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

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IN THE FAMILY COURT
AT PALMERSTON NORTH

I TE KŌTI WHĀNAU
KI TE PAPAIOEA

FAM-2019-091-000303
[2023] NZFC 10811

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MIKAERE RANGI] Applicant
AND	[CHELSEA MABLE] Respondent

Hearing:	21-23 August 2023
Appearances:	Applicant appears in Person F Seelen-Smith and C Bell for the Respondent C Davidson as Lawyer for the Child H McKenna as Counsel to Assist
Judgment:	7 November 2023
Reissued:	20 March 2024

RESERVED JUDGMENT OF JUDGE J F MOSS

Introduction

[1] The parties in this matter wanted to create a child. They entered into an agreement for conception by donor insemination prior to the pregnancy. [Elle] was born as a result, in [date deleted] 2018. The co-parenting agreement anticipated there

would be co-operation, some consultation, and provided for a role for [Elle] with the mother as the main caregiver, her partner as a parent, and the applicant as having some contact from time to time.

[2] The relationship between the applicant and respondent soured soon after the child's birth. The mother struggled with the applicant's strongly expressed need to introduce [Elle] to his whānau, and with his inconsistency. In the five years of her life, [Elle] has developed into an accomplished well-settled child and will shortly start to attend school.

[3] The applicant seeks definition of contact and appointment as a guardian.

Legal principles

[4] The parties agree that the applicant was a semen donor. They agree that his status is defined in s 21 of the Status of Children Act 1969. That section reads:

> **21 Partnered woman: non-partner semen donor not parent**
>
> (1) This section applies to the following situation:
>
> (a) a partnered woman becomes pregnant as a result of an AHR procedure:
>
> (b) the semen (or part of the semen) used for the procedure was produced by a man (man A) who is not her partner.
>
> (2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy.

[5] Applying other provisions in the Status of Children Act, the child's parents are the birth mother and the woman she lived with at the time of conception. The couple had had an earlier child, but separated at the time the pregnancy with [Elle] became known. Since then, the other mother [name deleted] has had no contact with [Elle]. She has not permitted contact for [Elle]'s mother or [Elle] with the older child [name deleted]. [Elle]'s mother is a parent of that child, pursuant to the Status of Children Act, s 21.

[6] The applicant has applied for orders under the Care of Children Act 2004. The fundamental difference between the theoretical underpinning of the Care of Children

Act and the Status of Children Act were considered in the Supreme Court in *Hemmes v Young*.[1]

[7] At para [9], the Court considered the underpinning statutory purpose and scope of the Status of Children Act, and said this:

> The essential purpose of the Act was and is to remove the legal disabilities of children born out of wedlock. The short title to the Act signals that its principal concern is with status, which is a legal concept involving legal relationships and their consequences in law. It is in the context of legal status and removing the disabilities previously attaching to the status of illegitimacy that the reference to the relationship between every person and his mother and father must be understood. The statutory context and purpose, with their focus on status, both clearly suggest that the Act is referring to legal rather than biological relationships. Indeed, the terms of s 3(1) make it perfectly clear that, at least in that section, the word "relationship" must be referring to the legal relationship between the parties. The biological relationship between a person and his father and mother could never have depended on whether the biological parents were married. The biological relationship is an immutable fact in respect of which the marriage or otherwise of the biological parents can make no difference. Hence s 3(1) of the Status of Children Act cannot, contextually or logically, be concerned with biological relationships. The same can be said of the use of the word "relationship" in subss (2) and (3) of s 3.

[8] The Court on that occasion was considering the Status of Children Act and the Adoption Act, where a previously adopted child sought a declaration as to paternity in respect of the biological father. The Court was considering the legal relationship, not the child's identity.

[9] In terms of legal relationship, the agreed position of the parties is that the applicant is not a parent. On the plain reading of s 21 of the Status of Children Act that must be accurate. The legislation is concerned with adult liability and responsibility, and not with child identity.

[10] By contrast, the Care of Children Act is fundamentally concerned with child identity.

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[1] *Hemmes v Young* [2005] NZSC 47.

[11] The fundamental underpinning of the Act is set out in ss 3 and 4 of the Care of Children Act. These sections read:

> **3 Purpose of this Act**
>
> (1) The purpose of this Act is to—
>
> (a) promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and
>
> (b) recognise certain rights of children.
>
> (2) To that end, this Act—
>
> (a) defines and regulates—
>
> (i) parents' duties, powers, rights, and responsibilities as guardians of their children:
>
> (ii) parents' powers to appoint guardians:
>
> (iii) courts' powers in relation to the guardianship and care of children:
>
> (b) acknowledges the role that other family members may have in the care of children:
>
> (c) respects children's views and, in certain cases, recognises their consents (or refusals to consent) to medical procedures:
>
> (d) encourages agreed arrangements for, and provides for the resolution of disputes about, the care of children:
>
> (e) makes provision for enforcing orders internationally:
>
> (f) implements in New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction:
>
> (g) reforms and replaces the Guardianship Act 1968 (including the Guardianship Amendment Act 1991).
>
> **4 Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances—

(a) must take into account—

(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(ii) the principles in section 5; and

(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

(4) This section does not—

(a) limit section 6 or 83, or subpart 4 of Part 2; or

(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

[12] In determining an application pursuant to the Act, and applying s 4, the Court must apply the jurisdiction accorded to the Court under the Family Court Act 1980 in accordance with the welfare and best interests of the child in his or her particular circumstances, as a first and paramount consideration.

[13] Read in accordance with the principles of the legislation, the Court's primary concern includes examination of a child's identity. This is spelled out in s 5(e) of the Act, and among others is a principle which the Court must consider.[2]

[14] [Elle]'s identity includes social and psychological aspects, but also genetic ones. Thus, the concept of identity is unduly limited if considered only in terms of legal relationships.

[15] In *Lane v Lester*, the Family Court considered the applicability of the United Nations Convention on the Rights of the Child and the best interest principles

[2] *Kacem v Bashir* [2010] NZSC 112.

in the Status of Children Act.[3] Judge Burns emphasised that the Status of Children Act was concerned with legal relationship and not with biological relationships, notwithstanding that the child may have a biological relationship with his progenitor which is not a legal relationship.

[16] In construing the provisions of the Care of Children Act, the Court must apply a purposive approach, and consider the text from the standpoint of best interests and welfare. A child's legal rights and responsibilities and opportunities form part of the picture of overall best interests. And to that extent, I consider the word 'parent' needs to be considered in light of the Care of Children Act, rather than in light of the Status of Children Act. That then requires a further consideration of the position, from a child's point of view, which is occupied by a parent, a father, and a mother.

[17] For this reason, although these proceedings began with an application under s 19 of the Care of Children Act, that application was discontinued with the encouragement of the Court. A further application under s 27 of the Care of Children Act was then filed. These two sections create different pathways to the appointment of a child's guardians.

[18] Section 19 requires the Court to appoint the father of the child a guardian unless it would clearly be contrary to the child's best interests. Section 27 imposes a standard on an applicant to demonstrate positive consequences for a child flowing from the appointment of the applicant as a guardian and imposes on that applicant the theoretical burden of proof.

[19] From a child's point of view, bearing in mind his or her identity, both in terms of genetic wealth and social capital, I consider that it is advantageous to enable the assumption of guardianship status for the father by the easier s 19 route, notwithstanding the human-assisted reproductive technology's part of the Status of Children Act.

[20] A close examination of the SCA text discloses an absence of consideration of the position of the human subject, the child. It is adult-focussed. Such a limited point

[3] *Lane v Lester* [2022] NZFC 9861.

of view is not, and in my view, permissible in interpretation of the Care of Children Act. To [Elle], bearing in mind the natural meaning of the word father, the applicant is her father. However, the Court now has the s 27 application. For clarity, s 27 of the Care of Children Act reads:[4]

> **27 Court-appointed guardians**
>
> (1) The court may appoint a person as a guardian of a child, either in addition to any other guardian or as sole guardian, either—
>
> (a) on an application for the purpose by any person; or
>
> (b) on its own initiative, on making an order removing a guardian under section 29.
>
> (2) The court may appoint the person as a guardian of the child—
>
> (a) either for a specific purpose or generally; and
>
> (b) either for a specified period or not.
>
> (3) However, only the High Court may appoint or remove a litigation guardian for proceedings before the High Court or a court higher than that court, but the High Court may also appoint or remove a litigation guardian for proceedings that are not before the High Court or a court higher than that court.

[21] In interpreting matters related to best interests and identity for a Māori child, I consider that it is necessary for the Court to ensure proper consideration of familial, community, and cultural matters which are inherent in the development of the identity of a Māori child. These considerations are different from those for a Pākehā child. The Court has been assisted in reaching a sophisticated understanding of this matter by submissions sought from counsel to assist whom I appointed to consider this question. Counsel and parties agreed to the appointment, and had the opportunity for comment on the submissions.

[22] The other cultural component of this child's life is the underpinning philosophy and structural reality within which she was conceived. The LGBTQI+ community also, of course, has a culture which will condition the identity of children who are brought up within the culture. The particular family structures which are chosen, and which develop for children in this community, are also an important part of their

[4] Care of Children Act 2004, s 27.

identity. Although this was noted, prehearing, at the time I appointed counsel to assist in relation to the Māori identity issues, there have been no submissions filed related to the mother's view or on behalf of the child's development in terms of that community.

[23] This absence may appear that there has been uneven consideration of that aspect of the child's upbringing. There are two matters that require comment.

[24] The first is that the Court had neither evidence nor advice by submissions in relation to that community setting.

[25] The second is that consideration of matters of Māori identity is required, in terms of proper consideration of Māori children. This obligation arises from the application of Te Tiriti o Waitangi. Application of matters of tikanga are relevant to the application of legal principles, just as much as interpretation of statute. Application of statute to the rights and identity of children is incomplete without application of the principles of tikanga.

[26] The Court's expertise is more limited than is ideal, and more limited than will be likely in the next decade or two. That is an experiential gap.

[27] Matters of tikanga which are engaged in considering the welfare and interests of a child are co-extensive with the principles underpinning Te Ao Māori. Children are a taonga. It is upon their health and well-being that the health and well-being of Te Ao Māori rests. The health and well-being of Māori children is undermined if they are not considered, indivisibly, from their whakapapa.

[28] Counsel to assist drew attention to the obiter comment in *Ellis v R*.[5] Williams J was considering the applicability of the Care of Children Act, although interpretation of the statute was not engaged in the Court's criminal procedural decision-making, which related to the continuation of prosecution after the defendant had passed away.

[29] In relation to matters where tikanga is not specifically referred to in statute, as is the case in the Care of Children Act, counsel to assist also referred the Court to

[5] *Ellis v R* [2022] NZSC 114 at [262], fn 261.

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board, where the Court of Appeal found tikanga Māori to be applicable law when exercising discretionary powers.[6] The Court said:[7]

> We consider that it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

[30] Much earlier in the development of the jurisprudence related to the acknowledgment of the status of tikanga as law, in 1997, the High Court considered that the child's welfare required preservation of concepts which underpin the structure of family. The case related to a custody order (as it was then called under the Guardianship Act 1968) which the Court described in this way:[8]

> …because the familial constitutions and relationships are an important part of the culture of all people and are entitled to preservation under the provisions of the Treaty of Waitangi and the draft Treaty on Indigenous Peoples' Rights, both of which formalise at least to some extent, what might otherwise be seen as vague generalities.
>
> Secondly, we consider that the importance of those concepts as a starting point applies to all the statutory provisions which apply to the care, nurture and upbringing of children.
>
> Thirdly, while they apply and form a starting point, they are subsumed within the concept of the welfare of the child, which provides the ultimate standard under all of the statutory provisions concerned.

[31] The Supreme Court also considered the status of tikanga as part of the common law of New Zealand, in *Takamore v Clarke.*[9] The Supreme Court held that the common law "can never be in conflict with its statute law, but with that qualification, our common law has always been seen as amenable to development to take into account of custom". [10] As counsel to assist sets out at para [41] of their submissions, the Supreme Court in *Ellis v R* agreed that "tikanga has been and will continue to be

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[6] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; [2020] NZRMA 248.
[7] At [177].
[8] *Barton-Prescott v Director-General of Social Welfare* [1997] NZLR 179 (HC) at 189.
[9] *Takamore v Clarke* [2012] NZSC 116.
[10] At [150].

recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant".[11]

[32] Rights and responsibilities of a guardian recognise, within English common law, the concept that a child's upbringing is tied to its forebears. Tikanga extends the concept, and makes the ties which our children have to forebears who have passed indivisible.

[33] I consider it is consistent with statutory interpretation that the broader concept of whakapapa is a relevant and necessary consideration for a Māori child. To artificially limit familial constitution to the link between one generation and another is a foreign concept in most cultures. The provision for the right of contact for grandparents, appearing in the Care of Children Act, provides some confirmation that this is inherent within Pākehā families. That it is more so within Te Ao Māori appears as an enhancement in interpretation of the statute, not a contradiction.

[34] Considering the principles embedded within s 5 of the Act, my conclusion that principles of tikanga are properly to be considered for a Māori child is fortified. The advisory provisions in s 5(b) to (f) are matters which the Court must consider. The Court cannot consider the child's identity and the maintenance of the child's relationships without considering the advantages and obligations inherent in whanaungatanga and whakapapa.

[35] It may be, ultimately, that the development of interpretation in this field goes further. It is arguable, but has not been argued before me, because the safety principle has not been engaged, that the Court must consider a child's safety in the context of preservation of whanau. To excise a Māori child from whānau poses a significant risk to a child's psychological safety.

[36] In summary, I consider that the pathway to appointment as a guardian for a father may be available under s 19 of the Care of Children Act. The Court's jurisdiction must be exercised from the child's perspective, and the genetic link is an

[11] *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239 at [19]; [108]-[110] per Glazebrook J, [171]-[174] per Winkelmann CJ, [257]-[259] per Williams J and [279] per O'Regan and Arnold JJ.

indivisible part of that chance identity. In this matter the application pursuant to s 27 requires the Court to consider that the appointment would be in the best interests and welfare of the child, and bearing in mind the s 4 obligation to apply the Court's jurisdiction as an exercise of welfare and best interests, this exercise must be centred within the child's framework. Thus, bearing in mind concepts of whanaungatanga and whakapapa, s 27 cannot be interpreted without incorporating those concepts.

[37] Prior to the conception, the mother and applicant entered into a co-parenting agreement. This agreement is bound by the terms of s 41 Care of Children Act which reads:

> **41 Agreements between parents and donors**
>
> (1) A party to an agreement to which subsection (2) applies—
>
> (a) may seek to have terms of the agreement embodied in an order of the court that may be enforced, as provided in subsections (3) and (4); and
>
> (b) may apply to the court for its direction on certain matters that cannot be agreed with other parties to the agreement, as provided in subsections (5) and (6).
>
> (2) This subsection applies to an agreement between the parents of a child and a donor or donors so far as it relates to contact between the donor or donors and the child, or to the role of the donor or donors in the upbringing of the child, or to both.
>
> (3) An agreement to which subsection (2) applies cannot be enforced under this Act, but, on an application for the purpose by a party to it, the court may, with the consent of all parties to it, make an order of the court that embodies some or all of the terms of the agreement.
>
> (4) An order under subsection (3) may, so far as it relates to contact with the child, be enforced under this Act as if it were a parenting order relating to contact.
>
> (5) Any of the parties to an agreement to which subsection (2) applies may apply to the court for its direction if those parties are unable to agree on a matter—
>
> (a) concerning the role of the donor or donors in the upbringing of the child; and
>
> (b) that is the subject of terms of the agreement embodied in an order under subsection (3).
>
> (6) On an application under subsection (5), the court may make any order relating to the matter that it thinks proper.

[38] Although the mother gave evidence that she had not understood the full terms of the agreement, and nor had she intended to commit to the role for the applicant to the extent as she did, in the agreement, that matter is addressed below. In terms of the provisions of s 41, I consider that the provisions in the agreement as to contact are insufficiently clear to be enforceable or, to be converted to a parenting order without further examination.

[39] The agreement related to name is, however, clear. I consider that the provision in the agreement relating to name is not an agreement as to the role of the day-to-day care nor as to the upbringing of the child. Since the agreement was signed it, the parties have not agreed on the matter related to name, and thus an application pursuant to s 41(5) may be made. The application is in part to enforce the terms of the agreement, and in part to embody the terms of the agreement in an order.

The case specific to [Elle]

[40] The Court's obligation is to determine both matters relating to guardianship and the naming of [Elle] and also matters of contact. For young children, matters of contact relate more to day-to-day and operational matters of their comfort, confidence, and psychological development. A young child is not a mini adult. Their psychological needs require application of child-focussed psychological theory to the individual personal approaches of their important adults.

[41] For [Elle], what she needs from a biological father in terms of guardianship is different from what she requires from her biological father who is a relative stranger to her, in terms of contact. Such conflict as there is in this matter is focussed on the theoretical status of guardian and of "father" but not on the operational child-to-adult relational and developmental nuances which do not depend on genetic connection.

[42] In applying the best interests of the child, there is nothing within concept of whanaungatanga which enables or requires a departure from considering the particular child and his or her particular needs and interests, on a day-to-day basis. A Māori child has attributes and advantages which are different from her Pākehā classmate, but they are still particular to the individual child.

[43] The mother's concern in this matter is most volubly expressed, because of concern about assumptions which the applicant has made, in her view, about the exercise of his tikanga rights in terms of contact with and possession of the infant and young child. The mother considers that the applicant has not adequately accounted for the child's individual developmental needs. The mother's concern about the applicant's inconsistency in the exercise of contact plainly continues to trouble her. She repeatedly she emphasised how difficult it was that the applicant had gaps between his contact, and during the COVID period: the longest gap was about six months. Her case is focussed on the need to protect [Elle] from the inconsistency, and on the applicant's lack of understanding of the impact of the gaps in contact on [Elle].

[44] As is routine in the Care of Children Act, the Court has sought psychological evidence to examine the child's needs, developmentally, and psychologically in the context of the dispute between the parties. The psychological evidence has explained the position for [Elle] in different ways. Each psychologist (Ms Dunne and Dr Orr) took a slightly different view of the progressive development of contact bearing in mind [Elle] and her relationships with her family. However, both are clear that [Elle] needs care to be taken with her development in light of her particular circumstances, her particular personality, and her particular parents.

[45] The mother's relationship with [Elle] is warm, creative, engaged and enabling. Both psychologists agree that she has a primary bond with her mother, and is very well attached. Dr Orr expressed understanding about but concern over the anxiety the mother has around how the applicant's role in her family can develop, and whether he is committed to consistently maintaining connection.[12] She concluded that the mother's anxiety is a significant relational factor hindering the development of the relationship between [Elle] and the applicant.

[46] When the two adults agreed to share the genetic makeup of a child, they did not necessarily consider their differences in terms of personality and attitude. Examination of the early correspondence, alongside the evidence now, delineates the

[12] Dr Orr, June 2023 para 69-71, Bundle p 485.

extreme difference between them. Early on the mother wrote that she wanted to have a half-caste Māori baby.[13] She wrote to the father:

> I grew up without knowing my father or having a father figure and I do not wish to put that upon my children I would love to be known as the father and would be happy with you on the birth certificate I would like to be main carer for the baby but happy to let baby spend time and stay with you as well. As I said it's important to me they know where dad and dad and where they come from [14]

[47] This message was sent in April 2016, some weeks before the parties signed the co-parenting agreement. The prior emails suggesting that the mother had thought about what she wanted from the relationship with the applicant. She also enquired about that time whether he would be prepared to donate semen for another child.

[48] And then, in May 2017 the mother wrote:[15]

> GUESS WHAT you gonna be a daddy

[49] The plain meaning of these messages demonstrates that the mother's view prior to the birth of [Elle] was that she wanted to develop a family unit in which the applicant would play a part, but when it came to the point of developing that relationship, she changed her mind.

[50] The applicant says, in relation to the agreement signed, that he would not have agreed to share genetic material unless there was a strong foundation for co-parenting and enabling their child to belong within his whānau and identity. These differences between the parties have contributed to the current highly polarised status, and Dr Orr raised concern that [Elle] would be caught in the middle.[16]

[51] Each parent brings personal business to their attitudes. The applicant was not brought up by or with the knowledge of his father and did not find him until his father was deceased. The mother does not have a relationship with her father and rejects the proposition that she might ever develop one. Thus, the applicant has an unmet need to be fathered. The mother appears to state in evidence a need to protect her child

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[13] Email from the mother to the applicant, 12 April 2016, Bundle p 203.
[14] Email mother to applicant, 11 April 2016, Bundle pp 202-203.
[15] 5 July 2017, Bundle p 53.
[16] Dr Orr, June 2023, para 73.

from the difficulties which arise in a relationship with a father. She has also come to believe that the relationship she had with her partner deprived her of fully free choice, and that the behaviour of the applicant imposes a similar dynamic on her.

[52] A further complication which has contributed to the conflict in this matter is the difference between the parents in terms of confidence and entitlement in the personality of the applicant, and anxiety and protectiveness in the personality of the mother. Instead of the parties accepting the need to live with and work with these differences, they continue to fuel extreme conflict.

[53] Both psychologists have raised some concern about the applicant's capacity and willingness to learn the skills to develop a relationship with [Elle]. There were difficulties in the time of COVID, in relation to conflict, and because of the applicant's work environment which led to periods of absence from contact. The mother's case focussed, almost entirely, on the inconsistency of the applicant's exercise of contact. The reality is, arising from that, as well as from the personal and theoretical differences between the parties, the relationship between [Elle] and the applicant is less warm, less ordinary, less developed and less attached than would be ideal for a child of nearly six years old.

[54] Both psychologists considered the applicant's approach needed some amendment. Both psychologists considered that the difficulties with contact had been affected by the mother's extreme anxiety related to it. It is easy for the Court to accept that advice, but difficult for the parties to resolve the problem. The applicant has, in feeling that the matters of tikanga and identity have not been adequately considered, criticised and rejected the points of view of both psychologists on the basis that they do not understand Te Ao Māori. Instead of taking an approach where a child is enriched by concepts of tikanga and adroit nuanced individual parenting, the applicant has tended to dismiss the need to take account of individual parenting matters. [Elle] needs him to learn.

[55] The structure of contact has settled a little in recent months. [Elle] attends contact at a supervised contact centre where the applicant, his sister, and a nephew of a similar age to [Elle], join in for an hour and a half. [Elle] is resistant at the beginning.

She will not engage with the applicant at first but enjoys the play with the other child. Somewhere between the middle and the second two-thirds of the period of time she is more engaged with everyone and was observed by Dr Orr to be enjoying herself.

[56] The degree to which she can play out her discomfort is concerning to me. She may have a learned reluctance because of her mother's distress. She may have a personal reluctance because of her own character. She may have a reluctance because of her five-year-old impression of preference about contact with her father.[17]

[57] The Court is not, really, in a position to throw any light on this. Earlier in proceedings, Ms Dunne observed [Elle] being engaged with the applicant during a visit to Te Manawa but was concerned that there were times the applicant's full attention to [Elle]'s needs and safety wavered. When [Elle] was first born the applicant visited her, until the relationship between the parties became more difficult, and fractious communication and court proceedings added to work pressures and absences for the applicant, such that contact would unsatisfactorily stop and start.

[58] The applicant's case revolves around his strong commitment to playing a part with [Elle], such that her identity is forged within her wider whānau, from all sides. It has been difficult for the applicant to understand and accept the Court's focus on the Eurocentric social science based approach to the consideration of the welfare and best interests for the child. For the reasons set out above, it is clear to me that matters of identity, development, safety and wellbeing all include central consideration of a child's place within her heritage.

[59] Two senior members of the applicant's whānau gave evidence. Matua [Tamati Anewa] and Ms [Anaru Hohana] both exemplified a whanaungatanga approach.[18] Adopting that approach, in consideration with, in recognition of, and in consultation with the mother is tika. It is essential. Sadly, Family Court proceedings do not offer a helpful process. The fact of litigation is in direct contrast with concepts of whanaungatanga. Both witnesses spoke of [Elle]'s need to connect now, with her whanau comprising the applicant's people and the mother and her people.

[17] For further analysis see Dr Orr at para 66-68.
[18] Whose pepeha appears at Notes of Evidence, pp 33-35 and 56 respectively.

Ms [Hohana] spoke of the unfairness to a child if that child misses out on one side of the family. She pledged that her door is open to the mother.[19]

[60] The hope expressed by Ms [Hohana], and the cautious concession expressed by the mother, that the two women could progress this business, is reassuring. It is not, however, at this point, enough. [Elle] needs urgent attention to matters relating to her identity, and a defined sense of belonging within her whānau. As the applicant described it, if she relates to the whanau, she relates to him. That approach does not accord with Eurocentric social science theory. Hand in hand with that she needs regular quality contact with the applicant in circumstances which foster her sense of belonging with him and within whānau and the reciprocal engagement human to human with the applicant. The applicant does not have other children. He may need to learn some tips and tricks for engagement with a six-year-old girl. The relationship will not occur naturally in light of the mother's extreme opposition, although that would be ideal in less hostile circumstances, or where the parties resided within a community which is strength-based and supportive of each of their roles. They do not reside in such a community, and I predict they never will. Thus, to some extent, the way in which the applicant develops the one-to-one relationship with [Elle] will differ. She needs him to approach her different world, as an individual, as well as bringing with him the vast resources inherent in whakapapa.

[Elle]'s needs from her guardians

[61] A child's guardians have a legal responsibility for children. This is, generally, conceptually confined to significant life and development decisions related to health medical matters, education, religion, and region of residence. Although the appointment of the applicant as a guardian is hotly opposed, and although the Court has power to appoint a guardian for limited purposes, no one provided the Court with guidance in evidence or in submissions related to welfare related definition of a guardian in a case where human assisted to technologies apply, where whanaungatanga and whakapapa apply, or where the culture and custom of LGBTQI+ families will influence the upbringing of the child.

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[19] NOE pp 59-61.

[62] If the Court accepts the responsibility to make decisions using its jurisdiction conditioned by the welfare and best interests of the child, an individual decision related to the appointment of guardians will require careful definition. The Courts maintains a significant focus on the impact for children of ongoing conflict and hostility within family. Dr Orr provides references to the social science which examines this. Given the entrenched views of both parties, and the apparent impact on [Elle] of the complicated engagement in contact, it is possible to conclude that the degree of conflict is a primary consideration. This is therefore adverse to her welfare, and therefore the application to be appointed guardian should be refused, because excluding the applicant from decision making will reduce conflict.

[63] However, there has been insufficient attention to understanding the impact of conflict, and planning future roles for the development of [Elle]'s identity as a Māori child for the Court to conclude that all other matters must be subservient to the goal to reduce conflict. In particular, the applicant and respondent have focused their hostility on two separate parts of [Elle]'s development, not pausing to consider that at every stage of her development she is both an individual needing to master the psychosocial tasks of growing up, and also a member of a group of loving others. The stark difference for [Elle] between an approach based in principles essential to Te Ao Maori, and an approach based in individual rights and entitlements (which is reflected in the drafting of COCA) is that impact of conflict will be different when it is diluted by the threading of ties for the child within whanau.

[64] The mother's evidence focused on her distress that the applicant had been so inconsistent with contact, and that the agreement between herself and the applicant went beyond what she now considers proper, in terms of commitments to co- parenting. Although the mother gave evidence that she did not understand the agreement, it was prepared from a template which she and her then partner used for the older child. It was amended to meet the particular circumstances of the particular planned baby, and was signed prior to conception. The parties discussed it by email. It was witnessed by the mother's mother. I do not accept the mother's evidence that she did not understand the terms of the agreement. Although there was no evidence from the mother's then partner, and thus the account of that relationship derives only from the mother, I accept the mother's evidence that she experienced that relationship

as personally and emotionally abusive, which may have played a role in her signing the agreement.

[65] The separation about the time the mother confirmed the pregnancy came as a shock to the mother. The former partner's refusal to permit the mother to have an ongoing relationship with the older child distressed the mother deeply. The mother has altered [Elle]'s first name to hyphenate with the first name of the older child. When she spoke of the historical difficulty, the mother's distress was plain and poignant. The fact that it has been more difficult than the mother anticipated to establish a co-parenting arrangement with the applicant does not excuse the mother from her commitment to establish that co-parenting arrangement. The psychological evidence is clear that that is enormously complex for the mother, and that she struggles with a degree of anxiety, most of which is focused around these issues.

[66] By contrast, the applicant has vigorously maintained the right to be appointed a guardian, as necessary to recognise the status of the relationship between him and [Elle], which derives from whakapapa. His focus on the day-to-day relationship with [Elle] has been less consistent. He excuses absence and inconsistency on the basis of work demands. The applicant is a proud and accomplished man with a nationally important role in New Zealand's cultural heritage. His evidence left the Court with the distinct impression that the principles for [Elle] relate more to her belonging to a proud heritage, rather than his engagement in the minutiae of her life. The applicant has been accommodating (although not happily) with changes in the style and structure of contact. His evidence included respectful acceptance that for [Elle] the contacts needed to be arranged in a way which could be made to work for her mother. His frustration related not to so much to the adequacy of the contact, but to the impossibility of establishing a relationship with the mother.

[67] The applicant has included his sister, and now proposes to include a cousin, Ms [Hohana] and Matua [Tamati Anewa] in attempting to develop, for [Elle], a whanau about her which includes the mother. Ms [Hohana] and Matua [Tamati] both warmly and respectfully emphasised the necessity of that engagement. The applicant's sister, [Judy], has deeply offended the mother and her mother. They feel that she has been dishonest, by appropriating toys during a visit. These were meant for use by her

child, but not removal by her child. The sister is a more ebullient, warm and traditional woman. The combination of the mother's reticence and her extraversion is not likely to be easy. I did not detect in the presentation of the applicant's sister any ill will, or anything but a dedication to including this child within the wider whanau. She is troubled by the burden which she sees being carried by [Elle].

[68] These then are the swirling threads of the conflict. However, beyond protecting [Elle] from conflict, the absence of the applicant as a guardian deprives her of a broad inclusion in his rich heritage, a separate set of attitudes in relation to education, access to Te Reo Māori in an everyday sitting, and guidance, therefore, in education. The absence of the applicant as a guardian deprives [Elle] also of access to the rich spiritual world which, whether by faith or by superstition or by allegory, forms the foundation of Te Ao Māori.

[69] Put more simply, if the applicant is not a guardian of [Elle], the responsibility for ensuring the provision of this wisdom will not have legal recognition. For [Elle], the applicant will have no greater significance than a person outside of her family, unless she tracks down and creates links with him. If the applicant is not appointed as a guardian, [Elle] will still be a member of his whānau. If he is not a guardian, her links to the whakapapa, from which she derived her mana, will not be altered. However, in honouring the partnership of two cultures, to decline recognition that the applicant has the responsibility as a guardian, within the legal structure which conditions the lives of children, is to reduce the equivalence in the partnership. The evidence of the applicant's cousin and kaumatua persuade me that whatever the outcome, the applicant's whānau will claim [Elle] as one of their own. However, equivalence in participation is, in my view, better rendered by recognition as a guardian.

[70] The question then remains whether that recognition advances [Elle]'s welfare and best interests. In the uncomfortable words of the mother, before [Elle] was conceived, the mother wanted to have a half-caste child.

[71] Inherent in membership of and identity within a bicultural community is an equivalence of recognition of the strengths, riches, and responsibilities of each culture.

The appointment of the applicant enables a greater potential equivalence for [Elle] to take that full human part. I consider that there is some risk that major decisions which the mother would seek to make, particularly related to where she will live may cause a conflict which paralyses the mother's own future progress. However, I consider that risk to [Elle] is less than the risk to [Elle] of excluding the applicant as a guardian. The applicant's evidence, and that of his whānau, emphasise the need to resolve matters within whanau. Although the mother's intention to move to [another city] was notified only a few days prior to the hearing before me, the applicant's initial response was not to reject that out of hand, but rather to continue to represent that he would consider, consult, and reach an accord about [Elle]'s future.

[72] I consider there is more for [Elle] to gain with the applicant is a guardian than without. I consider that the appointment of the applicant as a guardian advances [Elle]'s welfare and best interests. It will ensure a legally recognised pathway to development of the broad features of her identity. It will enable equivalence for the adults as they consult about how her place within whanau develops. The applicant's capacity for agreement, and for respect of the role of the mother in [Elle]'s life is greater than the mother's respect for the applicant.

[73] The appointment of the applicant as a guardian will not enable him to uplift [Elle]. The mother's fear that he would do that became entrenched when she was a very little infant, when the applicant understandably sought to introduce her to whānau. [Elle] was the mother's first baby. She is anxious and protective by nature. The applicant's expectations were too full on for this mother. The applicant reacted badly to the mother's reluctance, construing that as disrespectful of his role, and of his whānau. The applicant became less consultative, and less respectful in turn. Each party can reconsider their perspectives on these early moments. [Elle] needs them to do that.

[74] The applications before the Court do not challenge the day-to-day care of [Elle] with her mother. That is proper. There is no evidence tending to suggest that the applicant either would or could undertake the day-to-day care of [Elle] with the focus, creativity, and devotion which the mother displays.

[75] I am satisfied that the applicant should be appointed as guardian for [Elle] for general purposes.

Contact

[76] The mother's opposition to any contact was and is extreme. The Court determined the contact, but this too has not pleased everyone. The evidence before me established that, from the applicant's point of view, these matters of development of the relationship need to occur through discussion and development of relationships among whānau.

[77] Contact has become extremely difficult for [Elle]. She needs the applicant to connect to a regime of contact which is regular, and includes acceptance of her needs. The psychological evidence satisfies me that the relationship between the applicant and [Elle] is only just beginning to develop. Because [Elle]'s mother and grandmother are very cautious about the relationship, and because there is no social strength in the connections between adults on each side of [Elle]'s whanau, there is little adult assistance to support her developing the relationship. This is likely to improve if Ms [Hohana] and the mother can find common ground, and if Ms [Hohana] can then become a conduit for feedback, messages, and the sharing of news and joys. This could have the beneficial effect of taking [Elle] away from being burdened with the adults' unhappiness.

[78] Contact should continue to occur on a fully supervised basis each fortnight until [Elle] is six, and thereafter not more than three-weekly. This is an important recognition that [Elle] will start school, her time will be more full and confined, and there will remain stresses within the contact arrangements for some time. The mother proposed that contact should be reduced to monthly if it had to happen at all. There do not seem to be reasons other than convenience for this. The mother's evidence appeared to confirm her reluctance for the relationship between [Elle] and the applicant to develop. While the contact can continue to be fortnightly, it should continue in that way.

[79] The degree of supervision will need to relax. I do not consider the evidence establishes that [Elle] needs the protection of supervision, nor that the applicant

presents such a risk that he cannot be trusted to see [Elle] without his being supervised. However, in practical terms supervision has been necessary to establish the contact, and will continue to be necessary for a limited time, to enable the mother's trust in [Elle]'s comfort to be established. After a further four fully supervised sessions, the supervision is to occur only on transitions from the mother, and her mother, to the applicant, and then at the end of contact. After a further four sessions, with transitional supervision, I recommend that the parties find an arrangement for transition which is practical and relaxed. [Elle]'s counsel is to start work on this development now, so that by Christmas the transitions can be managed personally by the parties.

[80] Contact will need to be re-negotiated if the mother's principal place of residence changes. Whether that will require the intervention of the Court is not clear. It will be a useful exercise in respectful consultation, which I urge the parents to undertake, bearing in mind the broad factors related to [Elle]'s development. I note the applicant's confidence that this can be worked out.[20]

[Elle]'s name

[81] The applicant has asked the Court to direct the name of [Elle] to be as agreed prior to conception. The co-parenting agreement included a provision to have her surname as [R-M].[21] The full terms of the agreement related to naming read as follows:

> Both parties are to be involved in this discussion and the mother will make the final decision if required. In this event the applicant will have the opportunity to contribute a middle name.
>
> The child's family name will be [R] hyphenated with [M].
>
> Discussion of child's birth certificate will have the mother and the father (sic).

[82] The applicant is implicitly applying for recognition of the terms of the co-parenting agreement, in seeking to choose the name, as contemplated by the Care of Children Act, s 41. I am of the view that whether [Elle] bears his surname or not comes under "the role of the donor…in the upbringing of the child" (s 41(2)), thus the

[20] Evidence of applicant, NOE p 28 line 25 to p 29 line 6.
[21] Agreement dated 14 March 2017, Bundle p 40.

section applies. The agreement is sufficiently clear that I consider that its terms can be embodied in the order.

[83] The child has been registered, and the applicant does not appear as the father. The mother effected registration within a few weeks of the birth, and did not consult the applicant about it (contrary to the terms of the agreement). The mother opposes the proposed middle name. The mother has, as noted above, amended [Elle]'s name to include the mother's older child's name as her second name.

[84] The name has profound significance to the applicant, and will be an important symbol of belonging to the applicant's whanau, because of the status of the tipuna.[22] The name has geographical links to [detail deleted], and will assist her to be recognised by the applicant's whānau. The naming of children is often symbolic of connectivity, which underpins the theory of family and community structure. Thus, for the applicant the name is a way to assure [Elle]'s family about her links.

[85] The co-parenting agreement specifically provided for the applicant to choose a middle name. I consider that [Elle] will benefit from holding the name. The name [Roimata] is to be added to her name.

[86] The addition of a different surname is different. [Elle] will soon identify herself primarily by a first name and surname. She may already do this. At this point I consider that it is too great a new imposition on [Elle] to change that name to [M-R] or to [R-M] . The name is unwelcome to her mother. The mother is in charge of day-to-day matters related to identifying [Elle] in enrolments. Including the name which would have to be used every day would, I am satisfied cause such adversity for the mother that [Elle]'s comfort with her own name would be unlikely to be fostered and embedded. The stress related to a more complex surname is greater than the immediate benefit which [Elle] will have from it. However, the symbol inherent in the name is important. The parties agreed that the applicant's name would form part of [Elle]'s name. Therefore, the applicant's surname is to be included as a third but not surname.

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[22] See oral evidence of [Aroha Hohana], NOE p 57 lines 27-30 and p 65 lines 9-19.

[87] It will remain for [Elle] to choose to include a hyphen in her name as she grows up. With the applicant as a guardian, her identity with and link to his whanau is assured.

Summary of orders

[88] The applicant is appointed as a guardian of [Elle].

[89] The mother is to have day-to-day care of [Elle].

[90] The applicant is to have contact as set out above (paras 78-80).

[91] [Elle]'s name is to be [Elle Roimata R M].

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Judge JF Moss
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 20/03/2024