

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 MAKĀURAU**

**FAM-2015-044-000234
[2023] NZFC 1696**

IN THE MATTER OF THE ORANGA TAMARIKI ACT 1989

BETWEEN CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN
Applicant

AND [MELISSA PATERSON]
[JARED MATENGA]
[MRS A]
Respondents

AND [TAMA MATENGA]
Child or Young Person the application is
about

Hearing: 10 & 20 February 2023

Appearances: M Bird for the Chief Executive
J Mason for the Respondent [Paterson]
H Arthur for the Respondent [Matenga]
M Headifen for the Respondent [A]
A Cooke as Lawyer for the Child
A Gluestein as Lawyer to Assist

Judgment: 20 February 2023

ORAL JUDGMENT OF JUDGE A M MANUEL

[1] I am about to give an oral decision and reserve the right to make changes to the written version before it is signed and released, but the result and the essential reasons will not change.

[2] This case concerns [Tama Matenga] who will be eight years old on [date deleted] 2023. The parties are Oranga Tamariki, [Tama]’s caregiver [Shannon Andrews],¹ his mother [Melissa Paterson] and his father [Jared Matenga].

[3] Before mid-January 2023 [Tama] was cared for by Ms [Andrews]. He had been in her care from the time he was [under 1 year] old. Until relatively recently he had limited contact with his mother and no contact with his father.

[4] Oranga Tamariki has a custody order under s 101 of the Oranga Tamariki Act 1989. It was made in 2015. In about 2017 a condition was added by consent which provided that “[Tama] is to remain placed with [his caregiver] pending further order of the Court.”

[5] [Tama]’s mother wanted [Tama] to live with her. Oranga Tamariki supported the move. So did [Tama]’s father. [Tama]’s caregiver and lawyer for child did not agree that a move would assist his wellbeing or be in his best interests.

[6] Failing agreement by all parties, disputes must be decided by the Court. Parties cannot take matters into their own hands.

[7] An eight-day hearing was held in late August and early September 2022 to decide the dispute. A reserved decision was given dated 1 November 2022.² In terms of the decision it was held that:

- (a) a move to the mother’s care was to be trialled on the basis set out in a draft Oranga Tamariki plan of August 2022 with the dates and details to be set in consultation with an independent psychologist;³

¹ Referred to in the intituling as ‘[Mrs A]’

² *Chief Executive of Oranga Tamariki v [Paterson]* [2022] NZFC 11180.

³ At [135](a).

- (b) the Chief Executive was to provide a review of the last plan for [Tama] within a month of the date of the decision and was to report thereafter every two months. The documents were to include a report prepared by the independent psychologist for the purposes of the Court;⁴
- (c) the mother's application for access was adjourned so that if for any reason the trial move was unsuccessful she had an application for access before the Court;⁵ and
- (d) subject to availability, the proceedings were to be case managed by me.⁶

[8] It was not too long before things started to go badly wrong. Oranga Tamariki filed a report on 7 December 2022, but there was no report from an independent psychologist included with it.

[9] Oranga Tamariki's draft plan of August 2022 had included (inter alia) the following proposals:

- (a) Oranga Tamariki engaging urgently with the independent psychologist to discuss how best to advise [Tama] of the transition; and
- (b) the pacing of the transition plan being adjusted accordingly to how [Tama] was responding. If the transition was going well then the pacing would remain as outlined or be sped up. If the transition was not going well then the pace would be slowed down as much as was practicable. [Tama]'s wellbeing would be the main driver of the pace of the transition. The social worker would consult regularly with clinical services, the independent psychologist and [Tama] on a fortnightly basis to monitor the pacing of the transition.

⁴ At [135](e).

⁵ At [135] (f).

⁶ At [135] (j).

[10] Oranga Tamariki's December 2022 report contained the following statement from his social worker:

I'm still working to engage an independent psychologist to assist with the Transition Plan... I will continue to work on this matter with urgency.

[11] The social worker also suggested that rather than engaging an independent psychologist:

I would like to propose engaging a psychologist from the Oranga Tamariki Clinical Services team so that we can get oversight from a psychologist who is available now and who has experience in this sort of work...

[12] In other words, Oranga Tamariki was seeking to change the basis of the draft plan of August 2022 so that the requirement for an independent psychologist to be engaged was dropped and a psychologist from the Oranga Tamariki clinical services team was used instead.

[13] Overall the Oranga Tamariki report December 2022 report was positive with the report writer stating:

Up until this point Oranga Tamariki have been pleased with how the Transition Plan has been progressing. [Tama] is becoming very used to and comfortable spending longer durations with his mother and siblings.

[14] But there were also concerns raised and the social worker stated that:

When not with [his mother] [Tama] has exhibited some uncharacteristic behaviours. These include being confused, withdrawn, pushing boundaries and using baby talk.

[15] Shortly after, on 8 December 2022, lawyer for child reported. She had met with [Tama]'s school principal and with [Tama] himself. She raised concerns which she described as "serious."

[16] Lawyer for child reported that the principal said that since the Court hearing and [Tama]'s increased contact with his mother the school had seen a "massive shift in his behaviour". His behaviour had regressed and become babyish as if he was seeking comfort. The school said the change in him had been dramatic and thought that maybe he was regressing to babyhood going into a comfort zone. The school was aware that [Tama] was having a lot of meltdowns at home and had been particularly

alarmed when [Tama] came to school and told his teacher and friends that his mother had taken him to a gang pad to attend a party put on by the “biggest gang in [location A].”

[17] [Tama]’s lawyer then met with him and he repeated his comments about the gang party saying that “one time Mum took him to a party where there were gang members who had jackets with patches on the back and that Mum knows a couple of gang members.”

[18] [Tama] was adamant that although he enjoyed the extra time with his mother he did not want to leave his caregiver’s care. He wanted to remain living with her and attend his school and all their activities together.

[19] The concerns which then followed in the December 2022 lawyer for child report made disturbing reading:

Oranga Tamariki made extensive submissions to the Court that they would adequately fund any proposed transition to be overseen by an independent child psychologist. This has still not happened. There is no psychological support in place for [Tama].

In my respectful submission the transition plan has been under recorded, under funded and under delivered.

[20] Lawyer for child attached a letter to her report from Oranga Tamariki saying they had approached several psychologists without success and wanted to use an inhouse one. Lawyer for child continued:⁷

With a shortage of good quality, independent psychologist’s (sic) it was entirely foreseeable that Oranga Tamariki would struggle to obtain an independent psychologist to manage the Transition Plan. It quite frankly beggars belief that their whole submission to the Court was predicated on a successful transition plan which the Court relied on after the evidence of Dr Peter Watts who said such a Plan was key.⁸

Planning and funding for the Transition Plan should have been put in months before it was actually needed.

...

⁷ Paras 18 & 19.

⁸ Peter Watts was the Court’s expert psychologist and gave evidence at the August and September 2022 hearing.

It would appear that Oranga Tamariki have very little intention of following the Court's Directions.

[21] What followed was an affidavit from the social worker who denied that [Tama] had attended a gang party with his mother (although little explanation was provided for the denial). Her discussions with [Tama]'s school principal however tended to confirm the concerns raised by lawyer for child.

[22] The case was to be managed by me subject to availability. I was not available to deal with the proposal to dispense with an independent psychologist or the serious concerns raised by lawyer for child. They were referred to the Auckland Family Court liaison judge on 14 December 2022. Directions were made as follows:

In accordance with [the November 2022] judgment the social worker has filed a 186 report. The report will need to be referred to Judge Manuel to review upon her return. In the meanwhile counsel are invited to file memoranda about the social work report as appropriate ...

Lawyer for child ... has filed a memorandum dated 8 December. This will also need to be referred to Judge Manuel on her return and I note it raises concerns about the social work report, Oranga Tamariki and independent psychologist.

[23] On my return to work on 16 January 2023 I organised a judicial conference to take place on 27 January 2023. It emerged either just prior to or during the telephone conference that:

- (a) no independent psychologist had been appointed;
- (b) Oranga Tamariki had not waited to find out whether the Court would approve or disapprove the proposal about dispensing with an independent psychologist;
- (c) consequently the draft plan had never been finalised; and
- (d) the move from [Tama]'s caregiver to his mother had already happened, on 14 January 2023, and he was due to start school shortly. (In fact the date had been moved forward by about nine days from the date proposed in the draft plan of August 2022).

[24] At the conclusion of the judicial conference, timetabling orders were made prior to a decision being given about whether Oranga Tamariki's proposal to dispense with the independent psychologist should be adopted or not and, if not, whether [Tama] should live with his caregiver until an independent psychologist could be engaged.

[25] Meanwhile the proposal from Oranga Tamariki had changed again and, rather than using a psychologist from the Oranga Tamariki clinical services team, it was now proposed that:

[The social worker] should be permitted to continue to assess the progress herself, in consultation with clinical services. She is able to provide adequate supports and eyes on the child and provide updating reports as set out in her affidavit. Alternatively the Court could direct a further s 178 to appoint a psychologist or direct Peter Watts to assume the role.

[26] A half-day hearing was held on 10 February 2022 to decide these issues.

[27] Turning first to the issue of the independent psychologist, it should be stated that it was not the Court's suggestion that an independent psychologist should be engaged. It was Oranga Tamariki's own suggestion. It was first made, as far as I am aware, in a draft plan dated April 2022 or, in other words, many months before the hearing took place. It was the foundation on which the draft plan was based. It was on the basis of the engagement of an independent psychologist that the plan was put to both the Court and to Dr Watts. The involvement of an independent psychologist was to convert the draft plan to a final plan and work out dates and times because the ultimate success of the move was far from certain. Dr Watts' evidence made that very plain indeed. His evidence under cross-examination, which affirmed the evidence in his earlier reports, was to the effect that:

- (a) there was a pathway available to trial the move and while no one could know how successful it would be, the transition plan would act as a safety net and "we have to wander into this and just see how far we get;"⁹

⁹ At [82] (a).

- (d) the move needed to be trialled “effectively to get it over with”. Either it would work or not, but the alternative was the damage which exposing [Tama] to continued litigation would cause;¹⁰ and
- (g) the decision sat on a “knife edge” but nevertheless Dr Watts saw the move as a way of ensuring that [Tama] had the best opportunities to know his whānau as much as he could in a way where he was kept safe and secure throughout the whole process so that he received therapy and still had contact with his caregiver.¹¹

[28] The decision of 1 November 2022 did not approve the draft plan. A move was premised on a final plan being put together with the assistance of an independent psychologist. The input of the independent psychologist was not optional or merely desirable. It was essential in terms of dates, timing, details and ultimately deciding whether the trial move was in [Tama]’s wellbeing and best interests. The Court, as decision-maker, needed a properly-qualified expert and impartial opinion about how [Tama] was faring with a trial move. He had previously been moved as a baby, when attempts to move him back to his mother’s care were tried, but failed.

[29] It would appear that the decision-making has in fact been made by [Tama]’s social worker. Whether or not that has been informed by the Oranga Tamariki clinical services team, it is no substitute for decision-making by the Court informed by an independent psychologist.

[30] Neither Oranga Tamariki nor the mother are likely to be impartial. The mother’s position was summarised in the 1 November 2022 decision as follows:¹²

[Tama] was parted from [his mother] for reasons which she probably does not accept as valid. Since then she has been utterly focused on regaining his care. At times she may have taken steps which were counter-productive to achieving her goal or lost sight of his interests.

[31] The mother had earlier tried to have [Tama] moved to her care and in 2018 a seven-day hearing had taken place in the Family Court. She was unsuccessful and the

¹⁰ At [82](d)

¹¹ At [82](g).

¹² At [99].

Court held that [Tama] was to remain with his caregiver. The mother appealed that decision, again unsuccessfully.

[32] The Family Court in 2018 had held that the mother “would mislead, craft and hide information to suit her cause” and referred to a “lack of honesty and hence inability to accurately be able to assess risk.”¹³ This raised concerns about her as an accurate reporter of information.

[33] As for Oranga Tamariki’s impartiality, or lack thereof, in early 2021 there was a policy change at Oranga Tamariki. This coincided with a Waitangi Tribunal report on an enquiry into claims concerning the disproportionate number of Māori children in state care. Oranga Tamariki, which had hitherto staunchly opposed a move to the mother’s care, then did an about-turn and began to support a move for [Tama] to her care.

[34] The concern is that Oranga Tamariki may be committed to implementing a policy, resulting in it not being in a position to objectively assess the wellbeing and best interests of this particular child.

[35] Nevertheless, a move has taken place – apparently on the basis of a draft plan without input from an independent psychologist, without the plan being finalised and on the basis of a social worker’s say-so.

[36] Quite apart of the issue of impartiality, it should be obvious that a social worker is not a psychologist. Psychologists and social workers have different qualifications, experience and perform different functions.

[37] At the risk of oversimplification, a clinical psychologist aims to reduce psychological distress and promote psychological wellbeing. Typically, they provide consultation and supervision to other professionals and agencies. They will have a master’s or higher degree in psychology and have done 1,500 hours of closely-supervised practice and been approved and evaluated by the New Zealand Psychologists Board. They are registered as clinical psychologists with the Board.

¹³ At [18].

[38] An Oranga Tamariki social worker works with families, communities and other agencies and professionals to protect children and ensure safety and security for those who are in the custody of the Chief Executive. The social worker in this case has a master's degree in both psychology and social work but she is not qualified as a psychologist and has never worked as a psychologist. She has spent about six years engaged only in social work.

[39] Returning to the issues, the application by Oranga Tamariki to dispense with the engagement of an independent psychologist is declined. If an independent psychologist is not appointed this Court will not have the information it needs to assess the success or otherwise of the move or be confident that [Tama] is being supported throughout this huge change in his young life. As a vulnerable child he deserves better than the treatment he has been given by Oranga Tamariki to date.

[40] The proposal put forward by Oranga Tamariki that the transition is managed by social worker is inadequate for the reasons explained.

[41] I decline to accept the proposal that the Court find and fund an independent psychologist, perhaps Dr Watts. Dr Watts made it clear when he gave evidence in September 2022 that it was the last time he would be involved as a Court-appointed psychologist. In any event Oranga Tamariki needs to honour the proposal originally made to this Court and abide by the decision given. Of late they have been assisted by other counsel in searching for a suitable independent, and the Court is grateful for their assistance.

[42] As for the question of whether [Tama] should be in the care of his caregiver until an independent psychologist is engaged, none of the parties had any appetite for this suggestion. [Tama]'s lawyer submitted that it was not in his wellbeing and best interests.

[43] Lawyer for child met with [Tama] and reported on 7 February 2023. [Tama]'s lawyer asked what his thoughts were if the judge said he was to go back to his caregiver - would it be "horrible or okay." Before a third option was given (i.e. good), [Tama] said "okay," but his preference was to remain with his mother. Lawyer for child reported that [Tama] appeared to be missing his former friends and sadly, he did

not think he would see them again. He said that if he could that would be a “10 out of 10.”

[44] In conclusion, lawyer for child submitted that:

The plan for [Tama] needs to continue but requires urgent “re-assessment.” Transition should continue and be closely supported and monitored – objectively. This should again look to how [Tama]’s previous peer relationships can be continued and how [his caregiver] can play a role in his life over the course of the transition – if the placement falls over/becomes untenable after a period of some months – then she represents the backstop in the event of the move to [his mother] not working out.

[45] I accept those submissions. A direction made previously that [Tama] not attend school until the question of his placement was resolved is discharged.

[46] [Tama]’s caregiver has applied for interim access, reviving an oral application first made in September 2022. It is best for [Tama] that an interim access order is made and this is to take place fortnightly after school so that [Tama] can have dinner with his caregiver on a Friday evening and return to his mother’s to have dinner with her on a Sunday evening. This arrangement is to commence on 4-5 March 2023 so that [Tama] can join in celebrating his caregiver’s birthday. The transport is to be arranged and if necessary provided by Oranga Tamariki. There is also to be WhatsApp contact twice a week on a Tuesday and Thursday at 6 in the evening.

[47] Oranga Tamariki was directed to report within a month of the 1 November 2023 decision and thereafter every two months. Their first report was due on 1 December 2022 and was not filed until 7 December 2022. Their second report was due on 1 February 2023. Today is 20 February 2023 and it has still not arrived. It is to be prepared and filed without further delay.

[48] As an aside, I comment on the evidence that has been provided for today’s hearing by Joanna Jackson and Juanita Harrison. Ms Jackson swore an affidavit in support of the mother dated 7 February 2023. Ms Jackson describes herself as a “complex trauma and family harm specialist” with qualifications in the “field of psychology” and over 25 years’ experience working in this field. She has been involved in supporting the mother since 2021. She purports to provide evidence about how [Tama] is faring. The evidence is neither expert nor impartial. Consequently it is of little or no value to this Court in decision-making. Ms Jackson is thanked for her

role in supporting the mother but her affidavit is to be returned to the mother's lawyer and not form part of the evidence. Ms Jackson is to refrain in future from engaging in assessments or assistance with [Tama]. Her efforts are to be directed solely to the mother.

[49] As for Ms Harrison, who is an inhouse psychologist at Oranga Tamariki, she signed a document dated 2 February 2023 which was annexed as an exhibit to an affidavit of the social worker dated 3 February 2023. The document is described as a "clinical services case consult" and it is prefaced with the caveat:

Consultation notes and recommendations are based on the information provided at the time of the consultation and do not reflect a comprehensive assessment or report.

[50] Ms Harrison's document is unsworn. She does not qualify herself as an expert. The contents of the document give rise for concerns about her impartiality. She opines that she does not believe a psychologist is needed to monitor the transition. She continues that she suspects it would be difficult to find one and in her opinion there: "...shouldn't be a concept of a trial transition for a child (respectfully, this would do a dis-service to the child and family)." This is completely contrary to the evidence which the Court heard from Dr Watts and ultimately accepted. I do not propose to direct that Ms Harrison's statement is removed from the Court file but it is in my view of little or no use in assisting the Court in its decision-making.

[51] Counsel to assist has been appointed to enquire and report on what appear to be a breach or breaches by one or more of the parties of the Court's decision of 1 November 2022. The report is still pending but meanwhile I remind all involved that Court orders are binding and it is not open for them to amend, revise or ignore them or otherwise take the law into their own hands. This also applies, perhaps more so, to a government department such as Oranga Tamariki. As the former US Supreme Court Justice Louis Brandeis said in his noted decision *Olmsted v United States*,¹⁴ "in a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously" and that "if the government becomes a lawbreaker it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy."

¹⁴ *Olmstead v United States* 277 U S 438 (1928).

[52] The government being bound by the law is a key element of the rule of law. One does not need to be a scholar of constitutional law to understand the importance of the government operating within the rule of law. As noted in the English House of Lords case *Bennett v Horseferry Road Magistrates Court*:¹⁵

There is no principle more basic to any proper system of law than the maintenance of the rule of law.

[53] I direct that copies of this decision and those that precede it up to and including the decision of 1 November 2022 are sent to the Chief Executive and the Commissioner for Children.

[54] To monitor this case a 30-minute teleconference is to take place in the week beginning 6 March 2023 and I propose to convene regular teleconferences thereafter. Oranga Tamariki is to report inter alia on progress in appointing an independent psychologist. Lawyer for child has proposed a draft brief for the psychologist and the lawyers may wish to comment on this proposal.

A M Manuel
Family Court Judge

¹⁵ *R v Horseferry Road Magistrates Court; ex parte Bennett* [1994] 1 AC 42 (HC).