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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2017-090-000460
[2021] NZFC 6445

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[MOIRA WALLACE] [DUNCAN WOODS] Respondents

Hearing: 17-20 May 2021

Appearances: C Holdaway for the Chief Executive
T Smitton for the Respondent [Wallace]
Respondent [Woods] appears in Person
S Sage as Lawyer for the Child

Judgment: 9 July 2021

RESERVED DECISION OF JUDGE S D OTENE
(Disposition)

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[1] [Kaitlin Godfrey], born on [date deleted] 2017, is the daughter of [Moira Wallace] and [Duncan Woods].[1] The Chief Executive is [Kaitlin]'s custodian. It is

[1] The references hereafter to [Kaitlin] and some of her whānau members by their first names is for ease

critical and urgent for [Kaitlin] to determine with whom she will be raised; whether that be [Moira] and the whānau who support her, or with [Joan and Rex Barr] and their family, with whom the Chief Executive placed [Kaitlin] in [date deleted] 2018. [Moira] lives in [location 1] and Mr and Mrs [Barr] live in [location 2]. I determine, with provisos, that it is in [Kaitlin]'s well-being and best interests to be placed with her mother.

[2] That said, the court's ability to implement that determination by order or direction is constrained. To explain why that is so, and to identify the steps that must be taken to effect that placement, requires a detailed factual and procedural background and consideration of the legislative framework. I provide that after first summarising the nature of the proceeding and what each party seeks.

The Proceedings

[3] [Kaitlin] has been declared in need of care or protection. The proceedings have now reached what is commonly described as the "disposition" phase, in which the court may make a variety of orders to meet the care and protection needs.

[4] The Chief Executive submits a plan recommending that the court make a final custody order in his favour. It is premised on the basis that there is no realistic possibility of [Kaitlin]'s return to [Moira]'s care. The factors most acutely informing that position distil to the following. First, the trauma that will be occasioned to [Kaitlin] by disruption of her secure attachment with Mr and Mrs [Barr] if she is placed with [Moira]. Secondly, the intensive support required for [Moira] to adequately parent [Kaitlin] and the fluctuating relationships between [Moira] and those in the [Woods]' whānau who offer their support to her.

[5] [Moira] seeks to resume [Kaitlin]'s care and hence disagrees with the plan. She proposes that [Kaitlin] be placed with her in the parenting facility where they resided for the first eight months of [Kaitlin]'s life, or alternatively, with the [Woods] whānau.

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of identification given the common surnames. No disrespect is intended. [Kaitlin] is named in some documents as carrying the surname "[Wallace]", but [Moira] clarifies she is surnamed "[Godfrey]" as [Duncan] was before taking his father's name "[Woods]".

[6] [Moira] has no application before the court, she has simply sought to be heard in respect of the Chief Executive's proposed plan. She seeks:

(a) That a family group conference be convened to explore options for [Kaitlin]'s care arrangement, including her return to [location 1].

(b) That consideration be given to replacing the Chief Executive's interim custody of [Kaitlin] with custody in favour of an iwi social service if such a service can be identified.

[7] Ms Sage is the lawyer for [Kaitlin]. She attended upon [Kaitlin] in [location 2] shortly prior to the hearing. Ms Sage endorses the "impeccable" care provided for [Kaitlin] by Mr and Mrs [Barr]. [Kaitlin] is obviously not of an age or developmental stage to assess and express views on the options for her care.

[8] Ms Sage's submission is that [Kaitlin] should, with appropriate supports in place, be returned to the care of her parents in [location 1] by way of a transition plan made with expert guidance. Ms Sage does not invite the court to endorse a lengthy arrangement whereby contact between [Kaitlin] and [Moira] is increased and assessed before considering a transition of care. She says that the long-term placement, whether with Mr and Mrs [Barr] or [Moira], needs to be settled now. The essence of Ms Sage's advocacy is that there has been failure to observe statutory principles that emphasise the care of a child within the child's whānau, hapū or iwi, which principles can and should now be afforded determinative weight.

Background

[9] In care and protection proceedings, the court is typically provided with large volumes of information about children and their whanau, that have been retained in department[2] records which encompass occurrences over decades and through generations. For lapse of time and other reasons, persons with direct knowledge of matters dealt with in that information are often unavailable to contemporary decision

[2] Being the Ministry of Children (as currently responsible) and its predecessors (as previously responsible) for the administration of this Act.

makers. Also, when care or protection grounds are alleged for reasons of chronic dysfunction over long periods, information is often not disputed when called upon or assessed with the view of making findings as to the occurrence of discrete events. Nevertheless, and with careful regard for the weight that can be properly applied, such information may have contextual value. I draw on information of that nature proffered in relation to [Kaitlin] and augmented by the evidence of her whānau and social worker to elicit the background that is material to the necessary findings.

The [Wallace] Whānau

[10] [Moira] is the daughter of [Erik Wallace] and [Gemma Kingston]. She is the third of their six children.[3] Mr [Wallace], both through separation from Ms [Kingston] and through incarceration, was absent from his children for significant periods of time. [Moira] recalls her mother's drug use and social gatherings in their home that were not safe for her as a child; but she also recalls the protection of her paternal grandmother, [Maude Hill]. Ms [Hill], who was alert to when active risk was present for the children with their mother, would often take [Moira] and her brother [John] into her care. [Moira] speaks now of the closeness of her relationships with her grandmother and [John] by reference to those early experiences.

[11] The Family Court ordered [Moira] and her siblings into the interim custody of the Chief Executive in [date deleted] 2007. [Moira] was then aged [under 10].[4] In September 2008 the siblings were declared in need of care and protection and the Chief Executive's custodial responsibility was confirmed by substantive order.[5] It appears also that at some point the Chief Executive was appointed as additional guardian of the siblings.[6]

[12] But for an awareness that her mother's drug use was problematic, [Moira] did not understand at the time, and nor does she have a full understanding now, of the

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[3] Ms [Kingston]'s oldest child, [Cayden], now deceased, was given to adoption at birth.
[4] Born on [date deleted] 2001.
[5] Pursuant to s 101.
[6] Although a guardianship order was not evidenced, submissions of counsel for the Chief Executive refer to an additional guardianship order in favour of the Chief Executive (made pursuant to s 110) having been discharged contemporaneously with discharge of the custody order (made pursuant to s 101).

reasons she and her siblings were removed to the State's custody. However, the Chief Executive's receipt of more than 30 reports about concerns for [Moira], her siblings and parents, summarised in generic description as neglect, abuse, substance misuse and gang association, gives some indication of the complex vulnerabilities of Ms [Wallace]'s whānau occasioning the Chief Executive's intervention. Notwithstanding Ms [Hill]'s interventions, the Chief Executive's records indicate that her protective ability was oftentimes compromised by her difficult circumstances and her activities.

[13] Nor did [Moira], as a child, understand what was happening upon her removal to care. Her expectation was that she was being taken to her grandmother, as was routine when her mother could not look after her. She describes her then-fear, discomfort and distress when placed with people unknown to her and how she and [John] would make their way back to their grandmother when there was opportunity to do so.

[14] Through the ensuing 4½ years [Moira] was cared for by persons other than her whānau in a variety of arrangements. She and the other three oldest siblings ([John], [Tracey] and [Jimmy]) were placed first with caregivers separate from their two younger siblings ([Brooke] and [Georgie]). The younger siblings joined the older siblings in [date deleted] 2007. That continued until [date deleted] 2008 when all children were placed in a Child, Youth and Family[7] home. They were predominantly cared for in that home by the same person but also by relief carers and taken to respite carers outside the home. In [date deleted] 2008, [John] and [Tracey] moved to live with people who had been providing them respite care, thus separating [Moira] and [John]. Ms [Kingston] moved to [location 2] in late 2008 to be nearer her whānau support with a view to resuming the care of the children. [John] and [Tracey] were placed with Ms [Kingston] in [date deleted] 2009. In [date deleted] 2010 the other four children were placed in [location 2] with caregivers, [Eva and Paul Merrill], so that regular contact with Ms [Kingston] could be established as a precursor to return to her care. [Georgie] returned to Ms [Kingston] in [date deleted] 2010. [Moira], [Brooke] and [Jimmy] returned in [date deleted] 2012.[8]

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[7] Being the predecessor to Oranga Tamariki.

[8] In [date deleted] 2012 with the children having returned to Ms [Kingston], the custody and additional guardianship orders in favour of the Chief Executive were discharged and an order made directing the Chief Executive to provide support (s 91). The support order was reviewed in October 2013 with

[15] It is unclear for how long [Moira] remained with Ms [Kingston]. The Chief Executive records that by [date deleted] 2013 two of her siblings were again in the care of Mr and Mrs [Merrill], and that in [date deleted] 2014 Ms [Kingston] took four children (not including [Moira]) to the local Child, Youth and Family office having determined that she was unable to continue providing their care. A subsequent family group conference agreed that [Brooke] would live with Mr and Mrs [Merrill], [Georgie] with other caregivers and the other children with Ms [Hill] and Mr [Wallace].

[16] [Moira]'s recollection is that in 2013 or thereabouts, upon her father's release from prison, he asked [Moira] and her siblings whether they would like to live with him. Only [Moira] elected to do so and despite having had little contact with him, making that decision because matters were not satisfactory with her mother. She therefore moved from [location 2] to [location 3], where her father resided, and later with him to [location 1], at which point she lived again primarily with her grandmother, Ms [Hill]. [Moira] gives an account of her father's drug use and her grandmother trading drugs. The Chief Executive gives an account of Ms [Hill]'s struggle to manage the challenging behaviour of the grandchildren in her care and her sale of synthetic marijuana (when legal and continuing upon it being classified illegal). Additional issues were Mr [Wallace]'s further periods of incarceration, his management of a [details deleted] business, the eviction of Ms [Hill] and other whānau who resided with her when their rented home was found to be methamphetamine contaminated and Ms [Hill]'s and Mr [Wallace]'s supply of drugs to [Tracey] and possibly others of the children for sale at school and in the community.

[17] By 2015 [Moira] was coming to the attention of police for public disturbance. Police reported concerns to Child, Youth and Family about [Moira]'s drug use, aggression, disengagement from education and that Ms [Hill], despite being supportive of [Moira], was unable to manage [Moira]'s antisocial behaviour. A family group conference held in July 2016 to address [Moira]'s care and protection and an admitted offence of unlawfully getting into a motor vehicle agreed that the Chief

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recommendation that it lapse, which is apparently what occurred.

Executive would apply for an interim custody order for [Moira]. That order did not occur.

[18] Significant also for [Moira] around this time, at the age of 13 years, was establishment of her relationship with the [Woods] whānau, a connection made through her aunt who is partnered and has children with [Duncan]'s brother.

The [Woods] Whānau

[19] [Duncan] is the son of [Bryan Woods] and [Ruiha Godfrey]. They together have older children [Daniel], [Carl], [Kaitlin], and [Anaru] and a younger child, [Grace]. [Bryan] and [Ruiha] each have children from other relationships. The [Woods]' whānau narrative was generously given by [Bryan] and [Kaitlin Senior].

[20] [Bryan] has, as he describes, a "huge" whānau. His paternal whakapapa is to [iwi 1]. His maternal whakapapa is to [iwi 2] and that, in [location 4], is where he was raised. At aged 16 years he joined whānau in [location 5] and gained employment, moving there primarily to distance himself from physical abuse inflicted upon him by his father. He returned some years later to [location 4] and met [Ruiha] several years later again.

[21] A feature of [Bryan]'s life from his late adolescence in [location 5] has been prolific and entrenched abuse of alcohol and of drugs of all manner. That behaviour has continued over decades, punctuated by some periods of self-imposed abstinence. Despite that, [Bryan] maintained employment and he and [Ruiha] raised their children together, although with much compromise of their children's well-being. Their relationship was marked by mutual physical and verbal abuse, by frequent police attendances at their home due to that abuse and by a cycle of separation and reconciliation. [Ruiha] too was a substance abuser.

[22] [Bryan] did not physically abuse the children, having consciously determined not to do so given his physical abuse by his father. But the children were witness to their parents' abuse of each other and were spoken to and otherwise treated by [Bryan] in ways that instilled fear. The damage of that treatment is demonstrated in [Bryan]'s

acknowledgment that although his relationship with [Daniel] is now restored, his son once hated him.

[23] The State did not formally intervene in the care of these children, but the Chief Executive's receipt of reports of concern for them similar in volume and description to reports received for [Moira] and her siblings indicates complex vulnerabilities for the [Woods]' whānau similar to those for the [Wallace] whānau.

[24] In 2004 [Ruiha] left the family home for, as it transpired, the final time, thereby ending the relationship with [Bryan] and leaving responsibility for the children, then all aged under 10 years, to him. [Bryan] resigned his employment to care for the children. [Anaru] was given to the care of [Bryan]'s niece and [Grace] to the care of his cousin. [Bryan] and the other four children relocated to [location 1] in 2005, where they remain. [Bryan] removed the children from [location 4] to reduce the boys' exposure to gang culture that was occurring via the influence of some gang affiliated whānau.

[25] In 2008 [Bryan] was introduced by a whānau member to a church community. He participated on the periphery of that community for some five years, though his substance abuse continued as funds permitted, to the neglect and deprivation of the children. He then met through the church a person he describes as a "Man of God". That encounter was for [Bryan] a singularly and spiritually profound experience of the healing power of the Holy Spirit. It manifested in his immediate cessation of substance use (alcohol and all drugs). His abstinence continues to the present day. His life is committed to Jesus as his saviour, encompassing worship at his church, pastoral relationships with others of the church community and sharing his experiences in outreach to the wider community. Grounded in faith, he has ended his decades long behaviour damaging of himself and his whānau. He encourages his whānau towards the life at which he has arrived – absent of substance abuse and violence.

[26] [Kaitlin Senior] shares her father's spiritual commitment and engages with him in some of the faith work. She and her partner have made a life for their [under 10-year-old] daughter protected from the childhood abuses she experienced. They extend that protection to [Kaitlin Senior]'s siblings, [under 15-year-old] [Jonah] and [under

10-year-old] [Alexis], the children of [Ruiha]. These children were placed with [Kaitlin Senior] by intervention of Oranga Tamariki, as it held care and protection concerns for them with their mother. Their care is now legally structured by orders made under the Care of Children Act 2004 in favour of [Kaitlin Senior] and her partner.

[27] [Kaitlin Senior]'s responsibility for her siblings speaks to two aspects of the [Woods]' whānau function. First, [Kaitlin Senior]'s role as tuakana; a role emphasised by [Moira] and [Duncan] in the name chosen for their daughter. Secondly, that [Ruiha]'s lifestyle continues to challenge her whānau. That said, [Ruiha] remains connected with them, [Bryan] included. The impression gained from the evidence is that [Kaitlin Senior] and [Bryan] are adept at managing the ebbs and flows of [Ruiha]'s circumstances, so that they can maintain good enough and safe enough relationships with her.

Oranga Tamariki Intervention

[28] [Moira] and [Duncan][9] were aged [under 15] when they commenced their relationship. Though [Moira] was ostensibly living with her grandmother, reports to Oranga Tamariki through the period from 2015 to 2017 indicated various changing living arrangements and a largely unstructured and, at times, unsafe lifestyle. What is known is that in June 2016 [Moira] was with [Duncan] at [Bryan]'s home when police executed a search warrant, recovering from [Duncan]'s room methamphetamine, a methamphetamine pipe and a psychoactive substance. Police inquiry indicated that [Ruiha] had been supplying [Duncan] with methamphetamine and psychoactive substances. [Moira] acknowledges that she was at that time using methamphetamine.

[29] In May 2017 [Moira] (then aged [under 18]) was staying with [Ruiha], having spent some time living with her father but finding this no longer viable. Reportedly, he had physically abused her. [Ruiha] contacted Oranga Tamariki. [Moira]'s pregnancy was disclosed.[10] By July 2017, the social worker had formed both a belief

[9] [Duncan] was born on [date deleted] 2002.
[10] [Moira] had not known she was hapū until approximately six months into her pregnancy and had not received antenatal care.

that the unborn child was in need of care and protection, and an intent to refer the case to a care and protection co-ordinator to convene a family group conference and to apply for an interim custody order. This position was relayed to [Moira]. She agreed to the social worker's suggestion that upon the baby's birth they would together enter a [residential parenting programme].[11]

[30] On 9 August 2017 the social worker made an application for interim custody of the unborn child in favour of the Chief Executive.[12] That application was made without notice to [Moira] or [Duncan], disclosing [Moira]'s willingness to work with Oranga Tamariki and to enter [the residential parenting programme]. Nevertheless, urgency was pleaded primarily because [Moira] was expected by her midwife to deliver her baby before the [expected delivery date], and because the social worker assessed that the baby's safety could not be assured without the Chief Executive holding her custody. Contemporaneously the social worker applied on notice for a declaration that the child was in need of care or protection on the grounds in s 14(1)(a), (b) and (f).[13]

[31] The interim custody order was granted as sought on 10 August 2017. [Kaitlin] was born [date deleted]. She and [Moira] entered [the residential parenting programme]. A family group conference held on 12 September 2017 agreed that [Kaitlin] was in need of care or protection, that a declaration should be made to that effect and that a custody order pursuant to s 101 should be made in favour of the Chief Executive. The conference plan was, broadly, that [Moira] and [Kaitlin] remain at [the residential parenting programme], with [Moira] accessing the parenting and educational support available through the programme, for [Duncan] and wider whānau to have contact with them as arranged by the social worker and for [Duncan] to engage with vocational and alcohol and drug services. Arrangements for [Kaitlin] once the [the residential parenting programme] placement was at an end were not addressed. That said, the plan was to be reviewed by the social worker in December 2017 and by the care and protection co-ordinator in March 2018 at which points, I infer, ongoing placement was to be addressed.

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[11] Operated by [charitable trust name deleted].
[12] Pursuant to Oranga Tamariki Act 1989, s 78.
[13] Pursuant to s 68.

[32] The social worker submitted a plan and report to the court dated 27 September 2017 premised upon a realistic possibility of the return of [Kaitlin] to [Moira] and recommending the making of a custody order in favour of the Chief Executive. The report signalled that a whānau member was being assessed as a caregiver for [Moira] and [Kaitlin] (presumably for when their residence at [the residential parenting programme] ended).

[33] [Moira] demonstrated strong parenting capability within the supported environment at [the residential parenting programme]. The social worker reported the following in March 2018: [Kaitlin]'s strong relationships with [Moira] and wider family and achievement of expected developmental milestones; observation of positive interaction between [Moira] and [Kaitlin]; [Moira]'s strong, positive, social networks and involvement in a range of social, community and recreational activities through [the residential parenting programme]; the house parents' description of [Moira]'s "amazing growth" in her time at [the residential parenting programme] and their confidence in her ability to put [Kaitlin]'s needs first.

[34] Those observations are congruent with [Moira]'s self-assessment of her progress at [the residential parenting programme]. She enjoyed the environment and reflects upon having acquired knowledge and skills during her time there. She realistically balances that with insightful acknowledgment that the placement presented challenges and a description of her management of those challenges. For instance, when she and [Duncan] were at odds, to the point she wanted to leave the residence, she would turn her phone off to break the unhelpful interaction. She understood that the not-uncommon disagreements between or with other mothers in the home were often driven by parenting fatigue and she was able resolve those conflicts without escalation. Through this period [Moira] and [Kaitlin]'s contact with [Duncan], appropriately sanctioned, was frequent and sometimes encompassed other members of his whānau. [Duncan] found employment when [Kaitlin] was born. [Bryan] and [Kaitlin Senior] both describe how connection with [Kaitlin] positively motivated [Duncan] and conversely his demotivation when [Kaitlin] and [Moira] moved away from [location 1]. For example, he stopped working when she and [Moira] left [location 1].

[35] [Moira] and [Kaitlin]'s placement at [the residential parenting programme] ended on [date deleted] 2018, at which point they moved to live with Ms [Kingston] in [location 6].[14] [Moira] actively communicated her preference for this course. She now explains that she did so knowing that she and her mother would not be able to successfully live together, given that it had been two to three years since they had lived with each other and that the soundness of their relationship fluctuated. [Moira] believed that she could have maintained the care of [Kaitlin] in [location 1] with the support of [Kaitlin Senior], [Bryan] and [Carl]. That was not the position taken by the social worker. [Moira]'s assent therefore was given in the context of no other options being available to her and her assessment that [Kaitlin] would be removed from her care if she did not live with her mother. Her assessment of the position was reasonable given the statement in the social worker's plan of 26 March 2018 that [Duncan]'s immediate family were not capable of looking after [Kaitlin].[15]

[36] There was little, if any, communication between the Oranga Tamariki office in [location 1] which held social work responsibility for [Kaitlin] up to the point of her relocation and the office in [location 6] that would then assume responsibility. It seems that the transfer protocol, by which a receiving office is to be provided information from the transferring office to inform the decision to accept or decline transfer, was actioned with the [location 2] office rather than the [location 6] office. That is unfortunate because communication with the staff at the [location 6] office or, optimally, their participation in the planning for [Kaitlin]'s care, might have enhanced an assessment of the viability of placement with Ms [Kingston] and, if considered viable, appropriate components of the plan. Instructive in this regard was the absence of surprise by [social worker A], the social worker in [location 6] ultimately assigned responsibility for [Kaitlin], when it was put to her that there was a case note by an [location 1] social worker noting a concern that Ms [Kingston] may not have the ability to support [Moira]. Similarly instructive was the active social work involvement by [social worker A]'s colleague for [Moira]'s sister [Jimmy] (then aged [under 15]) in Ms [Kingston]'s care.

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[14] There is reference to that having been agreed at a family group conference on 16 March 2018, although the record of that conference does not appear to be before the court.

[15] That statement was also made in respect of [Moira]'s immediate family, though presumably it was to be inferred that that concern did not extend to Ms [Kingston].

[37] The circumstances upon [Moira]'s and [Kaitlin]'s relocation to [location 6] were not as anticipated. In addition to [Jimmy], [Tracey], [John], his partner and their baby were then or soon after living with Ms [Kingston], hence seven people were being accommodated in a three-bedroom home. Ms [Kingston] was frequently with her partner away from the home, worrying [Moira] that the plan was not being complied with and thereby risking the removal of [Kaitlin] from her care. That led to arguments between [Moira] and Ms [Kingston]. [Duncan] moved to [location 2] and gained employment. [Moira] would travel to [location 2] to visit him. Knowing that [Duncan]'s contact with [Kaitlin] in those circumstances was not permitted and, if occurring, could also lead to removal of [Kaitlin] from her care, [Moira] would leave [Kaitlin] with Ms [Kingston].[16] [Moira] says she did so by agreement with her mother, but tension arose when Ms [Kingston]'s plans changed, for instance if Ms [Kingston] wanted to visit her partner. That said, in the report of a Gateway assessment[17] undertaken on 6 June 2018 it is recorded that [Moira] appeared to be caring appropriately for [Kaitlin], understood the importance of her education and accurately assessed that [Duncan]'s immaturity impeded his ability to care for [Kaitlin].

[38] By June 2018 [Moira] and Ms [Kingston]'s relationship had deteriorated to the point that it was untenable for them to continue living together. Indeed, Ms [Kingston] had moved to other accommodation with [Kaitlin] in her care whilst [Moira] and [Jimmy] remained in Ms [Kingston]'s home. On [date deleted] 2018 social workers placed [Kaitlin] with Mr and Mrs [Barr] in [location 2]. The placement with Ms [Kingston] was not sanctioned because she was not an approved caregiver, and in light of Oranga Tamariki's prior involvement with her. That position goes again to the problematic viability of the plan from the outset, and it is difficult to understand why it was agreed that Ms [Kingston] would oversee [Moira]'s care of [Kaitlin] if, on information known when the plan was formulated, Ms [Kingston] was unlikely to meet the Oranga Tamariki criteria for caregiver approval.

[39] [Moira] made known that she wanted to return to [location 1]. [Social worker A] therefore made inquiries of [Kaitlin]'s former social worker in [location 1] as to

[16] Though there is suggestion that on at least one occasion [Moira] took [Kaitlin] to visit [Duncan].
[17] The Gateway programme is a comprehensive health assessment and education profile for children in need of care or protection.

whether there were family who could provide appropriate support for [Moira] and [Kaitlin] if they returned or, alternatively, whether they could re-enter [the residential parenting programme]. Her colleague's response was that there were no such whānau and, having already attended [the residential parenting programme], [Moira] could not return.

[40] [Social worker A]'s plan and accompanying report of 4 July 2018 characterised [Moira] as having prioritised [Duncan] over [Kaitlin], concluded that [Moira] was emotionally unavailable to [Kaitlin], made reference to [Moira]'s aggressive behaviour towards Ms [Kingston] and Ms [Kingston]'s fear of her, violence between [Moira] and [Duncan] ([Moira] having told [social worker A] that [Duncan] had damaged her telephone) and that [Moira] had taken the position that she wanted visits with [Kaitlin] rather than to care for her. It was noted also that a report was received in May 2018 that [Kaitlin] was being hit by [Moira]. That report was not substantiated. Even so, the plan for the following three-month period remained premised upon there being a realistic possibility of [Kaitlin]'s return to [Moira]'s care. Specific detail of how that would occur was contingent upon [Moira] determining whether she would remain in [location 2] or return to [location 1] and, if the latter, the social worker would request a placement for [Kaitlin] in [location 1].

[41] For a brief period, [Moira] returned to live with her former and [Brooke]'s then-current caregivers, Mr and Mrs [Merrill]. That arrangement provided the prospect of [Kaitlin]'s return to [Moira]'s care and was the basis of a further family group conference plan made on 10 August 2018 and social worker report dated 27 October 2018. The relationship between [Moira] and Mr and Mrs [Merrill] fractured shortly thereafter, resulting in [Moira] being warned by police about her aggressive behaviour. [Moira] then resumed living with Ms [Kingston] and obtained employment. That arrangement was also brief, ending in the context of reported violence between [Moira] and Ms [Kingston], at which point [Moira] took up boarding accommodation. Despite these changing circumstances [Moira] maintained regular contact with [Kaitlin]. The contact was supervised, for the most part by [social worker A]. Given that the August plan was no longer viable, [social worker A] recommended that a family group conference co-ordinator convene another family group conference. For reasons that are unclear [social worker A]'s recommendation was not adopted.

[42] By 5 October 2018 when [social worker A] further reported to the court, the Oranga Tamariki position had fundamentally changed to an assessment that there was no realistic possibility of returning [Kaitlin] to [Moira]'s care. [Moira]'s request to return to [the residential parenting programme] with [Kaitlin] was not agreed to by Oranga Tamariki on the basis that there was no support available to [Moira] at the conclusion of the residential placement, hence [Kaitlin]'s then-continued placement with [Moira] was not likely to be viable. It was asserted that a permanent placement for [Kaitlin] was required, with a focus upon time imperatives appropriate to her developmental needs. Seemingly incongruous with that position is an action point in the plan of 14 November 2018 for [Moira]'s parenting to be assessed to establish her ability to care for [Kaitlin] independently. The rationale explained by [social worker A] is that the parenting education delivered through the assessment process might provide [Moira] with skills as to warrant revisiting placement decisions.

[43] [Moira] returned to [location 1] in February 2019 because her grandmother, Ms [Hill], was unwell. She decided the following month not to return to [location 2]. [Moira] stayed with Ms [Hill] through her illness until her death [soon] after [Moira]'s return. Contact between [Moira] and [Kaitlin] was to occur by video call, though [Moira] could not be contacted for the first session in April and was available for only a short period in May. This contact, by all descriptions, was not meaningful for either of them. Contact had been occurring on an approximate monthly basis with [Brooke], then aged [under 18-years-old].

[44] The parenting assessment was delayed because it was difficult, upon [Moira]'s return to [location 1], for [social worker A] and Rose-Marie Stoddard, the independent social worker tasked to complete the assessment, to make contact with [Moira]. Ms Stoddard's report when provided in June 2019 concluded, in broad summary, that [Moira] would be able to parent [Kaitlin] positively if in a supported and sheltered environment but would not be able to hold boundaries with [Duncan] and her family if she was to live independently in the community.

[45] [Social worker A]'s plan and report of 7 June 2019 retained the premise that there was no realistic possibility of [Kaitlin]'s return to [Moira] for reasons, inter alia, that [Moira] had abandoned [Kaitlin], not made herself available for contact or the

parenting assessment and advised that there was ongoing violence between her and [Duncan]. It was noted that options for [Kaitlin]'s permanent home with whānau had been explored without success and that Mr and Mrs [Barr] had expressed willingness to have [Kaitlin] permanently in their care. An action point in the plan therefore proposed that permanent placement options be identified, decided upon and facilitated.

[46] [Social worker A] explains that as a matter of practice there would have been an internal consultation before determining that no whānau placements options were available and at which point a hui ā-whānau[18] would be held inclusive of hapū and iwi. A hui ā-whānau had been earlier held, that is on 17 October 2018, attended by [Moira], Ms [Kingston], [Brooke], [Jimmy], [social worker A], the Oranga Tamariki Kairaranga ā-whānau[19] and a representative of the local runanga. It does not appear that whānau placements had been ruled out at that point, given that [social worker A] advises that the Kairaranga tried, without success, to obtain information from the maternal whānau present about other family members who might be able to provide support. In fact, whether as a result of that hui or other process, further inquiry into the possibility of [Kaitlin]'s placement with Ms [Kingston] was made, though ultimately ruled out. Hence by June 2019 when the final position was that all whānau placement options had been explored without success, the actions to do so appear to have been constituted by [social worker A]'s inquiry of her [location 1] colleague in June 2018 as to the availability of supportive whānau should [Moira] and [Kaitlin] return to [location 1], that was responded to in the negative, the unproductive hui ā-whānau in October 2018 and the inquiry about Ms [Kingston]. There does not appear to have been a hui ā-whānau convened for the express purpose of exploring hapū or iwi placement.

[47] [Moira]'s grief at her grandmother's illness and subsequent death, and at the removal of [Kaitlin] from her care, features large in her account of her actions through this period which, by objective measure, were indifferent or avoidant. She was instead

[18] Hui ā-whānau are gatherings facilitated using kaupapa Māori engagement protocols in accordance with Oranga Tamariki practice guidance.

[19] The Kairaranga ā-whānau (weaver of family connection) is a specialist role within Oranga Tamariki with the function to identify and engage significant whānau, hapū and iwi members in decision-making for tamariki and supporting and/or facilitating hui ā-whānau.

drawing again on the support of the [Woods] whanau and living for a period with [Kaitlin Senior] hoping that might lend to her case to resume [Kaitlin]'s care. By the assessment of both [Moira] and [Kaitlin Senior], [Moira] contributed well to the functioning of the household. [Kaitlin Senior] describes both [Moira] and [Duncan] as reticent personalities who learn by observing. She found [Moira] receptive to her guidance and support and respectful of boundaries she imposed. Most pertinent was that [Duncan] was not allowed in the home because [Duncan]'s alcohol and drug use, albeit from [Kaitlin Senior]'s abstinence standard, was and remains unacceptable. Similarly, she would not tolerate the possibility of abusive interactions between [Duncan] and [Moira] in her home. That restriction was difficult for [Moira] in the face of [Duncan]'s persistent requests that she be with him and given their emotional connection forged through shared experience during their developmentally formative years. The importance of that connection to [Moira] is evident from her observation that she has trusted her most private confidences to [Duncan] alone and the emphasis she places on the length of their relationship. In August 2019 [Moira] elected to live with [Duncan] at [Bryan]'s home. That is where they remain.

[48] The recommendation that there was no realistic possibility of [Kaitlin] returning to [Moira] was rejected by Judge Pidwell on 14 June 2019. A family group conference was directed inviting Oranga Tamariki to consider [Kaitlin]'s placement with [Moira] in a supported living environment. That conference was held on 25 July 2019 and a plan agreed for [Moira] and [Kaitlin] to enter a different residential parenting programme, [name deleted – second residential parenting programme]. Additional features of the plan included [Moira] completing a hair follicle test to detect drug use over a three month period, neurological assessment of [Moira], transition of [Kaitlin] to [Moira]'s care by way of familiarisation visits, and assessment of [Duncan]'s brother [Carl] as a caregiver should [Moira] be unable to maintain [Kaitlin]'s care.

[49] The next plan and report respectively dated 4 and 7 November 2019 assessed a realistic possibility of [Kaitlin]'s return to [Moira]. [Social worker A] was asked from the bench whether that assessment was grounded in a social work perspective or a response to the judicial indication. She answered to the effect that the plan to

transition [Kaitlin] to [Moira] was agreed because recommendation against return had been put to the court and rejected.

[50] In the four-month period to November 2019 the return of [Moira]'s hair follicle test negative as to all drug use was the only action completed. From Oranga Tamariki's perspective there had been an absence of proactivity by [Moira]. However, it would be inaccurate to attribute the lack of progress solely to [Moira] because there were other factors at play, including that the conference had devised a plan without full cognisance of the [second residential parenting programme]'s entry criteria and that there were logistical and administrative difficulties arising from reliance upon an [location 1] social worker for support. Unfortunately during this period, access that had been ordered[20] for [Moira] with [Kaitlin] on her birthday did not occur due to miscommunication about air travel requirements.

[51] The November plan was rejected by Judge Pidwell on 14 November 2019, characterising it as non-compliant with Oranga Tamariki obligations to consult with iwi. The judge directed Oranga Tamariki to file a new plan to address the available options for [Kaitlin]'s care within iwi and iwi support available for whānau to implement the family group conference plan to return [Kaitlin] to [Moira]. In response to that direction [social worker A] established contact with Te Iwi O Ngati Kahu Trust (TIONKT), kaimahi of which in turn established contact with [Moira], [Duncan] and [Bryan], resulting in agreement to convene a whānau hui in February 2020. A plan dated 29 January 2020 noting that intent was considered by Judge Pidwell on 4 February 2020 and the proceedings adjourned pending outcome of the hui.

[52] Notable also is that in December 2019 [Moira] had direct contact with [Kaitlin] in [location 2]. [Moira] travelled to [location 2] for the day accompanied in support by an Oranga Tamariki employee with whom she was acquainted and comfortable. Further contact was arranged upon [Moira]'s request for January 2020, contingent upon [Moira] providing a photograph. That had been suggested by Mrs [Barr] as a means of preparing [Kaitlin] for the next visit because she had been unsettled after the

[20] Interim access order made 7 August 2019.

December visit. The photograph was not received so contact did not proceed in January 2020. It next occurred in February 2020 and July 2020.

[53] [Social worker A] next reported to the court on 18 May 2020, reverting therein to an assessment that there was no realistic possibility of [Kaitlin]'s return to [Moira]. It is recorded that TIONKT had been unable to obtain effective engagement with [Moira] and [Duncan], that whānau with whom they had engaged did not consider [Moira] nor [Duncan] were in a position to care for [Kaitlin] and that the assessment of [Carl] as a potential caregiver was in progress though on the basis of initial inquires it was not clear that he would satisfy the approval criteria.

[54] Nor had it been possible to complete the neuropsychological assessment, [Moira] having attended only one assessment session. However, on that limited basis the assessor reported that [Moira] has demonstrated difficulty understanding, using and thinking with spoken language and made recommendations to assist her with the acquisition and processing of information. That assessment resonates with [Kaitlin Senior]'s sense that [Moira] learns by observation. Judge Pidwell considered [social worker A]'s May report on 3 June 2020 and, upon lawyer for child's invitation, called for a cultural report.[21]

[55] The cultural report, undertaken by [report writer 1], was provided in September 2020. [Report writer 1] received [Kaitlin]'s whakapapa from [Bryan], [Moira] and [Duncan]. As noted, she is uri of [iwi 2] and [iwi 1] through [Bryan]. Through [Ruiha] she is [iwi 2] also and [iwi 3], through [Erik Wallace] she is [iwi 1] and [iwi 4] and through [Gemma Kingston] she is [iwi 5].

[56] Also, by September 2020, TIONKT had secured regular engagement with [Moira] and met with whānau in hui through which a plan was devised proposing that [Moira] re-enter [the residential parenting programme] with [Kaitlin] for a 12 month period supported by the [Woods]' whānau through the course of the programme and, upon completion, whether she reside with them or independently. That plan was canvassed in [social worker A]'s report of 5 October 2020 as the first of three potential care options. The second option proposes that [Moira], with the support of a whānau

[21] Pursuant to s 187.

member, reside for a period of time in [location 2] to strengthen her relationship with [Kaitlin] whilst a comprehensive assessment of her ability to care for [Kaitlin] is undertaken. The third option, which is advocated for by [social worker A] and the only option comprised in her accompanying plan (and in her further and most current plan of 10 December 2020), is to maintain [Kaitlin]'s care permanently with Mr and Mrs [Barr].

[57] Contact between [Moira] and [Kaitlin] has now been established on a more regular basis, occurring, by and large, monthly since October 2020. [Moira] and the Oranga Tamariki support person fly from [location 1] to [location 2] for the day and spend approximately three hours with [Kaitlin].

Court Proceedings

[58] The early judicial focus and impediment to the progression of the proceeding was [Moira] and [Duncan]'s minority, meaning that unless authorised[22] they could not take part in the proceedings without a litigation guardian or next friend.[23] That issue took a period of five months from the commencement of proceedings, and three judicial conferences, to resolve. Resolution came on 25 January 2018, when [Moira] and [Duncan] were authorised to take part in the proceedings without a litigation guardian or next friend.[24] The proceedings were then adjourned to effect service on [Moira] and [Duncan] and to enable them an opportunity to take legal advice.

[59] In the 17-month period up to 14 June 2019 a further seven judicial conferences were held without disposition of the substantive application for declaration of a care or protection need.[25]

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[22] Family Court Rules 2002, r 90A.
[23] Family Court Rules 2002, r 90.
[24] At the first judicial conference on 6 October 2018 the presiding judge adjourned the proceeding for the appointment of a litigation guardian to be addressed before the next conference. It had not been addressed by the next judicial conference on 1 December 2017, so to advance the issue the presiding judge appointed counsel to assist to make inquiries and application for the appointment of litigation guardians.
[25] 13 March 2018; 26 April 2018; 15 May 2018; 11 July 2018; 27 July 2018; 9 October 2018; 12 March 2019.

[60] The application for a declaration was granted by Judge Pidwell at the hearing on 14 June 2019, but the Judge rejected Oranga Tamariki's recommendation that there was no realistic possibility of [Kaitlin]'s return to [Moira] and directed that a revised plan and report be filed.[26]

[61] In the 16-month period thereafter, to October 2020, there were a further five judicial conferences[27] which were adjourned variously for further particulars to be provided, for Oranga Tamariki to engage with hapū and iwi, for hui to be held and to obtain the cultural report.

[62] An ongoing theme in judicial minutes is concern with [Kaitlin]'s placement outside whānau, hapū and iwi structures and the prejudice to her of the passage of time without determination of where she would be permanently placed. Judge Pidwell's following comments are illustrative:

(a) Judicial Conference 14 June 2019:

> …I reject the recommendation that there is no realistic possibility of returning this child to her mother and will be asking Oranga Tamariki to reconsider its plan with a view to reconvening a family group conference, this time in [location 1] where the majority of her whānau are, where the placement options are for Mother perhaps to go into a supported living environment with baby and the transition to support to be provided through her whānau who I have had discussions with...I struggle with the placement of the child at the other end of the country with non-kin caregivers when all the whānau options have not been explored.

(b) Judicial Conference 14 November 2019:

> I am not going to give up yet. I am disenchanted with the proceedings and I am disappointed that the Ministry is not taking more steps to comply with their obligations to ensure that the child is placed within her whānau, hapū or iwi. [Counsel for the Chief Executive] was not able to tell me even which iwi she affiliated to and I could not find a reference on the file. I find that quite astounding in light of the changes to the legislation of late

[26] The declaration was made on the ground in s 14(1)(a): a child or young person is in need of care or protection if the child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived.

[27] 7 August 2019; 14 November 2019; 4 February 2020; 3 June 2020, 14 August 2020.

and need for children to first and foremost be placed within their whānau. This child has not been and needs to be.

….

[The plan] does not comply with the Ministry's obligations to consult with iwi.

(c) Judicial Conference 4 February 2020

…time is ticking on and these things need to happen within [Kaitlin]'s timeframes because the longer she stays in what is reportedly a stable and positive placement at the other end of the country, the harder it is for her to change.

(d) Judicial Conference 3 June 2020

This is situation where I think the Ministry really needs to look very clearly at its principles and obligation, particularly post-July 2019 and consider the trajectory of this child's childhood so far. There is an obvious concern now about changing her placement because it has been a loving and supportive placement for most of her life, but the delay has been caused by the lack of movement in terms of finalising a whānau option for this chid. I am not satisfied that the Ministry had done that in a timely fashion and in a child-focused timeframe.

…

[A Māori child placed with a Pākeha family at the other end of the country] is not in accordance with the principles of the legislation, some solution needs to be found. The ramification of that short-term and long-term need to be identified for this child. Her whakapapa needs to be identified, her iwi needs to be identified and some clear resolution needs to be identified in a culturally appropriate way.

(e) Judicial Conference 14 August 2020

The Court had consistently asked the Ministry to provide information and alternatives to address [Kaitlin]'s placement in [location 2] with a non-kin Pākeha family in light of the fact that did not meet the Ministry's obligations to consider her whakapapa and cultural connection.

[63] Against that background Judge Pidwell, on 15 October 2020, took the position that "the court needs to make a real determination about where [Kaitlin] should be for her childhood" and directed a hearing of the opposition to a s 101 custody order in

favour of the Chief Executive, identifying s 73 as the legislative basis for the opposition.

The Legal Framework

[64] The disposition phase[28] aggregates two aspects: first, determination of the arrangement most in the child's well-being and interest; and secondly, crafting through orders the structure that legally commands and authorises that arrangement. It is a task involving a delicate balance of judicial discretion and administrative powers and so will not always be straightforward for the reasons that will be explained in the section on orders. However, first the application of s 73 which constrains the court to impose the least restrictive intervention is considered, because there has been misapprehension that it applies to the disposition phase of proceedings commenced, such as these, before 1 July 2019.

Application of section 73 to the disposition phase: proceedings commenced prior to 1 July 2019

[65] Statutory amendments that took effect on 1 July 2019 repealed the declaratory mechanism, application for which was the manner in which proceedings were typically commenced.[29]

[66] The declaration was the jurisdictional gateway to the making of orders (other than interim orders) to meet the care and protection need, but the court could not exercise the discretion to make a declaration absent three elements: a family group

[28] Preceded by the court having determined that a child is in need of care and protection and made a declaration,

[29] Noting however that a suite of interim orders (custody, services, restraining, support) were available pending determination of proceedings. Section 68 empowered the making of an application for a declaration that a child is in need of care or protection, eligible applicants being the Chief Executive, a constable or other person with the court's leave. Subject to specified exceptions, the application could not be made unless a family group conference had been held per s 70. Section 67 provided the court, upon such application, with a discretion to make the declaration where "satisfied on any of the grounds specified in section 14(1) that a child or young person is in need of care or protection."

conference held;[30] satisfaction of the existence of a care and protection need;[31] satisfaction that the need could not be met by means other than a declaration or, in other words, satisfaction that the declaration is the least restrictive intervention. The third element is the constraint imposed by s 73(1) which then read:

> **73 Court not to make declaration unless satisfied that child's or young person's need for care or protection cannot be met by other means**
>
> (1) ***The court shall not make a declaration under section 67*** that a child or young person is in need of care or protection unless it is satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means, including the implementation of any decision, recommendation, or plan made or formulated by a family group conference convened in relation to that child or young person.
>
> (Emphasis added)

[67] Proceedings are now commenced by an application for a care or protection order rather than a declaration.[32] However, the jurisdictional gateway is unchanged because the court cannot exercise the discretion to make a care and protection order absent the three elements previously necessary for the exercise of the discretion to make a declaration. Section 73(1) constrains the discretion to make a care and protection order in the manner it previously constrained the discretion to make a declaration. It now reads:

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

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[30] In relation to the matter that forms the ground upon which the application was made, per s 72(1).
[31] On any of the specified grounds in s 14(1).
[32] Empowered by s 68.

[68] Applications for declarations made before 1 July 2019 must, by transitional provision, "be determined under section 68 ***and any related provisions*** as those provisions read before the commencement date" (emphasis added).[33] If in disposition it is proposed to make any of the orders now encompassed within the s 2 definition of a "care and protection order", s 73, as now amended, might be read to have a second application in the proceeding. I consider that reading incorrect, having regard to the nature of a proceeding commenced by application for a declaration and upon construction of the provisions empowering the disposition options.

[69] Proceedings commenced by an application for declaration may straddle the periods before and after the 2019 amendments in two ways. First, if the declaration is made before the amendments but disposition orders are not. Secondly, if neither the declaration nor disposition orders are made before the amendments. In both scenarios s 73 constrains the making of a declaration: in the first scenario because that is what s 73 then provided; in the second scenario by operation of the transitional provision to apply s 73 as it read prior to 1 July 2019.

[70] "Proceeding" is not defined in the Act nor in the Family Courts Rules 2002, but the definition in s 4 of the District Court Act 2016 as "any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application" is applicable.[34] Plainly, an application for a declaration is within this definition of a proceeding. The exercise of the civil jurisdiction that the application invites is the making of a declaration and, implicit in that, imposition of one of the disposition options empowered by s 83. The proceeding, when understood in this sense, does not conclude upon making the declaration.

[71] Continuation beyond the making of a declaration is apparent from the language in the statutory provisions specifying the process for obtaining plans that are mandatory prerequisites to the making of certain orders. For instance, s 131 is entitled "Adjournment for the purposes of obtaining plan" and prescribes the timeframe for a plan's provision "if any proceedings are adjourned" for that purpose. Similarly, further

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[33] Schedule 1AA, Part 3(11).

[34] Section 16 of the Family Courts Act 1980 applies the District Court Act 2016 to the Family Court and Family Court judges in the same manner and extent as it applies to the District Court and District Court judges, provided that the Family Courts Act prevails in any matters of conflict.

affirmation that proceedings remain on foot is that interim orders are typically continued upon the making of a declaration.[35]

[72] Using a s 101 custody order by way of example, the provision itself and s 83 empowers its making. In amended form they do so upon application made under s 68, which application is now for a care or protection order.[36] But the difficulty in transition proceedings is that there is no application before the court for a care or protection order. Rather, there was an application under the former s 68 for a declaration, which application has been determined though the proceeding continues. In those circumstances, the only means by which a s 101 custody order can be made in disposition is to treat ss 83 and 101 as "related provisions" under the transitional arrangements and apply them as they read before amendment, whereby they provide the court with the discretion to make the order "[w]here the court makes a declaration under section 67." The making of those orders was not constrained by s 73 because, as explained at [67], that constraint applied to the making of the declaration.

[73] Consequently, I do not consider that s 73, as amended on 1 July 2019, applies to the disposition phase of proceedings commenced but not completed prior to that date. Its application is spent upon the making of the declaration. The incongruity of an interpretation otherwise is apparent in the scenario in which the declaration and disposition are dealt with consecutively in the same hearing. The former s 73 would have to be considered upon making the declaration, then the current s 73 immediately after upon making a care or protection order.

[74] Hence, in this case, s 73 does not provide a legislative foundation to "oppose" the making of a s 101 custody order. That said, the making of disposition orders remains an exercise of discretion guided by applicable principles.[37]

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[35] *L v The Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2017] NZHC 3008.

[36] But previously an application for a declaration that a child is in need of care or protection.

[37] I do not consider that the principles in s 4, 5 and 13 as they read prior to 1 July 2019 need to be treated as "related provisions" for disposition purposes because they do empower the making of the disposition orders.

Disposition options

Orders

[75] The available options in disposition are principally as specified in s 83:[38] discharge of the child, or any parent or guardian from the proceedings without further order;[39] an order that the child, parent or guardian come before the court if called upon within two years;[40] an order for counselling;[41] a services order under s 86;[42] a restraining order under s 87;[43] a support order under s 91;[44] a "final" custody order under s 101;[45] a guardianship order under s 110;[46] or a combination of all but the first two orders.

[76] With focus upon circumstances where return of a child to the care of a person from whom the child was removed because there was a risk of serious harm is under consideration, the following provisions are of note:

(a) The court is empowered by s 103 to impose conditions on a final custody order for the purpose of facilitating the child's return.[47]

(b) There is the ability to make an interim custody order under s 102 rather than a final order. An interim custody order is finite, being permitted to remain in force for six months but renewable for one further period of six months.[48] Whilst the provision is not specifically drawn in

[38] In cases where the care or protection need is established on the ground of child offending (s 14(1)(e)), s 84 empowers orders in admonishment, reparation and in relation to property.
[39] Section 83(1)(a).
[40] Section 83(1)(b).
[41] Section 83(1)(c).
[42] Section 83(1)(d).
[43] Section 83(1)(e).
[44] Section 83(1)(f).
[45] Section 83(1)(g).
[46] Section 83(1)(h).
[47] Section 102(1) empowers the court to impose terms and conditions on a final custody order without specifying the purpose to which any conditions must be directed, though axiomatically a power must be interpreted having regard to the context of the Act. The interrelationship between ss 102(1) and 103 is not prescribed, though the authors of *Brookers Family Law – Child Law* (online loose-leaf ed, Thomson Reuters) at NT 10.6.03, suggest in light of the rule of statutory interpretation that a general provision should not derogate from a special provision, s 103 should be used where the condition is directed to facilitating the return and s 102 should be used where the condition is not directed to such return.
[48] Section 102(2) and (3)(a).

reference to the return of a child to a former carer, the limited duration lends to that purpose for the focus it demands upon coming to a settled arrangement.

(c) The standard duties of monitoring and conditions as to residence and association that attach to support orders, if availed of, offer a robust means of protection upon return of a child to a former carer.[49] That is underscored by the rarely used mechanism in s 100 to make a declaration for non-compliance by the carer with a condition of a support order (or interim support order), consequent upon which there is jurisdiction to make other protective orders.

[77] But orders alone do not address the care and protection need. For that to occur the legal construct must be met by practical implementation. And therein lies complexity, because orders (even with prescriptive condition) once made are implemented through the exercise of the administrative and management powers they confer on other parties, typically the Chief Executive. Hence, the extent to which the court can have confidence in the exercise of those powers may in some circumstances materially inform the court's exercise of its discretion as to the types of orders made and to whom and how responsibilities are vested.

[78] That is not to say that, in the face of possible inability or even refusal of implementation by the Chief Executive (or other persons or organisations conferred powers by orders), the court must yield its principled determination of the outcome most in a child's well-being and best interests to a lesser outcome. But to take a course in disposition without cognisance of these distinctions is to risk detriment to a child's well-being.

[79] How then might the court have sufficient confidence in the implementation of orders it proposes to make so as to in fact make them? First, the Chief Executive (or other persons or organisations conferred powers by orders) might willingly accept that the powers will be exercised in a certain manner. There is nothing to prevent that type

[49] Sections 93 and 94. In addition to the standard conditions within these provisions, there is discretion for the court to impose further conditions in circumstances prescribed in ss 96 to 98.

of assurance being given. Secondly, by way of understanding the full extent of the statutory mechanisms available in the disposition phase so that they are best utilised. Thirdly, and corollary to the second, is by understanding the limits of what can be judicially effected, so as to avoid impotent and delay-making intervention. Fourthly, by way of assiduous attention to the court's supervisory function in the application of the Act to ensure that the State, having intervened into a child's life, acts on a continuing basis in an adequate fashion for care and protection needs.[50] This final facet can be challenged by the problematic systemic function of the Family Court[51] and may require concerted judicial application, beyond reliance upon the administrative systems of the court.

Plans and reports

[80] If the court proposes to make any of a services order, support order, final custody order[52] sole guardianship order or special guardianship orders (under s 113A) it must, before doing so, obtain a plan.[53] The plan must be prepared by the applicant for the order or any other person that the court directs.[54] Typically, the responsibility to prepare the plan will fall to the Chief Executive (and therefore the social worker as his or her delegate) as the applicant for the care or protection order. The Chief Executive, if not the preparer of the plan, must be consulted in its preparation if it has implications for the Chief Executive. Failing to do so results in the plan having no effect.[55]

[81] Additionally, a social worker's report must be obtained before the making of a final custody order, a sole guardianship order under s 110 or a special guardianship order under s 113A.[56] In all cases the court has a discretion to obtain a social worker's report.[57]

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[50] See *Chief Executive of Oranga Tamariki—Ministry for Children v [TS]* [2021] NZFC 3817 at [10](b), [46] and [79] to [93] for discussion of the supervisory function of the court.
[51] Described in *Chief Executive of Oranga Tamariki—Ministry for Children v [TS]* [2021] NZFC 3817.
[52] But expressly not an interim custody order pursuant to s 101 by virtue of the application of s 102.
[53] Section 128(a). That plan must be prepared in accordance with s 130.
[54] Section 129(1).
[55] Section 129(1A). A plan typically has implications for the Chief Executive.
[56] Section 186(1)(a).
[57] Section 186(1)(b). There is also a discretion to obtain cultural and community reports (s 187). A range of other specialist assessments and reports can also be sought (see s 49 relating to medical examination of a child and s 178 relating to medical, psychiatric and psychological reports).

[82] The content of the plan is prescribed.[58] Broadly, it must specify the objectives to be achieved, the timeframe in which to do so, the details of services and assistance to be provided, identification of who is to provide those services and the responsibilities of any parent, guardian or carer having the care of the child or to whom the child is to return. The report must include specified information and, notably, a recommendation, with reasons, of whether there is a realistic possibility of the child's return to the former carer. If the social worker recommends that there is no such realistic possibility the report must set out the child's long term needs and the proposals for how they will be met.[59]

Impasse

[83] A self-evident point bears emphasis: the social worker[60] prepares the plan and report, and hence is responsible for the content. A social worker's assessment of all factors relevant to a child's well-being and best interests may in varying degrees differ from a judicial assessment. That is a legitimate social work position. A social worker who furnishes a plan and report consistent with that position cannot be criticised. Indeed, criticism would validly befall a social worker advancing a plan and making recommendations that the social worker did not consider to be in a child's well-being and best interests.

[84] Having received the plan (and report if required or directed), the task of the court is to consider it in the context of the principles of the Act. If the plan is considered inadequate, the court may direct the social worker to furnish a revised plan and may indicate any specific matter that it requires to be dealt with in the plan.[61]

[85] This a dynamic phenomenon akin (in diluted variant) to institutional dialogue, whereby a judge calling for a revised plan indicates the type of arrangement that application of the statutory well-being and best interest principles demands for a child and the Chief Executive, by way of his delegated social worker, reacts by preparing a

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[58] Section 130.
[59] Section 186(2A).
[60] Or in the case of the plan, such other person as directed pursuant to s 129(1).
[61] Section 129(2). There is no like provision to direct a revised report in the disposition phase, though presumably a new direction could be made pursuant to s 186(1)(b).

plan consistent with the judicial indication (from which it can be inferred that in doing so the judicial indication or other occurrence has evolved the social worker's position to align with the judicial position).[62] But if the social worker position it maintained, it is unlikely that a revised plan will be produced that is deemed adequate by the court. And again, the court may do no more than treat the plan as inadequate and direct the social worker to furnish a revised plan. When this process does not render a plan that the court deems adequate, there is an impasse.

[86] How than then might that impasse be overcome? A judge might make orders that impose an outcome. By way of example: it is possible to impose a condition on a final custody order in favour of the Chief Executive restricting the geographical area in which a child may be placed;[63] if the court is concerned to directly effect the child's placement rather than have it directed by the Chief Executive as in incident of his custody,[64] it may make a custody order to the person favoured; this court at various times has made services order and support orders highly specific in nature and in commitment of the Chief Executive to financial expenditure.[65]

[87] That said, there are boundaries to what the court might properly commit the Chief Executive, as the Court of Appeal reminds in the following dicta:[66]

> The chief executive can hardly expect a 'blank cheque' as to what is to be done. That said, neither can the Court expend the chief executive's money for him. In the vast majority of cases, there are not likely to be any real difficulties. But where there are, as here, there may be good and sufficient reasons where it is appropriate for a Family Court Judge to say that it is in the best interests of a young person that he or she remain, for

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[62] Acknowledging also that the information in a revised plan may assist to an adjusted judicial assessment and acceptance of the plan as adequate.

[63] *Chief Executive of the Ministry of Social Development v DR* [2016] NZHC 24 at [60].

[64] Section 104(2): a custody order pursuant to s 101 in favour of the Chief Executive authorises the Chief Executive to place the child with such person, or in such residence, as the principal manager of the department for the area in which the court is situated may direct. Subject to s 104 the Chief Executive may place any child in his care in the charge of any person he considers suitable to provide for that child's or young person's care, control, and upbringing (s 362).

[65] *Menzies v Ministry of Social Development* FC Upper Hutt FAM-2000-055-47, 24 June 2010 involved a services order requiring the Chief Executive to cover the cost of literacy tutoring for a child; *J v Ministry of Social Development* FC Wellington FAM-2001-085-1727, 23 September 2008 involved a services order requiring the Chief Executive to reimburse the grandparents for $5,000 of the cost of a gastric by-pass which had been performed on the young person; *GAHD v Chief Executive of Child Youth and Family Services Whangarei* FC Tauranga FAM-2008-088-637, 2 June 2010 involved a support order requiring the Chief Executive to fund contact in New Zealand twice a year between the child in Australia and her mother and sisters in New Zealand.

[66] *LC v Ministry of Social Development* [2008] NZCA 169, [2008] NZFLR 828 at [69] and [70].

> instance, in a particular locality for a time. The Court then has to carry out its statutory role to act in the best interests of the child, by the imposition of such a condition. By the same token, the rule of law governs Judges as much as the Executive, Family Court Judges must understand that they cannot dictate when particular facilities are to be provided. If, for instance, the Court is told that there are only 10 beds available in a given specialist centre, it would be quite inappropriate for a Family Court Judge to say that one of them must be allocated to a particular child and if there were not enough that the centre would/will have to provide more. Here again, the line between the judicial and executive action must be respected.

[88] Direct imposition of an outcome is well suited to discrete disputes, or specific and identified actions, or assistance or support as to a defined issue. For instance, the placement of a child with a person that does not meet Oranga Tamariki's caregiver criteria; a course of therapy; provision of transport to facilitate access; enrolment in an education institute.

[89] But the utility of directive means is reduced where the arrangement that the court considers is to the child's well-being can only be achieved by an amalgam of features interrelated and interdependent, that must function together, if not seamlessly then to a degree that meets the care or protection need. It rests upon the exercise of statutory powers and the discharge of statutory responsibilities that arise from orders the court makes, in combination with the delivery of supports and services, in further combination with whānau commitment to what is asked of them, adaptability to contingencies, identification of actions that will be taken if the care or protection need is not being addressed, and so on. This is not a matrix amenable to discrete order or direction by a court. It is for weaving by a comprehensive, well-structured and adequately resourced plan. And whilst there are many contributors to this matrix, the Chief Executive occupies a distinct and crucial position because of his duties to take the positive steps and actions to attain the purposes of the Act in a manner consistent with the principles in s 4A and 5, and the duty imposed to recognise and provide a practical commitment to the principles of te Tiriti o Waitangi.[67]

[67] Sections 7 and 7AA.

Factors material to [Kaitlin]'s well-being and best interests

[90] I distil three primary aspects that are material to the evaluation of the arrangement as to [Kaitlin]'s well-being and best interests: [Moira]'s ability to meet [Kaitlin]'s care and protection need; [Kaitlin]'s circumstances with Mr and Mrs [Barr]; and [Kaitlin]'s identity. These necessarily require a consideration of the broader function of the [Woods] whānau because, although the care of [Kaitlin] is sought by [Moira], it rests on support [Moira] derives from them.

[91] As with any interpersonal relationships, because so much of what happens within a whānau is known best and sometimes only by whānau members, their evidence, if reliable and credible, can be of significant assistance. I find that so with the evidence of [Bryan] and [Kaitlin Senior] and weight it accordingly. [Bryan]'s account of his whānau was compelling. There was no shying from the harm he inflicted and the consequences this had for his whānau, nor an attempt to pardon his behaviour by way of the harm and hardship he suffered. He had no obligation to place his regrets before the court and his whanau, who were present listening to his evidence, in the unvarnished way he did. It was a demonstration of integrity. I accept that his redemption and life repair is real and enduring. [Kaitlin Senior] was a similarly compelling witness for her childhood experience of a fractured life, in contrast to her adult experience of a safe life. She recognises, because she has experienced it herself, what is damaging for children, and the way she discharges her parenting obligations is demonstration that she understands and practices what is necessary for protection.

[Moira]'s ability to meet [Kaitlin]'s care and protection need

[92] [Moira]'s established capability to attend to the daily care of [Kaitlin] as a baby, in combination with her willingness to receive and ability to act upon parenting guidance provides confidence in her ability to care for [Kaitlin] at an age where she has developed more independence. Against that, the following factors are relevant to the assessment of the risk for [Kaitlin] in the care of [Moira]:

(a) [Moira] and [Duncan]'s emotional dependence on each other has, at times, inhibited them from placing [Kaitlin]'s needs ahead of their own,

demonstrated for instance when [Moira], influenced by [Duncan], moved out of [Kaitlin Senior]'s home despite having rationally chosen to be there to improve her case to resume [Kaitlin]'s care.

(b) Abusive behaviour has been a feature of [Moira] and [Duncan]'s relationship. I cannot conclude that it has extended to physical abuse, but I am satisfied it has extended to property damage by [Duncan] when, at the least, he damaged [Moira]'s telephone. [Kaitlin Senior]'s observations establish [Moira] and [Duncan]'s verbally abusive interaction, but at lessening volatility as they have matured.

(c) [Duncan]'s drug and alcohol misuse is established by [Kaitlin Senior]'s prohibition of his attendance at her home, his possession of methamphetamine and the psychoactive substance that was discovered upon search of [Bryan]'s home and [Moira]'s admission of prior methamphetamine use with [Duncan].

Although the evidence of [Duncan]'s substance use is not recent, I am unable to discount it as a current risk because he has not engaged with Oranga Tamariki or in these proceedings as to enable that assessment. I do not draw an unreserved negative inference from that disengagement. It has in part been motivated by [Duncan]'s reasoning that [Moira]'s prospects of being permitted to care for [Kaitlin] are enhanced if he steps away. It is an unrealistic perception, because his involvement is inevitable given the strength of the connection between him and [Moira], and it is proper that he be involved because he is a fundamental to [Kaitlin]'s identity. It is an action that nevertheless exhibits some protective intent. However, greater protection would lie in [Duncan]'s willing engagement with protective and support services to assist him and [Moira] to develop safe ways to manage their relationship and to address any problematic substance use.

(d) [Moira]'s hair follicle test result that was negative as to all drug use gives credence to her evidence of current abstinence, and diminishes

substance misuse by her as a risk, or at least an unmanageable risk for [Kaitlin]. [Social worker A] makes that assessment also.

[93] Risks for [Kaitlin] in [Moira]'s care can be mitigated in several ways. First, by prescriptive conditions such as where and with whom they reside. Secondly, by provision of assistance (educative, therapeutic and potentially residential) from, and monitoring by, child protection and social service agents. Thirdly, by the support available from the [Woods]' whānau in the following ways:

(a) [Moira]'s sense of belonging and emotional wellbeing rests with the [Woods]' whānau and she is embraced by them. These relationships have provided [Moira] the foundation for a more ordered life. For example, her residence with [Bryan] is in contrast to her fragile connection with her mother and their chaotic and quickly unsuccessful residence together.

(b) There is within the [Woods]' whanau the modelling of parenting practice and an expectation of behaviour that meets the needs of children. That is not only via [Kaitlin Senior] and [Bryan], but also by [Duncan]'s brother [Carl] and [his partner] who are parents to young children.

(c) [Duncan]'s substance use and the abusive aspects of [Moira]'s and [Duncan]'s relationship are not risks that the [Woods]' whānau have entirely neutralised. But I am satisfied that they are properly cognisant of those risks, that they hold [Kaitlin]'s interests ahead of her parents' interests and that they would intervene authoritatively to ensure [Kaitlin] is not harmed if those risks presented.

(d) [Bryan] and [Kaitlin Senior] each offer to accommodate [Kaitlin] with [Moira] and commit to participation in any transition of care process that might be crafted. Both are frank: they conceive their role in terms of support, envisaging [Moira] reaching the point of independently caring for [Kaitlin]; they do not envisage assuming primary

> responsibility for [Kaitlin]'s care should [Moira]'s care of her (whether with [Duncan] or otherwise) not be sustained. But the support [Bryan] and [Kaitlin Senior] offer cannot be realised if not adequately resourced. The impression is that it is not a burden they can shoulder unassisted.

[94] A further observation in respect of [Moira]'s ability to care for [Kaitlin]: the tenor of some evidence is to question the strength and consistency of her resolve to do so and to suggest that she has undermined opportunities to care for [Kaitlin]. That is the impression given from the description of [Moira] as engaging with [Kaitlin]'s social worker for self-interest and without regard to [Kaitlin]'s needs; as having made herself homeless by damaging property and, hence, making a potential placement with [Kaitlin] untenable; and as having abandoned [Kaitlin] when she did not return to [location 2] after her grandmother's death. Similarly that it cannot be understood why [Moira] is not more proactive in inquiries of Mrs [Barr] about [Kaitlin] during access visits, and the juxtaposition of [Moira]'s perceived passivity with Mrs [Barr]'s description of how she would do anything for her own children, and with the manner in which another whānau "stepped up" to resume the care of a child Mr and Mrs [Barr] previously cared for.

[95] For [social worker A]'s part she acknowledges the harshness of some expressions in reports she has prepared, and she explains that was not the intent. I accept that explanation and I am cautious not to treat discrete comments as representative of a general disposition nor to let the judicial vantage of hindsight obscure the dynamic, reactive and time sensitive circumstances in which social work actions must often be taken. But I do consider that at crucial points decisions have been made to the detriment of [Kaitlin] that would have been avoided with nuanced, rather than face value, assessment of [Moira]'s actions.

[96] For example, [Moira]'s deposed evidence that she did not want to reside with her mother at the conclusion of the [the residential parenting programme] placement was challenged. [Moira] did indeed assent to that, having earlier asked [Kaitlin]'s then-social worker if they might live with the [Woods]' whānau and being told no. The objectively reasonable expectation is that a mother, knowing she and her daughter

were being placed in an environment not to her daughter's interest, would not accept that position and advocate further for those interests. Similarly, it would be objectively reasonable to expect that a mother separated from her child and resolute about resuming her care would actively and eagerly seek information about her child's progress when presented with a prime opportunity to do so from the person most knowledgeable, her caregiver.

[97] However, regard to [Moira]'s subjective circumstance might explain why she does none of that. Her experience for 4½ years of her childhood in the care of the State was that she had to live where social workers decided, having then, and still now, little understanding of why those decisions were made for her. Her experience as an [under 15-year-old] expectant mother was that her best prospect of retaining the care of her child was to live in a residence as suggested by the social worker; and of the court upon an application by the social worker being satisfied that her unborn child was at such risk that it was necessary to order the child into the custody of the State without first providing [Moira] with an opportunity to be heard. That observation is not to impugn the actions of the social worker; but it provides context for how a vulnerable [under 18-year-old] might perceive the suggestion of a representative of the State. [Moira] has not experienced, vis-à-vis the State or generally, empowerment or volition. In that context it was extremely unlikely that [Moira] could, or would, voice again a position having had it already once rejected. As it transpired, [Moira]'s assessment of the prospect of successful placement with her mother was entirely correct and the social work assessment that [Duncan]'s whānau were not capable of looking after [Kaitlin] was wrong.

[98] The placement of [Kaitlin] and [Moira] with [Moira]'s mother was a pivotal decision. It resulted ultimately in the loss of not merely a possibility but the tangible prospect of maintaining [Kaitlin]'s care within her whānau. The circumstance whereby [Kaitlin] has now lived three years separate from them was very likely avoidable had due weight been given to [Moira]'s request, or there been pause and reflection to understand the full context of her assent. I do not find a weakness or inconsistency of resolve by [Moira] to care for [Kaitlin]. Rather, there is the necessity of understanding and delivering the full range of assistance she requires to care for

[Kaitlin], and for [Moira] to authentically engage with those tasked to assess and then deliver the type of assistance needed.

[99] In conclusion, I find that with the [Woods]' whānau support and the provision of assistance and monitoring by independent agents, the risks for [Kaitlin] in the care of [Moira] can be sufficiently mitigated as to make it a viable care option. I find also that to have been the situation in April 2018 when [Moira] and [Kaitlin] were required to reside with [Moira]'s mother.

[Kaitlin]'s circumstances with Mr and Mrs [Barr]

[100] [Kaitlin] is a dearly loved member of Mr and Mrs [Barr]'s family. Through them, [Kaitlin]'s close relationships extend to Mr and Mrs [Barr]'s two children and members of their wider family. Mr and Mrs [Barr] describe [Kaitlin] with a richness and insight that comes from deep care, and through having the opportunity to act for almost three years as [Kaitlin]'s parents.

[101] Although [Kaitlin] came to Mr and Mrs [Barr] with their expectation of her needing short-term care, they now generously offer her their permanent care. Safety, stability of home, continuity of care and support for [Kaitlin]'s development is assured for her with Mr and Mrs [Barr].

[102] Mr and Mrs [Barr] acknowledge their responsibility to [Kaitlin]'s identity as tamariki Māori if she remains in their care and, as Pākeha, the conscious effort that will require of them. In this regard they emphasise the aspects of tikanga and te reo Māori incorporated into the teaching at the early childhood learning centre [Kaitlin] attends and at which Mrs [Barr] is the head teacher. Mrs [Barr] participates in online te reo Māori and tikanga courses and is eagerly receptive to the guidance of Māori colleagues.

[103] Mrs [Barr] has facilitated contact directly between [Brooke] and [Kaitlin]. That has ceased with a change in [Brooke]'s circumstances, but Mrs [Barr] is supportive of further contact as can be arranged. Mr and Mrs [Barr] are prepared to

consider arrangements that would engender more meaningful contact for [Kaitlin] with her whānau.

[104] Mr and Mrs [Barr] understand the careful process of transitioning a child from their care to whānau. They have done so before, where, through their great commitment, a child, also Māori, who from the age of four months was in their care for a period of eight months was transitioned back to whānau. That transition involved their support of the child's parents. That child is now aged five years and the relationship between the [Barr] family and the child's whānau continues. That said, the whānau lived locally so the logistics of transition and an ongoing relationship with the child and the parents are not hampered by the distance that would be present in a transition for [Kaitlin].

[105] The term "attachment" has been used with respect to [Kaitlin]'s relationship with Mr and Mrs [Barr]. I take that reference as descriptive of their relationship, and not as an evaluation in terms of the psychological theory of attachment. It does not appear from the file that a psychological assessment addressed to [Kaitlin]'s relationships and functioning and the potential consequence of a change in care arrangements was mooted. To now obtain a psychological assessment would be to unacceptably delay decisions for [Kaitlin] that are already too long delayed. I proceed, however, on the basis that there is significant potential of harm to [Kaitlin]'s social and emotional development if she is removed from the care of Mr and Mrs [Barr]. If that is to occur it must be met by the level of support proportionate to that potential of harm.

Identity

[106] [Kaitlin]'s identity has properly been a matter of acute focus because she is a Māori girl being raised within a Pākeha family at significant distance from her whānau, hapū, iwi and whenua.

[107] [Kaitlin]'s whakapapa is rich yet was unknown to Oranga Tamariki until [report writer 1]'s report was provided in September 2020. It is instructive to consider

why the whakapapa was not known to the department, and the consequence of it being unknown, because it informs how [Kaitlin]'s identity might be nurtured in the future.

[108] Most obviously, it is not known because the whānau did not provide it. Had they done so there might have been an early opportunity for [Kaitlin] to be cared for within her hapū and iwi kin matrix, if not her whānau. These observations are made neutrally, recognising that whakapapa is a taonga to be treated carefully. [68] Hesitance to provide something precious to a third party can be understood if that third party is not trusted.

[109] A sentiment of mistrust is evident in [Bryan]'s assertion to [report writer 1] of being judged by Oranga Tamariki for his past actions, without due regard for his life changes, and in [Moira]'s self-description as a "CYFS kid". Their disposition towards Oranga Tamariki and what is known of the experiences of their whānau over time resonates with evidence received by the Waitangi Tribunal upon its recent Oranga Tamariki Urgent Inquiry characterised as follows:[69]

> Unfortunately, from all that we have seen and heard during our inquiry, it is clear that there is a widespread and significant lack of trust in Oranga Tamariki amongst Māori communities. This is particularly the case for those who have had long-term or intergenerational contact with the 'system' and those from so called 'hard to reach' communities, including the gangs. We have found particularly troubling some of the evidence we have heard about vulnerable young mothers avoiding contact with services they need, including health services, for fear of potential involvement of Oranga Tamariki.

[110] However, the disadvantage of whānau ill disposition aside, social workers for [Kaitlin] and their colleagues were woefully ill equipped to access [Kaitlin]'s whakapapa. That is not a criticism directed to [social worker A] because it is clear that she was critically concerned to know [Kaitlin]'s affiliations in order to identify a placement within her extended whānau, hapū or iwi. But it is equally clear that the

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[68] See for instance *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 184; *Kameta v Nicholas* [2012] NZCA 350 at [18] in which Harrison J quoted a conclusion of the Maori appellant court in *Mihinui – Maketu* A100 (2007) 11 Waiariki Appellate MB 237 (11 AP 230) "whakapapa and blood descent are as much a taonga tuku iho as land is"; *Re GM* [2019] NZFLR 291 at [13] acknowledging expert evidence that whakapapa is a taonga.

[69] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkingi Whāuarua Oranga Tamariki Urgent Enquiry* (Wai 2915, 2021) at 160.

institutional support of [social worker A] in that endeavour was inadequate. The following is illustrative:

(a) The complex task of whakapapa research was for the most part unstructured and left to [social worker A], and all the more difficult given her distance from the rohe of [Kaitlin]'s iwi and her understandable absence of connection into those communities. Nor was she able to easily able to recruit assistance. For instance, she inquired of the Kairaranga at her office whether he was aware of an iwi service in [location 1] that would be able to support to [Moira]. He did not know so he referred [social worker A] to a Kairaranga in [location 1]. That person was unable to assist. Ultimately [social worker A] established fruitful contact with TIONKT, but the organisational practice challenges are apparent.

(b) The absence of readily available cultural expertise led [social worker A] to commission a report from [report writer 2], a social and community worker lecturer. His brief was to "assist [the department] with finding a child focused solution having regard to the needs of [Kaitlin]…and with particular reference to the cultural needs of [Kaitlin]." [Report writer 2] interviewed [Moira] briefly by video call. That appointment was arranged by [social worker A] to occur on one of [Moira]'s day trips to [location 2] to visit [Kaitlin], without informing [Moira] of the purpose of the interview so as not to distract her from the visit. [Moira] participated but with discomfort for not being prepared and with still no understanding of its purpose once it concluded. The Chief Executive relies on [report writer 2]'s opinion only to the extent of it being a useful statement of a cultural perspective. Given the circumstance of [report writer 2]'s interview of [Moira], and that he engaged with neither any other members of [Kaitlin]'s whānau, hapū or iwi, nor with Mr and Mrs [Barr], I find it of no assistance. Moreover, had there been an adequate level of cultural acumen within Oranga Tamariki available to [social worker A], it is difficult to imagine that the process by which [report writer 2]'s inquiry took place would

> have been recommended. That process, and the substance of [report writer 2]'s report, might be contrasted with the process adopted by [report writer 1], whereby she met with [Moira], [Duncan] and [Bryan] in their home with their advance knowledge of her task, and by further comparison with the quality of information she obtained.

[111] The consequence of the whakapapa being unknown is that it denied the opportunity to hapū and iwi to exercise whanaungatanga responsibilities as to [Kaitlin], the most fundamental being the potential to care for her within her kin structure. It has thereby deprived [Kaitlin] of access to an aspect of her well-being.

[112] In assessing what might be necessary to prospectively meet [Kaitlin]'s needs in relation to her identity, regard can be had to evidence that the Waitangi Tribunal has found helpful in reference to the connection between upbringing and identity. The Tribunal referred to evidence of Mr Waihoroi Shortland emphasising that, in situations where tamariki need to be cared for outside of their immediate whanau:[70]

> it is critical that the child still has access to his or her culture. It is also critical that those tasked with caring for that child, have an understanding of what that entails. Without this, regardless of whether one has the best of intentions, the child would be denied an opportunity to grow within his or her own culture. One can grow up in a home that provides for the physical needs, but without the cultural perspectives that might be available through a Māori whānau, the cultural deprivation can be quite marked.

[113] I am not confident that through the Chief Executive there is the requisite understanding of what is required to ensure that [Kaitlin] has access to her culture, nor is there the wherewithal to deliver it, because nuanced cultural understanding appears to be absent and erroneous assumptions have been made about the cultural values of [Kaitlin]'s whānau. As an example, in the context of addressing [Kaitlin]'s identity and culture [social worker A] reported to the court in October 2020 as follows:

> [Kaitlin] is being exposed in her early learning class to other children of Maori descent and is being taught te reo Maori and heritage learnings. Because [Kaitlin]'s caregiver is the manager of the [suburb deleted] Early Learning Centre, she is aware of [Kaitlin]'s exposure and level of understanding of the exposure she has had. Her carers are able to

[70] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkingi Whāuarua Oranga Tamariki Urgent Enquiry* (Wai 2915, 2021) at 15.

> support what she has learned in the early learning class in her home environment. They also actively encourage contact with [Kaitlin]'s whanau based in [location 2].
>
> [Kaitlin]'s parents have not embraced their own culture in the past and as the cultural report outlines learning a connectedness to one's heritage is a life long journey. In that respect [Kaitlin]'s has had more exposure to her heritage and culture than she would have had if she were in her mother's care. I am aware of this because I have had conversations with Ms [Wallace] about how she feels about her own culture and she has requested that her daughter is encouraged to be an urban Maori, without being able to speak te reo Maori. Ms [Wallace] shows a preference to be supported by white European older females rather than individuals of her own culture.

[114] Even allowing that bare written expression sometimes creates an impression that is not intended, this statement:

(a) Conveys a lack of appreciation of how far short a limited exposure to Te Ao Māori in generic context untethered to whakapapa, falls from what is required to meet [Kaitlin]'s cultural need.

(b) By identifying [Moira]'s preference for support from European females it diminishes the source of her most fundamental support, the [Woods]' whānau.

(c) By its silence as to the ways in which [Kaitlin]'s whānau do live in ways shaped by Te Ao Māori, it amplifies, through a lack of balance, the extent of their disconnection from their cultural identity. This perhaps underscores the conclusion that [Kaitlin]'s exposure to her culture through the practices at the early childhood learning facility has been comparatively greater to the exposure she would have received in [Moira]'s care.

[115] I am mindful that there should be caution when applying weight to conclusions drawn from a discrete statement. However, a limited capability to meet [Kaitlin]'s cultural needs through the auspices of the Chief Executive is evident in other reports, which by and large cast the responsibility to whomever has had care of [Kaitlin] at any particular time regardless of their capability to do so, and without any bespoke cultural

support. Hence, when [Kaitlin] was in [Moira]'s care the perfunctory statement is given that "*[Kaitlin]'s cultural needs should be encouraged and nurtured by her caregiver*" notwithstanding the view taken of [Kaitlin]'s disconnection;[71] when [Kaitlin] was initially placed with Mr and Mrs [Barr], "*[Kaitlin]'s cultural needs should be encouraged and nurtured by her caregiver. The caregiver will be able to support [Kaitlin]'s positive connection with her biological parents*"[72] yet Mr and Mrs [Barr] possessed, for reasons explained above, no knowledge of [Kaitlin]'s whakapapa and whānau; once [Kaitlin] was engaged in early childhood education and having contact with her aunt [Brooke], "*[Kaitlin]'s cultural considerations are observed at [suburb deleted] Early Learning Centre. [Kaitlin] will have on-going contact with her aunt who over time will provide her with knowledge of her whanau and whakapapa*",[73] despite [Brooke], being only [under 18-years-old] and having had a similar experience to [Moira], likely being no better positioned than [Moira] to impart [Kaitlin]'s whakapapa to her. Similar observations can be drawn from statements about [Kaitlin]'s contact with Ms [Kingston] and [Jimmy] as a means to enhance her cultural identity.

[116] There is a disingenuity and superficiality to these statements. Again, that is not a criticism of individual social workers, rather I place it within the context of an organisation that is ill equipped to discharge responsibilities to [Kaitlin]'s cultural needs, and hence her identity.

[117] A more nuanced approach appreciates complex degrees of cultural disconnection, and that whānau disconnected from hapū and iwi, and their whenua and marae, may nevertheless be engaged, consciously or otherwise, with norms of Te Ao Māori. That is the case for [Kaitlin]'s whanau, as [report writer 1]'s evidence established: [Moira] and [Duncan] do have a level of understanding of tikanga; [Moira] acknowledges her marae; tuākana tēina relationships operate; manaakitanga is extended in [Bryan]'s home; [Bryan]'s relationship with [Ruiha]'s younger children and their comfort in his home is a manifestation of whanaungatanga; [Bryan], [Kaitlin Senior] and [Moira] attend to their wairua through their spiritual practices.

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[71] Ji-Sook Wang, Social work report dated 27 September 2017.
[72] [Social worker A], Social work report dated 4 July 2018.
[73] [Social worker A], Social work report dated 7 June 2019.

[118] These concepts have some equivalence with norms of Te Ao Pākeha such as care and hospitality and the support of extended family relationships. These are experiences [Kaitlin] enjoys as a member of the [Barr] family, and Mr and Mrs [Barr] have genuine intent to nurture [Kaitlin]'s cultural identity and support her whānau relationships. However, without intending disrespect, their experience in Te Ao Māori is not deep and they will require significant support and guidance, support which has thus far been lacking, to provide [Kaitlin] with the means to authentically access her identity.

[119] But more fundamental is a point taken from [report writer 1]: that to raise [Kaitlin] outside her kin structure is to deprive her of her whakapapa in a lived and experiential way, and hence is to the detriment of her identity. The only means for [Kaitlin] to have her whakapapa, and hence the fullness of her identity in a lived way, is through her whānau, even in their disconnection. If not through them, it is through her hapū and iwi.

Determination of the arrangement most in [Kaitlin]'s wellbeing and best interests

[120] Per section 4A, the well-being and best interests of the child is first and paramount in every exercise of the care or protection jurisdiction. All who are conferred powers to exercise the jurisdiction must be guided by the principles of general application in s 5 and the principles in s 13 specific to the care and protection of children. The evaluation of what is to a child's wellbeing and best interests is therefore a robust and dynamic balancing process which I have previously described in these terms:[74]

> [In] stating various principles which ought to be taken into account, the Act is identifying constituent elements of child well-being. Well-being is a function of the balancing of those principles reasoned by the decision maker to the subjective circumstances of the child and the child's kinship group. Inevitably the advancement of some principles will diminish the realisation of others and the balance will require adjustment through time and changing circumstances, but it is by that process of accounting and weighting that an outcome most in the child's wellbeing and best interest is constructed.

[74] *Chief Executive of Oranga Tamariki v BH*, above n 15, at [33].

[121] For [Kaitlin], this evaluation must now encompass not only matters of well-being and best interests in the context of a care or protection need but also matters that are a function of the passage of time. There has been for [Kaitlin] what can only be described as an egregious failure of timeliness. That has, in part, been due to changing circumstances that have occasioned delays to enable events such as further planning meetings, the opportunity for [Moira] to obtain legal representation, the submission of updated plans and the clarification of litigation positions. But beyond that, there has been dilatory progress as to the proceedings, which has created a status quo for [Kaitlin] where she is in the care of Mr and Mrs [Barr], and hence the creation of a risk of detriment if that status quo is disturbed. Notably:

(a) The statutory requirement that, absent special reasons, the hearing of the application commence not later than 60 days after it was filed was exceeded by 20 months.[75]

(b) There have been repeated failures to schedule court events with the timeliness directed or deemed necessary.[76] That this hearing occurred seven months after it was directed by Judge Pidwell to occur with priority given the delays to that date, exemplifies the nature of this concerning lethargy.[77]

(c) The impasse as to the adequacy of the plan that has subsisted for two years has derogated absolutely from the principle of well-being that decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child.[78]

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[75] Section 200.

[76] For example, the first judicial conference was held on 6 October 2018, notwithstanding that it was directed to be held no later than 14 September 2018; the conference on 27 July 2018 was adjourned with direction that another conference take place in the week of 3 September 2018 or the earliest date thereafter. The conference was held five weeks beyond that date. Upon the adjournment on 9 October 2018, the earliest date to which the matter could be recalled was three months hence on 18 January 2019. For reasons not readily apparent that conference did not proceed. The next conference took place on 12 March 2019, five months having elapsed since the prior conference.

[77] Any proceedings in the Family Court at Waitakere, North Shore, Auckland, Manukau, Papakura or Pukekohe requiring a hearing of one day or longer duration are administered by a centralised process at the Family Court at Auckland. By that process a prehearing teleconference is held at which the fixture dates are confirmed. In this case the teleconference was held on 4 February 2021.

[78] Section 5(1)((b)(v).

[122] In the circumstances particular to [Kaitlin], the following principles most acutely to the fore, in respect of which the balance must be struck, are as follows:

(a) [Kaitlin] must be protected from harm: s 5(1)(b)(i)(B).

(b) Having been removed from [Moira]'s care, [Kaitlin] should, if possible and in a manner consistent with her best interests, be returned to [Moira]'s care per s 13(2)(h). Related to that, the primary responsibility for caring for and nurturing [Kaitlin]'s well-being and development lies with her whānau, hapū, or iwi per s 5(1)(c)(i).

(c) The approach to [Kaitlin]'s well-being, whilst accounting well thus far for her developmental potential and age (decision making time frames aside), requires greater account for her whakapapa and cultural identity per s 5(1)(b)(iv). Associated with this is the importance to be accorded to mana tamaiti[79] by recognising [Kaitlin]'s whakapapa[80] and the whanaungatanga[81] responsibilities of her whanau per s 5(1)(b)(iv) and (c)(iii).

(d) [Kaitlin] has with the [Barr] family a safe, stable and loving home. The safety and stability of a home for her with [Moira] is contingent upon support and assistance, per s 5(a)(b)(iii).

(e) [Kaitlin] has a place within the community of the [Barr] family. A change in her placement will be to disrupt her now closest relationships of care, of education and of friendships, per s 5(1)(d)(i).

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[79] *Meaning* 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, defined in s 2.

[80] Meaning 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, defined in s 2.

[81] Meaning (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, defined in s 2.

[123] I determine that the arrangement most in [Kaitlin]'s well-being and best interests is her placement with [Moira]. I reach that position for the following reasons:

(a) I am satisfied upon an analysis of [Moira]'s ability to meet [Kaitlin]'s care and protection needs that she can, with support, assistance and monitoring, protect [Kaitlin] from the harm that engaged the department's intervention. That is now consistent with the position the social worker because, having heard the evidence during the hearing, [social worker A] acknowledged that had Oranga Tamariki possessed the rounded understanding of the whānau that is now known, there would have been a different outcome at the conclusion of [Moira] and [Kaitlin]'s residence at [the residential parenting programme]. From that I infer from that Oranga Tamariki would have supported their residence with the [Woods]' whānau. In closing, Mr Holdaway for the Chief Executive confirmed that the contemporary social worker position would be to effect [Kaitlin]'s placement with [Moira], encompassing support of the wider whanau, but for the potential detriment to [Kaitlin] from disruption at a developmentally crucial stage of her now established relationships with the [Barr] family within and their community.

(b) [Moira] is not without parenting skill nor connection with [Kaitlin]. [Moira] has shown receptiveness to guidance. [Kaitlin] does not present with any developmental or health needs uncharacteristic for a child of her age that might present an atypical demand upon her carer. These aspects combined provide sufficient confidence of [Kaitlin]'s placement with [Moira] as to sustain a decision to embark on a transition of care.

(c) Professional guidance can be received as to the structure of a transition process to manage the potential detriment of her separation from Mr and Mrs [Barr].

(d) [Kaitlin]'s cultural identity is unlikely to be nurtured with depth in a placement unconnected to her whānau, hapū or iwi. Her understanding of her identity and experience of Te Ao Māori norms is more likely to be cultivated in the care of [Moira] and the more meaningful connection that that care can provide to her whānau.

The legal structure of [Kaitlin]'s placement with [Moira]

[124] This is not a circumstance in which the outcome that is in [Kaitlin]'s well-being and best interests can be structured by the directive and discrete means that could occur by, for example, granting a custody order in [Moira]'s favour or ordering discharge of the Chief Executive's interim custody without further order as to revert [Kaitlin]'s care to her parents. In any case, I do not consider that an immediate change in [Kaitlin]'s care is in her well-being and best interests, even if that immediate outcome were scaffolded by service and support orders.

[125] Rather, this is one of those situations that requires a comprehensive, well-structured and adequately resourced plan for the transition of [Kaitlin]'s care from Mr and Mrs [Barr] to [Moira]. It will need to identify, with particularity, the ongoing assistance that will be provided to [Kaitlin] and her whanau, and how and by whom the situation will be monitored. It will also require careful consideration for Mr and Mrs [Barr], given their extraordinary contribution to [Kaitlin] and the fact that their assistance that will be required to best transition [Kaitlin]'s care. To craft that plan requires the combined expertise of the social worker, whānau, iwi and community and support services.

[126] I intend that the plan be framed by an interim custody order, pursuant to s 102, in favour of the Chief Executive in order to secure the ability to maintain [Kaitlin]'s placement with Mr and Mrs [Barr] whilst transition is occurring, and by services and support orders. I am optimistic that now that the evidence has been tested and findings made, the prior impasse as to the objectives and other content of the plan might be overcome. I urge, as a starting point, the engagement of a suitable expert or experts in child development and whānau support, working within a kaupapa Māori framework, to assist in the crafting of the plan. I am unsure whether that assistance is

available thought TIONKT. If not, or if augmentation is required, consideration might be given to Sharon Rickard and her colleagues at Te Aho Tapu Trust, Psychological Services.

[127] Given the expertise and many contributions required to effect the plan, I set out broad, non-exhaustive expectations of the type of features that the plan and orders might entail as follows:

(a) [Moira], and members of the [Woods]' whānau in support of her, will spend extended periods of time in [location 2] to enable frequent contact with [Kaitlin]. They will need to be appropriately accommodated and financially assisted (noting the employment and childcare commitments of some whānau).

(b) Mr and Mrs [Barr], with [Kaitlin], will spend periods of time with [Kaitlin] in [location 1] to familiarise her with a different environment, again appropriately accommodated and financially assisted.

(c) A placement for [Moira] with [Kaitlin], at [the residential parenting programme] will be secured. Alternatively, the possibility of their placement with [Kaitlin Senior] or other members of the [Woods]' whānau be evaluated.

(d) [Duncan]'s access with [Kaitlin], cognisant of the risks associated with his substance use and abusive interaction with [Moira], will be defined.

(e) Parenting, relationship, and substance use programmes for [Moira] and [Duncan], as deemed necessary, are identified and their engagement facilitated.

(f) Confirmation of the funding arrangements to implement the plan.

[128] In respect of the funding aspect I make two observations:

(a) If there is a failure of implementation of the plan, [Kaitlin] will have been taken from the home and family where she is loved and has been cared for through the majority of her young life, have spent a period of time in the care of her whānau only for that not to sustain and then have a further adjustment in response to placement into another environment, potentially with people unknown to her. Failure of implementation may be to visit upon [Kaitlin] the harm visited upon her mother, when [Moira] was a child and subject to the care and protection jurisdiction of this court. If that failure is by reason of inadequate resourcing, the consequent trauma to [Kaitlin] will have arisen, not by reason of care or protection deficit (though that is what it may create), but by reason of systemic dysfunction, in a similar manner as the failures of timeliness have led to the risk of detrimental impact due to disruption of the status quo.

(b) I bear in mind that the line between judicial and executive action must be respected. I would however encourage those with the ability to allocate the necessary resources to reflect upon concessions made by the current Chief Executive's predecessor to the Waitangi Tribunal as to the structural failings of the care and protection system, and the impact of that on the outcomes for, and experience of, tamariki Māori and their whānau.[82] It strikes this court that some of the current experiences and outcomes for [Kaitlin] and her whānau thus far might fit within the paradigm described, and call for a proportionate commitment of resource in remedy.

[129] A final matter: [Duncan] must make a crucial contribution to the plan for [Kaitlin] not only because he is [Kaitlin]'s father but because of the strength of his connection with [Moira]. I take his attendance throughout the hearing as indication of a preparedness to participate, notwithstanding that he has remained in the background.

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[82] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkingi Whāuarua Oranga Tamariki Urgent Enquiry* (Wai 2915, 2021) at 5.

I am contemplating the appointment of a lay advocate, pursuant to s 163 and with an emphasis upon the lay advocate function in s 164(b), to represent the interests of [Duncan] in a manner that facilitates [Duncan]'s engagement in the plan for [Kaitlin]'s care and protection. My intent would be to appoint Terry Davis should he be in a position to accept.

Directions

[130] I adjourn the proceedings to a 90-minute hearing before me on 6 September 2021 for the making of disposition orders. I direct as follows:

(a) [Social worker A] is to prepare a plan pursuant to s 128 and report pursuant to s 186 and file same by 23 August 2021.

(b) Given the likely involvement of TIONKT, this decision is to be released to its manager, Dee Ann Wolferstan.

(c) Should Sharon Rickard, or a colleague at Te Aho Trust Psychological Services, be engaged for advice, I authorise release of the decision to Ms Rickard or a colleague. This direction may be actioned by counsel for the Chief Executive supplying this decision directly to Ms Rickard or colleague, upon contemporaneously filing a memorandum confirming that either or both have been engaged.

(d) This decision is to be released to Mr Davis. He is invited to indicate to the court within 14 days whether he is willing to accept the appointment. If he is available, the appointment may be confirmed by the Registrar without further reference to me. If Mr Davis is not available, he is to return the decision to the court and the Registrar is to refer the matter for my attention and further direction.

(e) In addition to all persons entitled by s 166 to attend the hearing, I permit and invite the attendance of all other professionals involved in the

preparation of the plan and representatives of any service provider engaged for the purposes of the plan.

(f) In addition to [social worker A], I request as representation of the Chief Executive, the attendance at the hearing from such person or persons who are delegated authority to fund the plan.

(g) Participants unable to attend the hearing in person are given leave to attend by audio video link.

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Judge SD Otene
Family Court Judge

Date of authentication: 09/07/2021
In an electronic form, authenticated electronically.