access (specifically for "*video access and any other access to occur at times to be agreed between Mr [Matenga] and the Chief Executive*")."

[29] Just before the hearing the parties filed a consent memorandum agreeing to the move to the mother's care on the basis of a proposed transition plan dated August 2022, which was to be overseen by an independent psychologist. The custody order in favour of the Chief Executive was to stay in place to support the transition, with the placement condition discharged and most of the other applications withdrawn. There were two minor disputes remaining, which the Court was asked to decide. One concerned Christmas 2022 with both the mother and caregiver asking to have [Tama] in their care on Christmas Day. The other was about whether [Tama] should continue to attend church and church-related activities. He had done so for many years in Ms [Andrews]'s care, but the mother's consent as guardian had apparently not been obtained. Lawyer for the child did not sign the memorandum and, as explained, Ms [Andrews] later withdrew her consent.

The evidence and the hearing

[30] The evidence for the Chief Executive included six affidavits by social workers Laura Castello, Joannah Ralston and Lindsay Wood.[30]

[31] The evidence for Ms [Paterson] included her four affidavits[31] and affidavits in support by:

(a) Donna Wilson of September 2019 (a whānau kaitiaki who was willing to supervise access);

(b) Faith Young of September 2019 (an advocate at [the Women's Refuge] who was working with the mother);

(c) [Kevin Franklin] of July 2020 (the mother's eldest child); and

(d) a critique by psychologist Tania Cargo of July 2021 of Dr Watts' reports.

[32] The evidence for Mr [Matenga] included his two affidavits[32] and an affidavit in support by [name deleted] of December 2020 (his new wife). A recent unsworn letter from [Stewart Barrett] was admitted at the hearing. Mr [Barrett] was the clinical lead for social work for [healthcare agency deleted] and he confirmed Mr [Matenga]'s attendance at a weekly mens group for several years. An article from [publication deleted] of [2022] was also produced outlining Mr [Matenga]'s involvement in [therapy].

[33] The evidence for Ms [Andrews] included her three affidavits[33] and an affidavit in support by psychologist Kathleen Orr of November 2021 critiquing Dr Watts' reports.

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[30] Laura Castello of September and December 2019 and December 2020, Johannah Ralston of December 2020 and June 2021 and Lindsay Wood of August 2022.
[31] Of September and October 2019 and January and July 2020.
[32] Of October 2019 and December 2020.
[33] Of November 2019, October 2020 and January 2021.

[34] There were six Lawyer for Child reports.[34] There were psychologists' reports from Dr Watts of May 2019 and March 2021 and a cultural report from Sophie Griffiths of September 2021. Six social work reports and plans were before the Court.[35]

[35] Ms Ralston, Ms Wood, Ms [Paterson], Mr [Matenga], Ms [Andrews] and Dr Watts all appeared at the hearing and their evidence was tested. Counsel did not require the other witnesses to attend.

[36] Where findings have already been made by the Family or High Courts, I have not revisited them, although in some respects I was invited to do so.[36]

[37] Limited weight has been placed on the critiques of Dr Cargo and Dr Orr. Dr Cargo herself acknowledged that her report was based on a limited evidential foundation and completed in a tight timeframe.[37] Until it was drawn to counsel's attention, her report was unsworn and she did not acknowledge the fourth schedule of the High Court Rules. While Dr Orr's critique was based on a wider evidential foundation then Dr Cargo's report, it was possibly affected by the nature of the brief.[38] Both critiques were criticised by Dr Watts in his evidence. Neither Dr Cargo nor Dr Orr was called to answer his criticism.

Current situation for the parties and [Tama]

Ms [Paterson]'s situation

[38] Contrary to the fears of the Chief Executive, Ms [Paterson] did not reconnect with Mr [Matenga] after he was released from prison. She has not repartnered. She has settled in [the Waikato] and is living in a "rent to buy" home. She is in receipt of a benefit. Her parents and siblings all live in Australia. Ms [Paterson] was abused by

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[34] Of March 2019, February 2020, January, May and June 2021 and August 2022.
[35] Of July 2020, April, May, June and November 2021 and May 2022.
[36] By way of example, earlier reports by psychologist Jude Clough of July 2016 and May 2018 were included in the bundle and referred to in the submissions for the mother, but Dr Clough's second report was found by the Court in 2018 to rely on evidence which was untested and which differed from the conclusions ultimately drawn by the Court. This resulted in deficits in the report and its conclusions. See *CE v [Paterson] & [Matenga]*, above n 16 at [78] and [79].
[37] Cargo report at paras 10 and 11, p 179 BOD.
[38] NOE p 372 l 29-34, p 373 l 1-4.

her mother as a child which resulted in her going into state care and later joining the [military] at a young age. It is some years since she saw her family. She is estranged from her mother but has contact with her father.

[39] [Teresa] was born in [late 2018]. [Kevin] lived with Ms [Paterson] for two years from about August 2019. He is now working and living with a partner in a city just over an hour and a half away.

[40] Ms [Paterson] has had no criminal convictions in recent years and there have been no concerns raised about her care of [Teresa]. She has been engaged with various support services and is connected to [Marae A] marae attending whananga and catering. ([Tama]'s hapū is [deleted], his iwi is [deleted] and his marae is [Marae A]). [Teresa]'s father is Māori[39] and Ms [Paterson] gave evidence that "I speak a lot of Māori to her, she sings Māori songs and she already has a good knowledge of her wider Māori whānau."[40] Ms [Paterson] has no contact with Mr [Matenga] and is not proposing to have any. She has occasional contact with a member of the extended [Matenga] family who lives locally. In the distant past she had contact with [Wayne Matenga], the father's younger brother. Ms [Paterson] is opposed to [Tama] attending church or church-related activities.

Mr [Matenga]'s situation

[41] After his release from prison in winter 2018 Mr [Matenga] made a fresh start in his life. He took steps to address the painful aftermath of a childhood in state care and an adult life spent affiliated with a gang and in and out of prison. He moved to the South Island, settled in a small town there and married in July 2019. He and his wife own their own home and he runs a [business].

[42] Mr [Matenga] no longer has any gang affiliations and he has had no fresh convictions since his release from prison.[41] He has engaged in counselling and a number of programmes to address his issues but in evidence admitted to a relapse in

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[39] Although his identity is said to be unknown.
[40] [Paterson] affidavit of July 2020, at para 32, p 152 BOD.
[41] Save for a traffic conviction in 2020.

drug use. He had recently been accepted into a residential rehabilitation programme to address this.

[43] Mr [Matenga]'s mother has passed away. He has a large number of siblings, including his brother [Wayne] who lives in Auckland and who was identified as a paternal family member able to help to connect [Tama] with his father and paternal family. Mr [Matenga] has [four other children] . He has established a relationship with his eldest son but sees little or nothing of the other children. He was raised in the Christian faith and supports [Tama] attending church and church-based activities.

[44] Mr [Matenga] is grounded in his culture and it is important to him that certain aspects are conveyed to [Tama] by him and his whānau directly. By way of example, Mr [Matenga] first gave his whakapapa to Ms Griffiths who then included it in her cultural report of September 2021 on the basis that it was not to be shared, copied or photographed.[42] And [Tama]'s hair is not being cut at Mr [Matenga]'s request in preparation for a Cook Island hair-cutting ceremony planned for [Tama]'s coming of age.

Ms [Andrews]'s situation

[45] Ms [Andrews] is a single woman with a social work degree who currently works as a senior youth mentor for a Christian-based community trust. The focus of her work role is [details deleted]. She lives in a rental property in the [Auckland] district close to the beach. Her mother has passed away. She has one sister and a brother and [nephews]. Her father, sister and her family live in the [region deleted] and her brother and his family in the [region deleted]. [Tama] has formed close attachments to Ms [Andrews]'s family and friends.

[46] Ms [Andrews] has supported [Tama]'s access with his mother and taken steps to assist him when he has been unsettled afterwards. She is alive to cultural considerations and asked for information about [Tama]'s whakapapa for some years before it was provided by Mr [Matenga] to Ms Griffiths. Meanwhile she took advice from [name deleted], a Cook Island Māori and expert in cultural matters to help meet

[42]"Whakapapa is a link to tūpuna and to identity and for Cook Island Māori it is a taonga (precious gift) and is taught through lived experience from whānau." Griffiths report p 8, p 407 BOD.

[Tama]'s cultural needs. She and [Tama] are part of a faith community with Pacific people and are involved with culturally specific activities such as [details deleted]. They read Cook Island and Māori books and engage in the languages on a daily basis. After [Tama] expressed frustration about his uncut hair, Ms [Andrews] arranged for him to be mentored by an older boy whose hair was uncut for cultural reasons.

[47] Ms [Andrews] said that regardless of the outcome of the hearing there would always be a place for [Tama] in her home.

[Tama]'s situation

[48] [Tama] enjoys school, is making good progress, is well liked and has his own close friends. He is an active child who prefers to be exploring and running around outdoors. He has joined [activities deleted]. He is happily involved in church-related activities.

[49] [Tama] has no medical or "significant emotional-behavioural or learning delays that would warrant a clinical diagnosis.[43] However he does experience episodes with difficult and distressed behaviour which Dr Watts said were driven by reactive attachment-based wounds associated with the care issues and disruptions he experienced in his early life. [Tama] needs "stable and set care routines" and "often seeks assurances around day-to-day activities."[44]

[50] After Dr Watts met with [Tama] in 2021, he concluded that:[45]

> … it was apparent that [[Tama]] experienced a primary and secure care attachment with Ms A …
>
> Alongside this primary care relationship between Ms A and [Tama], it was apparent that the child had a strong positive affinity and yearning for his mother and his maternal half siblings …
>
> … [He] presented as having a particularly strong affinity to [Kevin].
>
> With respect to his future care arrangements [Tama] clearly reported desire to spend more time with his mother and half-siblings.

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[43] Watts report March 2021, at para 38, 391 BOD.
[44] Watts report March 2021 at paras 39 and 40, p 391 BOD.
[45] Watts report March 2021, at paras 44-48, p 392 BOD.

[51] By the time [Tama]'s lawyer met with him in August 2022 [Tama] had got wind of the proposed move. His lawyer went to [Tama]'s school, meeting first with the principal. The principal knew [Tama] well and said he was normally a happy, lovable and friendly little boy but recently had become quite unsettled and emotional. [Tama] had made a comment to his principal that he wanted to cut his hair but his dad would not let him. The principal said he was anxious about his lawyer's visit because he thought his lawyer may be part of the process to uplift him and take him away from his mum, Ms [Andrews]. His was aware that his birth mother wanted him back. The principal's view was that [Tama] was very attached and well bonded to Ms [Andrews] and was worried about moving out of her care. In the principal's observation Ms [Andrews] was a wonderful caregiver to [Tama].

[52] [Tama]'s lawyer then met with him in private and reported that:[46]

> [His] demeanour was sad and glum. He frequently looked down and expressed frustration that his real Dad won't let him cut his hair
>
> …
>
> [Tama] said he really likes living with Mummy (Mrs A). He said he likes doing things with her in the weekend and likes going to the park. He also enjoys going to [a social activity] and Church.
>
> Of the contact with Mummy [Melissa], [Tama] said this was good and he liked it when he got to see her actual house. He thought he would like to go and see Mummy [Melissa] once a month. He thought about three hours would be the right amount of time. He liked seeing his older brother and younger sister.
>
> I asked [Tama] whether he had ever like to stay the night at Mummy [Melissa]'s. He was adamant that he did not want to. He said that Mummy (Mrs A) would miss him too much.
>
> I asked [Tama] whether he'd ever thought about living with Mummy [Melissa] and still being able to see Mummy (Mrs A). [Tama] was firm in his view. He said "*I'd rather stay with Mummy"* (Mrs A) … *I would miss her too much*." I asked him if he was sure, and he said he was.

[46] Lawyer for Child's report August 2022, at paras 11 and 13 to 16.

The relevant law

[53] The applications before the Court are made under both the OTA and the COCA.[47]

The OTA

[54] The purposes of the OTA are set out in s 4 and a copy is attached (see Schedule A). Section 4A of the OTA provides that the well-being and best interests of the child or young person must be the first and paramount consideration in all matters relating to the administration or application of the OTA. Section 5 of the OTA sets out the principles to be applied and a copy is attached (see Schedule B). The principles relating to care and protection of children are set out in s 13 and a copy is attached (see Schedule C).

[55] Section 11 of the OTA provides that the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity and that the child or young person must be given reasonable opportunities to freely express their views on matters affecting them and any views expressed (either directly or through representative) must be taken into account.

[56] Section 197 of the OTA provides that the relevant standard of proof is the civil standard, or balance of probabilities.

[57] Amendments to the OTA which took effect from July 2019 included the introduction of s 7AA, which places duties on the Chief Executive in relation to the Treaty of Waitangi, (te Tiriti o Waitangi) and additional purposes at s 4 including:

(a) s 4(1)(a)(i) affirming mana tamaiti (tamariki);

(b) s 4(1)(f) providing a practical commitment to the principles of the Treaty of Waitangi;

[47] See [28] above.

(c) s 4(1)(g) - recognising mana tamaiti (tamariki), whakapapa and the practice of whānaungatanga for children who come to the attention of the department; and

(d) s 4(1)(h) maintaining and strengthening the relationship between children who come to the attention of the department and their (i) family, whānau, hapū, iwi and family group and (ii) siblings.

[58] The concepts of **family group, mana tamaiti (tamariki), tikanga Māori, whakapapa** and **whānaungatanga** are referred to in various sections of the OTA, and are defined in s 2 as follows:

> **family group**, in relation to a child or young person, means a family group, including an extended family,—
>
> (a) in which there is at least 1 adult member—
>
> (i) with whom the child or young person has a biological or legal relationship; or
>
> (ii) to whom the child or young person has a significant psychological attachment; or
>
> (b) that is the child's or young person's whānau or other culturally recognised family group
>
> **mana tamaiti (tamariki)** means the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person
>
> **tikanga Māori** means Māori customary law and practices
>
> **whakapapa**, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend
>
> **whānaungatanga**, in relation to a person, means—
>
> (a) the purposeful carrying out of responsibilities based on obligations to whakapapa:
>
> (b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:
>
> (c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection

[59] The effect of the 2019 amendments to the OTA have been considered in several recent Family Court "return" cases.

[60] In the 2020 decision *Chief Executive of Oranga Tamaki v AR*[48] the Family Court addressed a contest between kin and non-kin relationships and emphasised that:[49]

> Section 5(1)(b)(vi) requires the Court to take a holistic approach which sees the child as a whole person. Such approach includes, but is not limited to considering the child's developmental potential, education and health needs, whakapapa, cultural identity, gender identify, sexual orientation, disability (if any) and age.

[61] In *AR* the Family Court declined to move a three year old Māori child from a Māori non-kin caregiver to his Māori maternal grandmother. The grandmother already had the child's older siblings in her care, but there were safety concerns if the child moved. A cultural report was available. The psychological evidence did not support a move.

[62] The 2020 Family Court decision *[L] v [P]*[50] concerned a three year old Māori child who had lived with Māori/Pākehā caregivers since he was a baby. His Māori paternal grandmother maintained that having regard to the child's heritage and whakapapa he should be returned to the care of his whānau. The decision was ultimately made under COCA once OTA orders had been discharged. No psychological evidence or cultural report was available. The Family Court declined to move the child because:[51]

> …The "*tie-breaker*" is the fact that [the current caregivers] have cared continually for [the child] from the time he was discharged from hospital and he has continued to thrive in their care. I was concerned the risks that were likely to result from the change affecting [his] emotional and psychological wellbeing were greater than those risks advanced by [the grandmother] if [he] remained in the care of [the caregivers]. When I assessed these risks, I found the risks unacceptable and potentially traumatising to [his] welfare and best interest if he was removed from their care.

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[48] *Chief Executive of Oranga Tamariki v AR* [2020] NZFC 4046.
[49] At [243].
[50] *[L] v [P]* [2020] NZFC 11387.
[51] At [253].

[63] In the 2021 decision *Chief Executive of Oranga Tamariki v MQ*[52] (also known as the *Moana* case) the Family Court commented on the effect of the 2019 amendments as follows. While the recent amendments have reframed and strengthened many cultural considerations, the ultimate determination requires a holistic analysis in which the child must be at the centre of the decision-making. No particular principle has been legislatively mandated to trump another.[53]

[64] *Moana* involved a five year old Māori child who had lived with Pākehā caregivers since she was a toddler. The Chief Executive sought a move to Māori caregivers who "whakapapa to [the child's mother] through marriage."[54] They were living in a papakainga[55] with other whānau and caring for the child's younger sibling. The decision was made under the OTA. The psychological evidence did not support the proposed move. No cultural report was available. While there was a considerable distance between the homes of the existing and proposed caregivers, the relationship between them was co-operative. The Court declined to move the child finding (inter alia) that:

> …
>
> (f) There is a real risk of long term harm to her wider but vital emotional, mental and psychological needs by effecting a change in placement,
>
> (g) I am not satisfied that is in her well-being and best interests to take that risk,
>
> (h) Her connections to whānau and cultural components have already been impacted by the earlier decisions and failings of Oranga Tamariki in searching for safe whānau connections at the outset
>
> (i) The deficits that [the child] has suffered in terms of whānau or cultural connections must be accepted as an unfortunate consequence of all that has occurred. But, the solution to those failings is not remove her from a safe haven. Instead, the solutions are to be found by applying the statutory principles and providing [her caregivers and prospective caregivers] with adequate support to build those connections, while retaining the stability of the status quo.[56]

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[52] *Chief Executive of Oranga Tamariki v MQ* [2021] NZFC 9089 (currently on appeal).
[53] At [57].
[54] At [12].
[55] Housing on ancestral Māori land.
[56] *Chief Executive v MQ* above n 52, at [323].

[65] The 2021 decision *Chief Executive v [Wallace]*[57] concerned a three year old Māori child who had spent the first eight months of her life in the care of her Māori mother. After that, she was cared for by Pākehā caregivers. Her mother sought a return to her care. The case was decided under the OTA with a final custody order made in favour of the Chief Executive. There was no psychological evidence but there was a cultural report available. A move was endorsed because the Court found that it was in the child's interests to be placed where her cultural identity could be nurtured and her whānau relationship supported. Her mother was not without parenting skills nor connection with the child and had the ability to meet the child's needs with support, assistance and monitoring from the Chief Executive.[58]

[66] In the 2022 appeal decision *McHugh v McHugh*[59] the High Court discussed the language of the OTA in the context of an application for orders appointing special guardians (rather than a proposed move) and held that:

> … the principles in ss 5 and 13 are specifically framed in the legislation as being a part of the determination of what is in the well-being and best interests of the child. They are not separate from the paramountcy principle. Having regard to those principles …does not demote the paramountcy principle but exercises it.[60]

[67] The High Court also held that the OTA required more than simple recognition and respect for te ao Māori values of mana tamaiti, whānaungatanga and whakapapa and the Court must take active steps to promote them:[61]

> Reading the Act as a whole in applying a purposive interpretation, the legislation heavily emphasises the importance of whānau connections and relationships, and is weighted toward honouring the child's place within their whānau (and hapū, iwi and family group) in providing an ongoing role for whānau in the child's life to the greatest extent possible consistent with the child's well-being and interests.
>
> In summary, I consider the language of the Act mandates the court and Oranga Tamariki to take active steps to promote the values of mana tamaiti, whānaungatanga and whakapapa in the well-being and best interests of tamariki Māori.
>
> The relevant te ao Māori value here is that no tamariki Māori is alone. Every tamariki is a taonga. There will be whānau, hapū and iwi willing to assume their responsibilities to the child.

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[57] *Chief Executive v [Wallace]* [2021] NZFC 6445.
[58] At [123].
[59] *McHugh v McHugh* [2022] NZHC 1174.
[60] At [88].
[61] At [111]-[114].

> …
>
> Whānau is not defined in the Act but authoritative definitions are coined widely. For example the Māori dictionary defines it as "extended family, family group." Therefore in the case of tamariki Māori, when considering a child's mana tamaiti the whānaungatanga responsibilities of whānau and how to maintain and strengthen the relationship between a child and their whanau, the Court should consider giving effect to more than one familial relationship.

[68] Two United Nations Conventions may be of relevance in this case:

(a) The United Nations Convention on the Rights of the Child, which at Article 8.1 gives the child the right to preserve his or her identity without unlawful interference and at Art 30 states that a child who is indigenous shall not be denied the right, in community with other members of his group, to enjoy his own culture, to profess and practise his own religion, or to use his own language;

(b) The United Nations Declaration on the Rights of Indigenous Peoples which was endorsed by New Zealand in April 2010 at the United Nations but has not been ratified.

COCA

[69] Under s 4 of the COCA the welfare and best interests of the child in his particular circumstances must be the first and paramount consideration of the Court. In assessing the welfare and best interests of the child, the Court must take into account those principles set out in s 5 of COCA which are relevant to the case under consideration. A copy of s 5 is attached (see Schedule D). Under s 6 of the COCA, a child must be given reasonable opportunities to express views on matters affecting him and any views must be taken into account by the Court.

Cultural report writer's evidence

[70] Mrs Griffiths connected with Ms [Paterson], Ms [Andrews], Mr [Matenga] and others before she completed her cultural report[62] and concluded that:[63]

> …Tamariki feel whānau connections to the people who are their primary caregivers, whether they are whānau or not.
>
> In the cultural context [Tama]'s primary ethnicity is Cook Island Māori and Māori. Acknowledgment of [Tama]'s whakapapa "ko wai au" (who am I) is vital regarding cultural identity, whakapapa (lineage) and whānaugatanga (a sense of belonging). Participation within culture is fundamental as tamariki learn the culture through involvement, observation, and guidance from older whānau members.
>
> Acknowledgement of [Tama]'s European whakapapa is also vital to give [Tama] a complete sense of self identity, knowing where he is from and where he belongs within his whānau groups.

[71] Ms Griffiths acknowledged each of the parties involved in [Tama]'s life. Mr [Matenga] had been "addressing the unresolved trauma he has carried with him for the last 35 years which has seen positive changes in his thinking and logic."[64] [Tama] had had no contact or interaction with his paternal siblings or whānau and it was important to establish and strengthen those relationships.

[72] Ms [Paterson] had a "great support network and has strived to better herself. She has embraced the Māori culture and loves the Māori way of being and doing, viewing her own culture as cold and judgmental. Ms [Paterson]'s involvement at [Marae A] Marae has seen her earn respect from kaumatua and kuia …" [65]

[73] Ms [Andrews] had "done a wonderful job of raising [Tama]"[66] and he had thrived in her care. Maintaining family connections or whānaungatanga was important to Ms [Andrews] and her extended whānau and lifelong friends had formed solid relationships with [Tama] and viewed him as one of their own. She was willing "to uphold and support [Tama] to know his whānau for his own cultural identity and wellbeing in a safe environment."[67]

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[62] Unlike Dr Watts, who was unable to contact Mr [Matenga] before he prepared his reports.
[63] Griffiths report, p 41, p 440 BOD.
[64] Griffiths report p 42, p 441 BOD.
[65] Griffiths report p 43, p 442 BOD.
[66] Griffiths report p 44, p 443 BOD.
[67] Griffiths report p 44, p 443 BOD.

[74] Ms Griffiths recommended that:[68]

> Regardless of the outcome for [Tama] with his permanent placement, it is crucial that he has ongoing meaningful contact with his caregiver, whānau. and wider whānau. The inclusion of whānau regarding any plans for [Tama] moving forward is important.

The psychologist's evidence

[75] In her critique Dr Orr summarised Dr Watts' position as opening a potential pathway for a move while maintaining that "it was not his role to determine if this was practicable, as that goes to the heart of the Court's decision-making. Rather, Dr Watts proposes a broad possible transition plan which appears to favour the transition."[69]

[76] In cross-examination Dr Watts maintained this position. Despite declining to make any predictions about the success or otherwise of a move it emerged that he did indeed favour the transition.

[77] The possible clinical pathway identified by Dr Watts was based on four factors:

(a) clinical research comparing kin and non-kin based placement;

(b) the mother's capacity to meet the child's needs;

(c) the child's attachment and relationship with the mother; and

(d) social resources.

[78] None of the three psychologists took any issue with the clinical research comparing kin and non-kin based placements.

[79] Dr Watts assessed the mother as now able to meet [Tama]'s needs. The relationship between [Tama]'s parents which was "a primary psychological driver" to the mother's parenting issues had ended. Her living and family situation was stable. There were no reported parenting concerns. There was in fact "a body of reports from various third party professionals attesting to the pro-social lifestyle [Melissa] has come

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[68] Griffiths report p 46, p 445 BOD.
[69] Orr report, at p 69, p 301 BOD.

to live as well as her parenting abilities."[70] The "biggest challenge" Ms [Paterson] would face with respect to parenting [Tama] would be:

> understanding and managing his reactive attachment wound. If [Tama] was to be returned to [Melissa]'s care, he would require a high level of emotional attenuation as well as a home environment with highly structured care arrangements and routines. [Melissa] would also have to bear witness to [Tama] likely grief for Ms A and remain child focused while managing it. Based on her report to me I formed the opinion that [Melissa] was aware of this and was motivated to receive education and support to manage this issue.[71]

[80] While [Tama] "presented as having a positive relationship and affinity" with his mother and his observed behaviour with her was "positive and affectionate[72] if a transition to her care was poorly managed this "would likely lead [Tama] to experience a marked exacerbation of his existing attachment issues with heightened psychological distress and behavioural difficulties."[73] Any transition would require:

> the scaffolding of community-based support for the mother as well as therapeutic support for [Tama], and include input from and contact with Ms A during the transition period. Ideally Ms A would in fact remain contactable for [Tama].[74]

[81] In Dr Watts' opinion the social resources were evenly balanced between remaining or moving. It was clear that "as a result of being in Ms A's long term care [Tama] is well embedded in her family, with her friends and within the wider social and educational community."[75] Due to the distance between the parties, if [Tama] were transitioned back into the care of his mother he would lose all his social resources but:

> At the same time [Tama]'s current living arrangements offer him no naturalised opportunity to develop relationships and attachments with his half-siblings and other members of his extended whānau/family. Returning to the care of his mother would allow [Tama] the best opportunity to develop relationships with these core family members.[76]

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[70] Watts report March 2021 at para 53, p 394 BOD.
[71] Watts report March 2021 at para 55, p 394 BOD.
[72] Watts report March 2021 at para 57, p 394-395 BOD.
[73] Watts report March 2021 at para 58, p 395 BOD.
[74] Watts report March 2021 at para 59, p 395 BOD.
[75] Watts report March 2021 at para 60, p 395 BOD.
[76] Watts report March 2021 at para 61, p 395 BOD.

[82] Dr Watts' evidence under cross-examination was to the effect that:

(a) there was a pathway available to trial the move and while no one could know how successful it would be, the transition plan would act as a safety net and "we have to wander into this and just see how far we get …";[77]

(b) [Tama] was at an age where "this is the time to have a move happen rather than a catastrophe during his adolescence or even later on when he has gone through puberty, and [is] sexually dimorphically stronger and more able to [cause] damage";[78]

(c) three months of "troubles and problems and distress" could be expected and then after another three months there should be a review to see if [Tama] was "becoming more suited or not";[79]

(d) the move needed to be tried "effectively to get it over with." Either it would work or not, but the alternative was the damage which exposing [Tama] to continued litigation would cause;[80]

(e) children who did not know their biological families were at risk of idealising or demonising them but at a more general level were not bonded and did not understand their tūrangawaewae;[81]

(f) [Tama]'s wish to remain with his caregiver was only to be expected but "that doesn't mean we don't do it." Dr Watts drew an analogy with a medical procedure which a child might not wish to undergo but was still best for him;[82]

(g) Dr Watts stressed several times that the decision "sits on a knife edge"[83] but nevertheless saw the move as a way of "ensuring the child has the best opportunities to know [his]

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[77] NOE p 396 l 26-27.
[78] NOE p 396, l 29-30.
[79] NOE p 334, l 5-8.
[80] NOE p 335, l 15-25.
[81] NOE p 341, l 4-11. (Tūrangawaewae – a sense of identity and independence associated with having a particular home base)
[82] NOE p 342, l 5-11.
[83] NOE p 325 l 23-34 and p 342, l 14-29.

whānau as much as [he can]" "in a way where the child is kept secure and safe throughout the whole process" so that he received therapy and still had contact with his caregiver;[84]

(h) the process need not be traumatic if [Tama] felt "securely held";[85]

(i) the premise was that the child would eventually one day want to know who his family of origin was and it was "inevitable" that he would return to them. This should not happen in an unstructured way and "we want this child to be stoked and preloaded with as much knowledge about [his] whānau as possible";[86]

(j) the advantages of continuing with the current care arrangement were "shorter term" whereas a move "was longer term with respect to the advantages";[87]

(k)in the future [Tama] could be told that the adults, in trialling the move, were "clinically hedging their bets to ensure that when he reflected on his childhood he had the best opportunity to have contact with his family of origin";[88]

(l) while remaining with his caregiver and increasing his contact with his mother and father might be the "ideal scenario" the reality was that "the very fact that we're [in Court] means that is highly unlikely to happen, which means a black and white plan needs to be put in place."[89]

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[84] NOE p 354, l 11-15.
[85] NOE p 358, l 32-33.
[86] NOE p 361, l 25-30.
[87] NOE p 361, l 1-5.
[88] NOE p 376, l 21-23.
[89] NOE p 384, l 24-26.

Key issues

Cultural factors

[83] Ms Griffiths identified [Tama]'s ethnicity as "primarily Cook Island Māori and Māori" derived from his father Mr [Matenga]. It follows that Mr [Matenga] and the paternal family are uniquely placed to meet [Tama]'s cultural needs.

[84] In evidence Mr [Matenga] emphasised the importance of certain aspects being conveyed to [Tama] by him and his whānau directly, but he has not been in a position to do that to date. For several years he has been on his own journey of healing and is continuing on that path.

[85] This left a vacuum with [Tama] unable to complete his pepeha[90] at one point and currently unable to understand the significance of his uncut hair, which is a bugbear for him.

[86] In the absence of any direct involvement by Mr [Matenga] both Ms [Andrews] and Ms [Paterson] have stepped up. Ms [Andrews] has sought cultural support and connected with Cook Island Māori. Ms [Paterson] has expressed an affinity with te ao Māori and forged links at [Marae A] marae. [Name deleted], a trustee at the marae, spoke highly of Ms [Paterson] to Ms Griffiths stating that[91] "my whānau, hapū and iwi view [Melissa] as one of our own."

[87] However, there may well be limitations on Ms [Andrews]'s or Ms [Paterson]'s abilities to meet [Tama]'s cultural needs. In cross-examination Ms [Andrews] acknowledged she was not able to meet [Tama]' cultural needs herself;[92] and Mr [Matenga] gave the following answers about Ms [Paterson] to her lawyer:[93]

> Q. And you think that culturally she is very aware of the tikanga and the Cook Island-Māori requirements and culture?
>
> A. Ah … to be honest I think she only knows a little bit just like everyone else. It's just … you know what I mean, 'cos she hasn't had much involvement with

[90] An introduction in te reo which shares your connection with important people and places.
[91] Griffiths report p 32, p 431 BOD.
[92] NOE p 172, l 4-5.
[93] NOE p 230, l 29-33, p 231. (No evidence, other than from the bar, was given that Ms [Paterson] was being whangai-ed to a marae).

> [Tama], but if she did you know what I mean, I think she would do exactly the same thing as [Ms] [Andrews] is doing; is her research.
>
> Q: Right, and you would be aware that she's being whangai-ed to a marae down in [location deleted] where she is?
>
> A. Yes.
>
> Q. And so, she is, in that regard immersed in tikanga Māori anyway down there?
>
> A. I don't know that because I'm not there, but …if she is then she is.

[88] In addition, Ms [Paterson] has taken the position (wisely given the background) that she will not have contact with Mr [Matenga] and his contact with [Tama] will need to be arranged by a social worker. While this will not prevent her having contact with other members of the [Matenga] family it may make contact between [Tama] and his father, who is essential to meeting [Tama]' cultural needs, more difficult.

[89] Ms [Andrews] currently has indirect contact with Mr [Matenga] via the monthly reports and items he sends and there is nothing to prevent her having contact with Mr [Matenga] to facilitate contact with [Tama].

[90] In the circumstances it is not clear whether [Tama]'s cultural needs could be better met by a move to his mother's care or remaining with his caregiver. [Tama]'s father and his paternal family are critical to meeting his cultural needs but a move to his father's care or the care of a paternal family member is not being proposed.

Ms [Paterson]'s parenting abilities

[91] Questions were raised about Ms [Paterson]'s parenting abilities, given the absence of any formal parenting assessment and various incidents where it was suggested she had put her rights as a guardian before [Tama]'s best interests.

[92] Dr Watts and the social workers maintained that Ms [Paterson]'s parenting abilities had been sufficiently scrutinised. She was successfully parenting [Teresa], who was a more vulnerable child than [Tama][94] and as a result of raising [Teresa] and her contact with [Tama] she had frequent contact with various professionals.

[94] Watts report March 2021 at para 54, p 394 BOD.

[93] The incidents raised included one in early 2022 when [Tama] had an accident which required dental treatment. It was put to Ms [Paterson] that she had delayed authorising treatment in an exercise of her guardianship rights which caused [Tama] unnecessary pain or discomfort. Ms [Paterson] vehemently denied this.

[94] It was also put to Ms [Paterson] that although it had been agreed that a possible move would not be discussed with [Tama], she had allowed [Tama] to see the proposed transition plan marked on her home calendar and had even put a choice between her and Ms [Andrews] to [Tama] directly saying "pick me, pick me." The latter allegation was denied.

[95] Both parents were criticised for refusing to allow [Tama] to cut his hair which had resulted him in being bullied at school and in confusion or resentment on his part.

[96] It was suggested that Ms [Paterson]'s stance over Christmas 2022 and church attendance indicated that she may be more focused on her rights as guardian than on [Tama]'s interests.

[97] Over the course of the hearing I had the opportunity to observe Ms [Paterson] as both a participant and a witness. The evidence about [Tama]'s hair, teeth and other matters was all examined in fine-grained detail.

[98] I reached the view that the difficulties over [Tama]'s hair were a result of lack of communication and certainly not any failure by his parents to prioritise his best interests, and that even if there was some justification for the other criticism, Ms [Paterson] either already has or can acquire the parenting abilities required to successfully parent [Tama].

[99] [Tama] was parted from Ms [Paterson] for reasons which she probably does not accept as valid. Since then she has been utterly focused on regaining his care. At times she may have taken steps which were counter-productive to achieving her goal or lost sight of his interests. But in 2018 the Family Court found that Ms [Paterson] was "a nurturing mother" and that "psychologically and emotionally as well as physically she can care for [Tama]. She is a strong, resourceful and determined

woman."[95] I agree with that finding, save that rather than presenting as a strong, resourceful and determined woman Ms [Paterson] was a mixture of both vulnerability and strength at the 2022 hearing. At times she was unable or barely able to engage in the hearing, which was adjourned for half a day after she absented herself without prior warning. She would become inordinately distressed by any criticism of her parenting. However, when she gave evidence about her three children she generally impressed as an intelligent, insightful and loving mother.

Analysis and findings

[100] Dr Watts' reports were criticised by two psychologists and he was cross-examined at length. All to little or no effect. His emphatic view, which was given for cogent reasons, was that a move to Ms [Paterson]'s care should be trialled.

[101] Thus the psychological evidence, which I must accept, supports trialling the move. For this reason this case is distinguishable from the decisions in *AR*, *[L] v [P] & Ors*, and *Moana* where a move was not endorsed, but there was either no psychological evidence available or the psychological evidence did not support a move. Another feature which distinguishes this case is that it post-dates the *McHugh* decision, which stressed that the Court must take active steps to promote te ao Māori values rather than simply recognising and respecting them.

[102] I have approached this decision starting from the point of [Tama]'s wellbeing and best interests (s 4A of the OTA) and then considered the purposes (s 4 of the OTA), principles (ss 5 and 13) and other factors which support:

(a) [Tama] remaining in Ms [Andrews]'s care; or

(b) a move to Ms [Paterson]'s care.

[103] The analysis which follows is not exhaustive, but identifies the relevant purposes and principles and assesses the interplay between the facts and the law.

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[95] *CE v [Paterson]*, above n 16, at [106].

[104] There are four principles set out in s 5 of the OTA, some of which are multi-faceted, by which the Court must be guided. They relate to the child's involvement (s 5(1)(a)), the child's well-being (s 5(1)(b)), the child's place in his family, whānau, hapū, iwi and family group (s 5(1)(c)), and the child's place in his community (s 5(1)(d)).

[105] Section 13 sets out a further eleven principles that must guide the Court on care and protection decisions. These cover both the general, such as the desirability of providing early support and services (s 13(2)(a)) and the specific, such as a child being removed from his usual caregiver only if there is a risk of serious harm to the child (s 13(g)).

(a) Purposes, principles and other factors which support [Tama] remaining:

(i) a safe, stable and loving home.

[106] The words "a safe, stable and loving home" are used at ss 4(1)(e)(i), 5(1)(b)(iii) and s 13(2)(i)(iii)(A) of the OTA. A safe, stable and loving home is central to a child's well-being. Ms [Andrews] has provided this for [Tama] for most of his life. While Ms [Paterson] may also be able to provide a safe, stable and loving home, this is presently untested.

(ii) [Tama]'s participation, views and support;

[107] Sections 4(1)(a)(i), 5(1) (a), s 5(1)(b)(vii) and s 11 of the OTA emphasise the importance of a child participating in and expressing views about any decisions affecting him and provide that any views expressed must be taken into account. Endeavours must be made to gain his support for any decisions made.

[108] [Tama]'s clear view is that he wishes to remain with Ms [Andrews] and while he wishes to have contact with his mother, he does not wish to have any overnight contact. At seven years of age his views are not determinative but they must carry weight. It may be difficult to obtain [Tama]'s support for a move to his mother's care given the strength of his feelings.

(iii) Impact of harm on the child and steps to enable recovery;

[109] Sections 5 (1)(b)(ii) and s 13(2)(a)(ii) of the OTA provide that the Court must take into account the impact of harm on the child and steps to be taken to enable his recovery.

[110] [Tama] is a child who experiences episodes driven by reactive attachment-based wounds associated with past care issues and needs stable care routines. A move may be counter-productive to [Tama]'s recovery because it will inevitably create disruption in his care routines and day to day activities.

(iv) Serious risk;

[111] Section 13(2)(a) of the OTA provides that a child should be removed from the care of a member of their family group who is their usual caregiver only if there is a serious risk of harm.

[112] Ms [Andrews] is a member of [Tama]'s family group[96] and she has become his usual caregiver. While Dr Watts' evidence is that a move is nigh on inevitable and may be harmful if it takes place at a later time or in an unsupported way, it is arguable whether [Tama] is at risk of any serious harm which would justify removal.

(v) Place in community;

[113] Section 5(1)(d) of the OTA provides that a child's place within his community should be recognised and in particular how the decision affects their stability (including the stability of their education and the stability of their connections to community and other contacts) and the impact of disruption on their stability should be considered.

[114] If a move takes place [Tama]'s place within his existing community will be at best disrupted and at worst lost. As Dr Watts acknowledged, he may lose all his current social resources.

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[96] See [58] above.

(b) Purposes, principles and factors which support a move:

(i) Long term outcome and developmental potential;

[115] Section 5(1)(b)(vi) of the OTA provides that a holistic approach should be taken that sees the child as a whole person including (inter alia) his developmental potential. Section 13(2)(j)(iv) refers to supporting a child to achieve his aspirations and developmental potential.

[116] Dr Watts' evidence was to the effect that [Tama]'s long term needs or development potential may be better supported by a move to his mother's care despite the short term disadvantages.

(ii) Placement with siblings;

[117] Section 4(1)(h)(ii) of the OTA refers to maintaining and strengthening the relationship between a child and his siblings. Section 13(2)(j)(ii)(A) of the OTA provides that a child who is in the custody of the Chief Executive should receive special protection and assistance designed to preserve his connections with his siblings;

[118] The relationship between [Tama] and [Teresa] may be better maintained and strengthened by a move to Ms [Paterson]'s care. The opportunity for him to grow up in the same home as [Kevin] has now passed given [Kevin] is living independently, but their relationship may still be better maintained and strengthened if [Tama] were in his mother's care.

(iii) Treaty principles;

[119] Section 4(1)(f) provides that one of the purposes of the OTA is to provide a practical commitment to the principles to the Treaty in the way described in the OTA. The Treaty is not specifically referred to in either ss 5 or 13.

[120] In the *Moana* case the Family Court considered the practical commitment to be a duty on the Chief Executive under s 7AA of the OTA, rather than on the Court.[97]

[121] On an alternative view, s 5(1)(b)(i) of the OTA provides that the child's rights must be respected and upheld when considering his wellbeing and as a Cook Island Māori, Māori and Pākehā child, [Tama] has rights which must be respected and upheld.

[122] The relevant Treaty principle was identified by the Waitangi Tribunal as a guarantee at Article 2 of Tino Rangatiratanga over kāinga.

> Kāinga captures a range of meaning including a village or a home. Continuity of chiefly authority over not just land or resources, but also the people is directly guaranteed in the Māori text of Te tiriti/the Treaty. This is nothing less than a guarantee of the right to continue to organise and live as Māori. Fundamental to that is the right to care for and raise the next generation.

[123] On a fundamental level [Tama] is a child in state care (albeit the care of the kindly Ms [Andrews]) but as a Cook Island Māori, Māori and Pākehā child he has the right, all things being equal, to be cared for and raised in a kin rather than a non-kin setting.

(iv) te ao Māori principles;

[124] The OTA enjoins the Court to promote the te ao Māori values of mana tamaiti (tamariki), whakapapa and whanaungatanga.[98] These are referred to at s 4(1)(a)(i); s 4(1)(g), s 5(1)(b)(iv); s 5(1)(c)(ii) and (iii); s 13(2)(b)(ii) and s 13(2)(j)(iii), generally in the context of a child's "family, whānau, hapū, iwi, and family group."

[125] "Family group" is defined broadly to include a family group in which there is at least one adult member to whom the child has a significant psychological attachment. Ms [Andrews] and the [Andrews] family fall within this definition. In other words, the OTA recognises these concepts in non-kin settings. This point was made by Ms Griffiths when she said that "[t]amariki feel whanau connections to the people who are their primary caregivers, whether they are whānau or not."[99]

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[97] *Moana*, above n 52, at [49]-[50].
[98] See [58] above.
[99] Griffiths report, p 41, 440 BOD.

[126] Furthermore, mana tamaiti (tamariki) is defined as:

> the intrinsic value and inherent dignity derived from a child's … whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, and family group, in accordance with tikanga Māori or its equivalent in the culture of the child …

[127] It follows that the OTA recognises the equivalent values in different cultural settings. This was also acknowledged by Ms Griffiths, who affirmed the presence and the value of whānaungatanga in both Ms [Andrews] and Ms [Paterson]'s households.

[128] However, while the OTA recognises recognises te ao Māori values across kin and non-kin settings and across all cultures, the definitions of whakapapa and whānaungatanga by their very nature tend to prefer kin to non-kin settings and so these values may be better promoted by a move to Ms [Paterson]'s care.

(v) holistic approach.

[129] Section 5(1)(b) of the OTA provides that the wellbeing of a child must be at the centre of decision-making and in particular (inter alia) at (vi) a holistic approach should be taken that sees the child as a whole person which includes but is not limited to his development potential, educational and health needs, whakapapa, cultural identity, gender identity, sexual orientation, and age.

[130] Broadly, the evidence of Dr Watts is that a holistic approach would see a trial of a return to the mother's care.

[131] Returning to s 4A, and having considered the purposes, principles and other factors which favour or disfavour a move to the mother's care, I find on the balance of probabilities that trialling the move is in [Tama]'s wellbeing and best interests. The decision is finely balanced but as foreshadowed at [100] and [101] above, the psychological evidence is the key to this outcome.

[132] The remaining issues concern Christmas 2022 and church-going and the mother's application concerning the guardianship dispute is resolved on the basis that Ms [Paterson] and her family, Ms [Andrews] and her family and Mr [Matenga] and his family are each to be free to include [Tama] when they practice their own faith (or

not) when he is in their care. This is to include church-going and church-related activities.

[133] The reason for this finding is that it will meet the principles in s 5(d) (continuity) and 5(f) (identity) of the COCA and [Tama]'s wishes under s 6 of the COCA. It is in [Tama]'s welfare and best interests for any unnecessary change to be avoided given the scale of change he will soon be facing. He has attended church and church-related activities for many years and enjoys it. While Mr [Matenga]'s contact with [Tama] is currently limited by distance and supervision in future it may progress to a point where [Tama] engages in faith-based activities with his father or the wider paternal family.

[134] For the same reasons (continuity and identity) [Tama] is to spend Christmas 2022 with Ms [Andrews] and her family. I considered splitting Christmas Day but this would be unfair to [Tama] because of the distances involved and the fact that he suffers from car sickness. The expectation is that [Tama] will spend Christmas 2023 with his mother and her family.

[135] In conclusion, I make the following orders and directions:

(a) The move to the mother's care is to be trialled on the basis set out in the draft plan of August 2022, with the dates and details to be set in consultation with an independent psychologist;

(b) The application by the Chief Executive to appoint additional guardians is dismissed together with the mother's application to discharge the custody order and application for a parenting order under COCA;

(c) The Chief Executive's application to discharge the placement condition and the care giver's application for access are adjourned to allow the three month plus three months periods referred to by Dr Watts to run;[100]

(d) A half day submissions only hearing is to be allocated no sooner than seven months from the date of this decision to consider the resolution of the

[100] See [82](c) above.

applications referred to at (c). Meanwhile the draft transition plan provides for regular access between Ms [Andrews] and [Tama] which I consider likely to be the minimum acceptable;

(e) The Chief Executive is to provide a review of the last plan for [Tama] within a month of the date of this decision and is to report thereafter every two months. The documents are to include a report prepared by the independent psychologist for the purposes of the Court;

(f) The mother's application for access is also adjourned to the hearing date referred to at (d) above so that if for any reason the trial move is unsuccessful she has an application for access before the Court and will not need to make a fresh one;

(g) The father's application for access in terms of the order sought is not opposed and is granted accordingly;

(h) Lawyer for the child appointment is to continue and she is to report regularly at such intervals as she sees fit;

(i) Leave is granted to the parties and lawyer for the child to bring the matter back before the Court on 48 hours notice; and

(j) Subject to availability, the proceedings are to be case managed by me.

Dated at Auckland this day of November 2022 at

A Manuel
Family Court Judge

Schedule A

Section 4 Purposes

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

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

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

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

(iii) are culturally appropriate and competently provided:

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

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

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

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

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

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

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

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

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

(ii) support to address their needs:

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

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

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

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

(ii) siblings:

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

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

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

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

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

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

Schedule B

Section 5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

(a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

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

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

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

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

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G)disability (if any); and

(H) age:

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

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

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

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

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

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

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

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

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

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

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

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

(i) how a decision affects the stability of a child or young person (including the stability of their education and the

stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

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

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

Schedule C

S 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, 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 whānaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:

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

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

(d) a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child or young person from harm or likely harm:

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

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

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

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

(i) commence early; and

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

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

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

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

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

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

(iii) be guided by the following:

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

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

(C) the importance of mana tamaiti (tamariki), whakapapa, and whānaungatanga 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 whānaungatanga responsibilities of the child's or young person's family, whānau, hapū, iwi, and family group:

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

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

Schedule D

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child 's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.