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

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IN THE FAMILY COURT
AT ROTORUA

I TE KŌTI WHĀNAU
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

FAM-2018-063-000443
[2022] NZFC 4502

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN First Applicant
AND	[RITCHIE ISAAC] [MAUDE NGAIRE] Applicants
AND	[MANAIA NGAIRE] [CURTIS WINSTON] Respondents
AND	[JODY NGAIRE] AND [MICHAEL NGAIRE] Born on [date deleted] 2018 Child or Young Person the application is about

Hearing:	16 May 2022
Appearances:	D Prasad for the Chief Executive M James for Applicants [Isaac] and [Ngaire] N Moynihan for Respondent [Ngaire] A Burns for Respondent [Winston] P McGuire as Lawyer for the Children
Judgment:	2 August 2022

RESERVED DECISION OF JUDGE M BROEK

"Kō te Tāmaiti te Pūtake o te Kaupapa

The child is at the heart of the matter"

[1] This was a long cause contested hearing concerning the special guardianship provisions of the Oranga Tamariki Act 1989 in respect of which I decided to reserve my decision. At the conclusion of the hearing, counsel referred me to two Family Court decisions on point and containing divergent approaches on the correct legal approach to be engaged. While writing this decision, it was timely that the High Court released a decision reconciling those divergences and offering further guidance, views I have taken into account in this decision and which has built in some delay in releasing this decision.

Background

[2] At the centre of these proceedings are ngā mana tamaiti, ngā māhanga [Jody Ngaire] ("[Jody]") and [Michael Ngaire] ("[Michael]"), born on [date deleted] 2018. They are the children of [Manaia Ngaire] ("[Manaia]") and [Curtis Winston] ("[Curtis]").

[3] Ki te taha ō ona Māmā, kō [name of iwi deleted] te iwi, kō [name of hapu deleted] te Hāpua, ā kō [name of marae deleted] te marae. On their father's side they are of Scottish descent.

[4] Shortly after their birth and following intervention from Oranga Tamariki, they were placed in the care of [Manaia]'s whanaunga [Maude Ngaire] ("[Maude]") and [Ritchie Isaac]("[Ritchie]") under a s 78 interim custody order.[1] [Maude] and [Ritchie] are [Manaia]'s whāngai parents. [Maude] raised her from birth until she was four years old when [Maude] met [Ritchie], then together they raised her until she achieved

[1] Granted on 28 November 2018.

independence. [Maude] and [Ritchie] are mature in years, both are in their seventies. There is a whānau connection through [Maude]'s former husband [Piripi Ngaire] ("[Piripi]") and [Manaia]'s Great Uncle who passed away 13 years ago.

[5] Safety concerns for the children and [Manaia] were held due to [Manaia]'s inability to accept her continued relationship with [Curtis] was placing them and her at risk. [Curtis] has an extensive history of criminal offending, including violence, drug use and breaches of protection orders. Oranga Tamariki records document repeated episodes of family violence between him and [Manaia] and the existence of four protection orders in place against him, one of which is for [Manaia]'s benefit. That information, together with concerns about [Curtis]'s mental health, led to Oranga Tamariki obtaining a restraining order against him at the same time the s 78 order was sought.[2]

[6] Immediately following the children's placement with [Maude] and [Ritchie] in early 2019, [Manaia] moved in with them. Their living arrangements quickly broke down with [Maude] and [Ritchie] citing her aggressive behaviour and inattention to care of the children as the reasons. Soon after, a family group conference agreed there were care and protection concerns for [Jody] and [Michael].[3]

[7] Rehabilitation of the children to [Manaia]'s care was contemplated initially, and the possibility was the subject of three psychological assessments. They bore similar themes; - recommending she address her mental health, family violence and drug use.[4] A sustained lack of agency in addressing those issues later led to rehabilitation being ruled out.

[8] Subsequent to the conference, [Manaia] was exercising supervised contact of three hours' duration, three times weekly at the home of [Maude] and [Ritchie]. [Curtis] was exercising supervised contact of lesser frequency, of one and a half hours' duration, three weekly, and separately from [Manaia]. Over the successive six months, [Manaia]'s attendance waned.

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2 It was also granted on 28 November 2018.
3 Held in February 2019.
4 Dr Llewellyn Ward's reports dated 13 February 2019, 29 April 2020 and 10 June 2020.

[9] In August 2019, there was an incident when she violently assaulted [Ritchie] by repeatedly smashing a phone over his head and causing injuries, to which the children were exposed. The incident was the catalyst for [Ritchie] and [Maude] obtaining a protection order against [Manaia]. Those developments necessitated a change of contact venue to the Open Home Foundation ("OHF"). While weekly mid-week supervised contact sessions of one and a half hours' duration were arranged, [Manaia] has only attended approximately half to date.

[10] [Curtis] has had little involvement with the children which I will say more about later. More recently, he has re-engaged and is exercising monthly supervised contact of one and a half hours' duration.

[11] Despite the concerns held about their relationship, [Manaia] and [Curtis] have remained together for the entirety of the children's lives and these proceedings. They live together in emergency accommodation in Rotorua and work together at the same [workplace]. Episodes of mutual family violence have continued throughout their relationship, and between [Curtis] and an adult son.[5]

[12] The consequence for [Jody] and [Michael] of the factual matrix as set out, is they have been in [Maude]'s and [Ritchie]'s care for virtually all their lives and do not know any other caregivers.

[13] Although Oranga Tamariki has held custody orders from shortly after the children's birth, it did not seek appointment as a guardian. [Maude] and [Ritchie] have not held guardianship orders either. That has meant [Manaia] and [Curtis] remained the children's joint and only guardians thus requiring [Maude] and [Ritchie] to consult with and defer, in the main, to [Manaia], to make decisions about guardianship matters until February 2021. Those decisions have included the choice of Kōhanga Reo, medical issues, whether [Michael] should have a haircut, and whether the children may travel to Australia to visit extended whānau.

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5 [Rangi].

[14] Delays encountered awaiting [Manaia]'s decisions, and the lack of consultation and transparency in her decision-making processes caused immense frustration and exhaustion of patience for [Maude] and [Ritchie].

[15] Eventually, the children's need for immunisations became urgent, necessitating an application by Oranga Tamariki to be appointed as additional guardians. The order was granted on 16 February 2021 and shortly afterwards, the children were vaccinated.

[16] The current orders in place are s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive and the s 87 restraining order against [Curtis]. [Maude] and [Ritchie] still have a protection order against [Manaia], and [Manaia] still has a protection order against [Curtis].

[17] There is general consensus amongst the parties that these proceedings are ready for disposition however their views differ as to the types of orders needed, if any.

The applications

[18] [Maude] and [Ritchie] seek discharge of the orders in favour of the Chief Executive and instead, seek their appointment as additional and special guardians under the Oranga Tamariki Act 1989. Exclusive guardianship is sought in respect of - the children's school and educational needs, overseas travel and haircuts.

[19] Oranga Tamariki and Ms McGuire, the children's lawyer, support the making of those orders.

[20] [Manaia] opposes the making of special guardianship orders. She says, they are unnecessary, contending [Maude] and [Ritchie] have acted unilaterally, to the exclusion of herself and [Curtis]. She does not agree to the children remaining in their permanent care as her stated long-term aspiration is for their return to her care. Instead, she agrees to parenting and additional guardianship orders being made in their favour. She believes she is more than capable of making decisions for the children in

consultation with them and wishes to continue sharing the children's guardianship rights and obligations without partitioning any issues.

[21] [Curtis] opposes [Maude]'s and [Ritchie]'s appointment as the children's guardians, and the children being placed with them permanently due to perceived safety issues in their home environment. He complains of a lack of consultation with him about guardianship issues and refutes the need for [Maude] or [Ritchie] to have exclusive guardianship for any matters. He believes [Manaia] is capable of making the right decisions for the children and his preference is for future guardianship decisions to be made in consultation with [Manaia] and himself.

The issues

[22] Against that context I must determine:

(a) The long-term care arrangements for the children and contact with the non-care parties.

(b) Whether the s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive of Oranga Tamariki should be discharged.

(c) Whether it is in the children's well-being and best interests for the following orders to be made:

(i) None;

(ii) A Parenting Order vesting the children's day-to-day care responsibilities in [Maude] and [Ritchie] and defining [Manaia]'s and [Curtis]'s access (contact) in conjunction with an order appointing them as guardians in addition to [Manaia] and [Ritchie] under the Care of Children Act 2004;

(iii) For them to be appointed additional and special guardians pursuant to ss 110 and 113A and B of the Oranga Tamariki Act 1989.

The law

Principles applicable in decision-making

[23] The first and paramount consideration in any proceedings under the Oranga Tamariki Act is the well-being and best interests of the child or young person having regard to the principles in ss 5 and 13, which the Court must be guided by.[6] Of the extensive list of s 5 principles, the following have relevance at this final stage of the proceedings:

> (b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—
>
> (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—
>
> (A) treated with dignity and respect at all times:
>
> (B) protected from harm:
>
> (iii) the child's or young person's need for a safe, stable, and loving home should be addressed:
>
> (iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:
>
> (v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:
>
> (vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

6 Sections 4A and 13.

developmental potential; educational and health needs; whakapapa; cultural identity; gender identity; sexual orientation; disability (if any); age:

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

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

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

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

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

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

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

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

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

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

[24] Additionally, and if applicable, the principles in s 13 which have application to any support or services to be provided should be considered.

Key definitions

[25] Featuring in the preceding provisions are the following key terms:[7]

- **mana tamaiti (tamariki*)*** means the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.

- **whakapapa**, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend.

- **whanaungatanga**, in relation to a person, means—

    - the purposeful carrying out of responsibilities based on obligations to whakapapa:

    - the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:

    - 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

- **family group**, in relation to a child or young person, means a family group, including an extended family,—

    (a) in which there is at least 1 adult member—

        (i) with whom the child or young person has a biological or legal relationship; or

        (ii) to whom the child or young person has a significant psychological attachment; or

    (b) that is the child's or young person's whānau or other culturally recognised family group.

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7 s 2.

Permanency orders available

[26] These proceedings require careful consideration of the legal options available to secure the care of the children and to appropriately guard against any future risks of repetition of difficulties already encountered.

[27] The often-preferred option is for the Court to grant the caregivers leave and make Parenting and Additional Guardianships Orders under the Care of Children Act 2004. A Parenting Order addresses dual purposes, by vesting the care responsibilities in the caregiving party and defining the frequency and form of the non-caregiving parties' contact. Once a Final Parenting Order has been made, its terms cannot be revisited within two years of the date of its making unless leave of the Court is granted for an application to be brought within the embargo period. A material change of circumstances must be established for the application to progress.[8]

[28] With this option of combined orders, there is the ever-present ability for the non-caregiving party to re-litigate the care and/or contact arrangements, and the non-caregiving parties remain on an equal footing with the caregivers regarding the making of guardianship decisions. Difficulties for the caregiver can arise when the children's needs require decisions to be made, and any of the following scenarios arise - the parent guardians are either non-contactable or unreasonably withhold their agreement to the proposed decision(s) or actively seek implementation of decisions considered unnecessary or detrimental to the children's well-being and/or their best interests.

[29] The prospect of any future difficulties arising can act as a disincentive to the caregivers seeking finality of proceedings with these orders, and instead, the continued involvement of Oranga Tamariki is sought, to provide a measure of security and support by acting as a buffer and/or conduit for communication. The special guardianship provisions were the legislative response to guard against the potential for those vexed situations to arise in future.

[30] Before the Court appoints a special guardian, it must first be satisfied that either the child has no other guardian, or the special guardian will replace, is additional to,

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8 Care of Children Act 2004, s 139A.

or is an existing guardian.[9] The person must first apply and be appointed as an additional guardian under s 110 before being appointed as a special guardian.[10]

[31] Section 110 provides that if the Court is satisfied a child or young person is in need of care or protection, or on application, it may make an order appointing as a guardian any of following persons; - the Chief Executive of Oranga Tamariki, an iwi social service, a cultural social service, the director of a child and family support service, or any other person. The guardian must be appointed either solely or in additional to any other guardian(s). If the person is a natural guardian then they are eligible to be appointed as a special guardian.[11]

[32] A *guardian* has the duties, powers, rights, and responsibilities a parent of the child has in relation to their upbringing of the child and any corresponding duties or rights vested in the child under any Act.[12] *Section 16 elaborates on those rights and responsibilities. They are:*

(a) the day-to-day care of the child (excluding testamentary guardians);

(b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development;

(c) determining for or with the child, questions about important matters affecting them.

[33] Without limitation, *important matters affecting the child* include—

(a) the child's name and any changes to it;

(b) changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians;

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9 Existing guardian means a person, other than a special guardian, who is or would be a guardian if the Court had not made a guardianship order under s 110.

10 *Chief Executive of the Ministry for Vulnerable Children v Grant-Shepherd* [2018] NZHC 1260.

11 Oranga Tamariki Act 1989, s 110.

12 Care of Children Act 2004, s 15.

(c) medical treatment for the child (if that medical treatment is not routine in nature);

(d) where, and how, the child is to be educated;

(e) the child's culture, language, and religious denomination and practice.

[34] These duties may be exercised whether or not the child lives with the guardian, unless a Court order provides otherwise. In exercising the rights and responsibilities to a child, a guardian must act jointly, by consulting wherever practicable with the aim of securing agreement with any other guardians of the child. This obligation does not apply to the exclusive responsibility for the child's day-to-day living arrangements.[13]

[35] The Court may make a special guardianship order appointing a person as a special guardian only if the purpose is to provide the child with a long-term, safe, nurturing, stable, and secure environment that enhances their interests.[14] The primary effects of a special guardianship order were succinctly articulated by his Honour Judge Mahon at paragraph [11] of the Family Court decision of *SA v AA*:[15]

a. A special guardian has custody of the child or young person and the order has the cumulative effect of an order for day-to-day care under the Care of Children Act.[16] The order must specify the access and other rights (not custody or guardianship rights) of each existing guardian of the child.[17]

b. Guardians may not apply for an access order under s 121 once the order is made.[18]

c. Where there are other guardians, the order must set out which rights are to be held exclusively by the special guardian and which are to be shared with existing guardians.[19]

d. The special guardian has a duty to inform existing guardians of decisions made in the exercise of exclusive guardianship rights.[20]

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13 Care of Children Act, s 16(5).
14 Section 113A.
15 [2017] NZFC 9686, [2018] NZFLR 674.
16 Oranga Tamariki Act, s 113B(1)(a).
17 Section 113B(1)(b).
18 Section 133B(2)(a).
19 Section 113B(4)(a).
20 Section 113B(4)(b).

e. Guardians cannot apply under s 115 (dispute between guardians) in respect of any guardianship rights held exclusively by the special guardian.[21]

f. There is no review of plans[22] and the Chief Executive's duty under s 7(2)(e) duty to have procedures to regularly review action taken in relation to the children does not apply.[23]

g. The order ceases to have effect at 18 or if the child enters a marriage/civil union.[24]

h. If the child ends up living with someone else on "more than a temporary basis" and the child was formerly in Oranga Tamariki or iwi/cultural social service custody, there is a duty to inform the social worker or director of the service as appropriate.[25]

i. Leave is required to apply to vary or discharge the special guardianship order unless the application is made by the Chief Executive, a social worker, an iwi or cultural social service or the director of a child and family social service, or all parties consent to the granting of the application. Leave is only to be granted if there has been *significant* change in circumstances.[26]

j. A special guardianship order is enforceable overseas.[27]

Leading authority

[36] The leading authority on special guardianship is the recently released High Court decision of *McHugh* v *McHugh*.[28] In the decision, Doogue J articulates that the approach to be taken is both a factual and evaluative approach[29] requiring the Court to have regard to s 4A as informed by any relevant principles in ss 5 and 13.[30] This necessitates identification of the constituent elements comprising the child's environment viewed holistically and assessment of whether that environment will enhance the child's best interests or not. The Court must then consider the purpose for which special guardianship is sought, the making of an order being a matter of

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21 Section 113B(4)(c)(i).
22 Section 113B(4)(c)(i).
23 Section 113B(6).
24 Section 113B(4)(c)(iii).
25 Section 113B(5).
26 Section 125(1)(ga); s 125(1)(A) and s 125(1)(B)).
27 Pursuant to s 92 of the Care of Children Act 2004.
28 [2022] NZHC 1174.
29 At [23].
30 At [27].

exercising its discretion, informed by and consistent with the factual and evaluative assessment.

[37] The case emphasised the high threshold for making a special guardianship order. At paragraph [36], the decision refers to Judge Otene's comments in *The Chief Executive of Oranga Tamariki v BH*:

> … it seems clear that special guardianship was introduced to deal with situations where the behaviours of the birth parents of a child were so disruptive and threatening as to risk the security or stability of the child's placement with other caregivers. The Regulatory Impact Statement describes the kinds of behaviours of birth parents that would warrant the making of a special guardianship order as "obstructive", "threatening", "abusive" and "destabilising" ….

[38] If tamariki Māori are involved, the Court must interpret s 113A in reference to the legislative purposes set out in ss 4 and 4A, including the Treaty of Waitangi/te Tiriti o Waitangi, the principles in ss 5 and 13, and the effect of the order. There must be recognition of Te Ao Māori which sees guardianship as the collective responsibility of whānau, hapū and iwi, rather than in a purely nuclear family framework.[31]

[39] As to the effect of special guardianship, it is considered one of the most restrictive orders the Court can make in respect of a child under the Act.[32] The Court of Appeal has observed the "least intrusive" order meeting the needs of the child should be made.[33]

[40] The seemingly irreconcilable approaches towards special guardianship in the Family Court cases of *BH*[34] and *WH*[35] were examined carefully with Doogue J preferring the approach in *BH*. *BH* espouses the nuanced position that the principles of the Act relating to tikanga Māori will weigh heavily against the making of an order for tamariki Māori but will not necessarily render such an order unavailable if, on a subjective evaluation of the circumstances, it is nonetheless in the child's well-being

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31 At [42].
32 At [44].
33 At [49] referencing *E v Chief Executive of the Ministry of Social Development* [2007] NZCA 453, [2008] NZFLR 85 at [49]. Although the decision considered an interim custody order, Doogue J considered it applies to guardianship orders as well.
34 Ibid.
35 [2021] NZFC 4090, [2021] NZFLR 216.

and best interests.[36] Doogue J observed there was no demotion of the paramountcy principle nor were any factors afforded priority over the child's wellbeing and best interests. Rather, in her Honour's view, they were considerations in assessing the weight to be given to any applicable principles in the case of a Māori child's well-being and best interests.[37] The Act requires more than a "recognition" or "respect" of whanaungatanga, mana tamaiti and whakapapa, it required a more active application of them.[38] In her view, it mandates the Court and Oranga Tamariki taking active steps to promote the values of mana tamaiti, whanaungatanga and whakapapa in the well-being and best interests of tamariki Māori[39] which might require the need for investigation of the child's whakapapa to determine whether there was "a" suitable person or persons demonstrating a willingness to carry out the duties and obligations, the essence of whanaungatanga.[40]

[41] Ultimately, a highly compelling reason should be required before a special guardianship order is made in respect of tamariki Māori where it may have the effect of damaging or severing whānau connections.[41]

[42] The conclusion at [127] elucidated the court's task where tamariki Māori are concerned:

> the task for the Court in complying with the paramountcy principle in the case of an application for special guardianship of tamariki Māori is properly completed by:
>
> (a) the substantive application of the principles (te ao Māori values) enshrined in ss 5 and 13 as they relate to tamariki Māori as constituent elements of s 4;
>
> (b) requiring that "adequate research has been undertaken with respect to the child's whakapapa",[42] with "whakapapa" being defined in the Act as "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";[43]

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36 At [81].
37 At [93].
38 At [95].
39 At [112].
40 At [115], referencing the Judge *Re WH* at [70(e)].
41 At [118].
42 *Re WH* at [71(b)].
43 Oranga Tamariki Act, s 2(1).

(c) identifying a plurality of persons who may play a role in the life of tamariki Māori;

(d) recognising, in the right circumstances, that a special guardianship order can exist side by side with the operation of mana tamaiti, whakapapa and whanaungatanga where whānau have been given the opportunity to be involved in decision-making for their tamariki;

(e) having regard to those matters and the other principles, and reconciling them in order to determine whether it is in the best interests of the child for a special guardianship order to be made;[44] and by

(f) recognising that the threshold for the making of an order is a high one.

Long-term care

Dr Llewellyn Ward – s 133 court appointed psychologist

[43] The Court has the rare benefit of psychological information spanning the children's entire lives captured in Dr Ward's four reports completed over the course of these proceedings.[45] The earlier reports had focussed on assessing [Manaia]'s parenting capacity at those times, and in the medium to long-term, and made recommendations of steps she should take to achieve those objectives. Additionally, Dr Ward commented on the contact arrangements and support systems to monitor her parenting if she did not resume care of the children, as well as the effect on the children of the parents' ability to cooperate or otherwise in regards to parenting, and the advantages and disadvantages of the care options.

[44] The first report recommended the provision of more conclusive evidence that [Manaia]'s parenting is not compromised by her mental health and for her to undertake a residential parenting programme, acknowledging she had strengths in terms of her knowledge and motivation to parent and seek support.[46] Otherwise, a referral to a peri-natal psychological service was also considered a suitable alternative to assist with clear identification and resolution of any psychological needs.

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44 *Chief Executive of Oranga Tamariki – Ministry for Children v BH*, above n 24, and *Chief Executive of Oranga Tamariki – Ministry for Children v T*, above n 25, both demonstrate how the tensions can be appropriately reconciled.

45 Dated 13 February 2019, 29 April 2020, 10 June 2020 and 10 May 2022.

46 13 February 2019.

[45] [Manaia] was also recommended to provide periodic evidence of her sobriety from drugs and for her contact to be supervised by an independent person to overcome the chance of difficult whānau interactions. Dr Ward identified as a positive factor, [Manaia]'s willingness to engage in work but which sat alongside elements of concern, namely, her affective dysregulation and the possible psychiatric cause of this impression. Achieving wellness was considered fundamental to her ability to parent effectively.

[46] In subsequent reports, he observed that the children's care arrangements appeared to be providing a safe, nurturing and positive environment for ngā tamariki. Whereas the contact arrangements with [Manaia] had appeared fraught with inconsistent attendance and delays. He was unaware of any evidence [Manaia] had effected any changes to the critical issues previously identified.

[47] Dr Ward's last report discussed a broad range of topics – the effectiveness of the current contact arrangement for the children, the children's relationships and attachments to the parties, the psychological impact on the children should they be removed from their caregivers' care, whether there are any psychological issues that arise for the children remaining in the long-term care of their caregivers, the effect on the children of the party's ability to cooperate with one another, whether there are any safety issues for the children from a psychological perspective and the advantages and disadvantages of the care options and orders proposed by way of disposition.[47]

[48] In summary, Dr Ward expressed these opinions:

(a) The current arrangements appear to be providing a safe, nurturing and positive environment for ngā tamariki, whereas the contact arrangements for [Manaia] were fraught with no-shows and delays.

(b) The children have a warm positive relationship with their grandparents, and many indicators of a secure and positive attachment were evident. He was unable to comment on their relationship with either [Manaia] or [Curtis], as neither parent had engaged in the process of the updated report.

(c) He foresees age-typical issues arising for the children in future which [Maude] and [Ritchie] will be able to manage provided their health and energy levels permit. They have contemplated succession care planning, however, if steps

[47] Dated 10 May 2022.

are not taken now develop relationships with other whānau, he foresees some risk for the children. The other risk identified for the children, is if [Manaia] and [Curtis] are able to continue to have involvement in guardianship decisions, which [Maude] and [Ritchie] have found frustrating and exhausting, and have caused them to feel powerless.

(d) The original safety issues about ongoing family violence between [Manaia] and [Curtis] had neither changed nor improved for the children. [Maude] and [Ritchie] remain vigilant about possible stalking and also hold a degree of apprehension about the children's and their safety.

(e) As the children have spent their entire lives in the one placement, this provides a secure attachment and solid base from which they can continue positive and safe psychological development. If a change of care was contemplated, careful management would be required, and it would need to occur as a slow transition with contact with their grandparents being maintained and supported as much as possible.

[49] The children were observed to be thriving and joyful, which Dr Ward attributed to the positive and psychological nurturing care that occurs in a safe home and from their engagement in Te Ao Māori.

[Manaia Ngaire]

[50] From a care and protection evidential standpoint, [Manaia] denied little. She acknowledged mutual violence was a feature of her relationship with [Curtis] and agreed her methamphetamine and cannabis use had been legitimately held concerns. In her oral evidence, she conceded she had commenced but had not managed to complete any parenting courses.

[51] She accepts she has mental health issues but for different reasons than those identified by the psychiatrist who had undertaken an assessment of her, Dr Kumar. She says her issues manifest as agitation and defensive behaviour in response to personal issues yet, she acknowledged there was a time when drug-induced psychosis was suspected. The primary issue, she believes, is her experience of significant trauma from uplifting the children from her care.

[52] Those views were at odds with Dr Kumar's assessment, who had prescribed her antipsychotic medication for ongoing psychosis. She candidly acknowledged she had not read Dr Ward's or Dr Kumar's reports properly as she felt they would traumatise her, although she accepted there could be benefit in reading them, particularly to improve her mental health. Neither had she read her GP's notes which had been admitted into evidence. That theme of avoidance had continued until the first day of the hearing, when a delayed start was required to allow time for her and [Curtis] to read Dr Ward's updating s 133 report despite its availability the week prior. [Manaia] had not kept an appointment with her Counsel to read it.

[53] [Manaia] does not agree with children being placed permanently with [Maude] and [Ritchie], and sometime in the distant future, seeks their return to her care.[48] During her oral evidence it became apparent she had little appreciation the hearing would determine the permanency of their care. On more than one occasion she requested greater time to complete the personal work she had commenced. Yet, her stated wishes contrasted starkly with her documented lack of motivation to engage in these proceedings, in completing the personal development work or even attending the scheduled contact visits with the children.

[Curtis Winston]

[54] [Curtis] believes [Maude] and [Ritchie] have gang associations, and the presence of their adult son who is temporarily residing in a separate dwelling at their property, presents an unsafe environment for the children. Specifically, he is concerned their son both consumes, and sells illicit drugs. He has had prior personal involvement with their son who made false allegations against him in 2019 and which led to his temporary incarceration. Failure to consult with him about guardianship issues was another and secondary reason he opposes the children remaining with [Maude] and [Ritchie] in the long-term.

[55] With the greatest of respect to [Curtis], he presented as an unsophisticated man albeit with good intentions. In his oral evidence, he spoke readily about his difficult upbringing, having been taken into state care during his childhood and so it must be

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[48] Affidavit of [Manaia Ngaire] dated 28 October 2021, para 36.

assumed, that sadly, he has experienced deficient parenting. It follows then that his approach to parenting and his position in these proceedings has been coloured by those experiences and lack of experiences, something I have been mindful of.

[56] It became apparent that he lacked insight into the inconsistencies in his oral and affidavit evidence. Paragraph 13 of his affidavit dated 10 September 2021 said:

> [Manaia] is doing what she thinks is best for the children and I support her in that regard.

[57] Then, at paragraph 14, he said:

> At present I am only allowed to see the children once a month for one hour. This is not enough for me to be able to build any sort of meaningful relationship with the children. I would prefer if visits were on a weekly basis and believe that it would be in the best interests of the children to establish the best possible relationship they can have with me.

[58] The difficulty with [Curtis]'s position, is he is not actively seeking the children's care but he fails to identify any other suitable caregiver/s other than [Manaia], who does not seek their care as an outcome of this hearing. He acknowledges the absence of a close relationship between himself and the children, having identified the need to build a meaningful relationship with them.

[59] While giving oral evidence [Curtis] expressed the view the children would be better off in the care of other unidentified Oranga Tamariki caregivers. He had not made this proposal in his affidavit evidence and it appeared to be an "off-the-cuff" comment, made with little consideration for the psychological ramifications for the children.

[60] Had he engaged in the proceedings in a meaningful way, he may have gained an appreciation for the children's most important psychological needs and the quality of care they have received. Despite being afforded time to consider Dr Ward's updating report prior to the commencement of the hearing and being present throughout Dr Ward's oral evidence, somewhat astoundingly, [Curtis] had remained unaware of Dr Ward's identity, or of his role in the proceedings or the significance of his evidence.

[61] The allegations of safety issues in [Maude] and [Ritchie]'s home were denied by them and were not raised by Oranga Tamariki, the children's lawyer or Dr Ward, all of whom were aware of the specific allegations. I was not satisfied on the balance of probabilities the facts as alleged by [Curtis] had been established as he does not have any direct knowledge of his allegations. Even if I had been, they do not automatically equate to established safety concerns and more evidence would have been required. Against those findings, there was no justification for [Curtis]'s suggestion the children should be cared for by other caregivers.

[62] On the contrary, the evidence establishes the children are thriving, settled and happy with the bulk of their most important needs, including their engagement in Te Ao Māori, being met by [Maude] and [Ritchie] who are committed to caring for them in the long-term. Any pre-existing care and protection concerns have long since been addressed. Oranga Tamariki considers there is no longer a statutory role to be fulfilled and concurs, it is time for orders in its favour to be discharged. With the children's well-being at the forefront of my assessment, I have decided they should remain in [Maude]'s and [Ritchie]'s care, and on a long-term basis.

Contact with the non-care parties

[Manaia Ngaire]

[63] [Maude] and [Ritchie] propose a reduction in the frequency of contact for [Manaia] from fortnightly to monthly due to her inconsistent attendance. They propose [Curtis]'s contact remains the same.

[64] Oranga Tamariki records show there were no less than 15 occasions when the children were collected because [Manaia] had failed to attend an arranged contact session. The social worker agrees the frequency of [Manaia]'s visits should reduce to a less frequent schedule which would benefit the children.

[65] [Manaia] wishes to have regular weekly visits, despite acknowledging she has only attended half the scheduled visits. For her, once monthly is insufficient to enable bonding with the children and she believes it will exacerbate the separation-anxiety, she says they will experience. The difference between her proposal and the reality of what she is capable of committing to, illustrates a real disconnect.

[66] She is also concerned about the lack of focus on the children developing relationships with their paternal whānau. Ms [Franklin] was aware a recent visit between the children and their paternal grandmother had been readily facilitated, despite the short notice given to [Maude] and [Ritchie]. She refuted the children's paternal whānau are excluded from their lives, nonetheless, she acknowledges the care and protection plan is silent on this issue.

[67] In settling the frequency of [Manaia]'s contact, a balance must be achieved between the purpose of such contact, the children maintaining a relationship with their mother, and the reality of [Manaia]'s likely future commitment. While the children currently have no awareness of their mother's inconsistent attendance, they will inevitably develop insight in future which has the real potential to cause psychological harm from their disappointment. As the children are young and they will not have developed a sense of time, fortnightly frequency would better meet their needs and on average appears to be the level of frequency [Manaia] is capable of committing to.

[68] [Manaia] works on weekdays and the current contact interrupts the children's attendance at Kōhanga Reo, so it makes sense for contact to move to weekends. In the absence of any evidence suggesting [Manaia] has addressed her mental health issues and factoring in [Curtis]'s oral evidence she regularly uses cannabis, and occasionally methamphetamine, the children's safety necessitates continued supervision of her contact. There is no working relationship between [Manaia] and her parents, who harbour ongoing fears about her potential to exhibit volatility towards them, fears I consider are reasonably held. Therefore, her contact should remain at a professional venue.

[Curtis Winston]

[69] [Curtis]'s engagement in these proceedings has been significantly less than [Manaia]'s and the same can be said for his engagement with the children. Shortly after the children's birth, three weekly supervised access visits were occurring at the offices of Oranga Tamariki. They were stopped on 8 September 2019 as his focus had been on adult issues, not the children.

[70] In early November 2019 he failed to attend and attempts to communicate with him were unsuccessful. While he attended the children's birthday on [date deleted] at their grandparents' home, his next visit did not occur until over a year later because he had ceased communication with Oranga Tamariki.[49] In early October 2020 was trespassed from the offices of Oranga Tamariki as he had threatened a duty social worker.

[71] There was some delay in his contact getting underway again due to difficulties encountered in arranging an assessment with him. Eventually, contact resumed in early February 2021. He did not show for the next scheduled visit in March and was significantly late for visits scheduled in early June, August and October 2021. The September visit did not occur. This evidence went unchallenged by [Curtis].

[72] He seeks greater frequency of contact, preferably on a weekly basis so the children may establish the best possible relationship they can have with him. The social worker's assessment is that monthly contact for an hour is sufficient time for the children to know him. In a similar vein, as with [Manaia], there is a disconnect between [Curtis]'s proposal and the reality of his ability to commit.

[73] During his oral evidence, he was an open book about the ongoing incidences of mutual family violence between himself and [Manaia], their regular cannabis use, and less frequent methamphetamine use. Those factors indicate the need for continued supervision and the frequency and duration to be no greater than monthly. This frequency will ensure the children know their father, and the commitment required of [Curtis] as informed by his past level of engagement, is likely to be met.

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[49] 21 December 2021.

Guardianship decisions

Medical

[74] In early 2021, [Manaia] had arranged a doctor's appointment for [Michael] without consultation with either [Maude] or [Ritchie], and according to them, absent any need as [Michael] was in good health. Had it not been for Oranga Tamariki acting as a conduit for communication with her, they would not have learned of its making.

[75] The incident had been preceded by another a year earlier, when [Manaia] had arranged the children's immunisations without informing either of them. Again, on that occasion, they had learned of the appointment via Oranga Tamariki. Those incidents caused [Maude] and [Ritchie] to believe [Manaia] had made the appointments with the objective of causing annoyance and were motivated by a power struggle dynamic**.**

[76] [Manaia]'s affidavit evidence explained she had made the appointments as she had noticed ear infections and was advised to take action upon discussing this with an OHF nurse. [Maude] had not been consulted directly because she was refusing to communicate with [Manaia], although [Manaia] had tried to resolve communication issues with [Maude] through the restorative justice process, but she would not talk to her. Those issues were not put to [Maude] by way of cross-examination and no corroborating evidence had been adduced from the Open Home Foundation.

[77] I found [Maude] to be a credible witness and I had no reason to doubt otherwise. Whereas [Manaia]'s varying presentation throughout the hearing manifesting in occasions when she was quick to anger at minor issues and other occasions when she was flat in effect, together with incredible narratives such as her experience in the police cells, led me to seriously question her credibility. And so, I prefer [Maude]'s evidence about this issue.

Education

[78] Aware of [Manaia]'s wish for the children to attend Kōhanga Reo**,** [Maude] and [Ritchie] had canvassed numerous local options. [Manaia] had identified [name

deleted] Kōhanga Reo as suitable and they agreed. It was also convenient due to its proximity to their home.

[79] Shortly after, [Maude] and [Ritchie] were blindsided by [Manaia]'s decision to enrol the children at a different Kōhanga Reo in the suburb of [deleted], at a distance from their home.[50] [Manaia] had correctly understood, the ability to choose the Kōhanga lay with her. As she and [Curtis] were the children's only guardians at the time, [Maude] and [Ritchie] had no legal ability to oppose her decision. She explained she had considered almost every other Kōhanga Reo in Rotorua, but the others had enrolment issues. [Maude] and [Ritchie] refute there were enrolment issues with the other potential options.

[80] The ramification of [Manaia]'s choice, is they were required to travel 20 to 30 minutes each way daily as the Kōhanga Reo did not offer a transport service, contrary to [Manaia]'s belief otherwise. This presented real inconvenience for them, and they believe her decision was motivated by spite. Nevertheless, they accept it was a good Kōhanga Reo, and report that [Michael] and [Jody] enjoyed their time there. Out of necessity, as the Kōhanga has closed, the children attend another in [location deleted].

[81] Ms [Hawes] was clear, [Manaia] had not agreed to any of [Maude] and [Ritchie]'s suggested choices of Kōhanga Reo, and she had advised them transport would be provided, but that was not the case.

[82] [Curtis]'s affidavit was silent about the children's education. When asked about his views on future schooling, he expressed a preference for home-schooling, referencing his own experience as the reason. An aspect he had not thought through, was the implication of his wish, as it would require the children to spend greater time with and be educated by [Maude] and [Ritchie]. This suggestion was in conflict with his expressed opposition to the children remaining in their care due to perceived safety concerns, a point he struggled to grasp.

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50 [Name deleted] Kōhanga Reo in [suburb deleted].

[Michael]'s hair

[83] In late September 2020, [Maude] had wanted to cut [Michael]'s hair for health reasons. Her evidence was that in the heat of summer, his pillow would be saturated due to the length and thickness of his hair. It was also impairing his ability to eat properly. An obvious solution was to tie his hair up and which was attempted, but he would undermine those attempts.

[84] It was [Maude]'s unchallenged evidence that [Manaia] was aware of [Michael]'s difficulties, yet she was unyielding in her position, expressing opposition to a haircut until [Michael] was five. As it turned out, her objection had been conveyed on behalf of [Curtis] who was objecting for cultural reasons – both Scottish and Samoan. It was his evidence he had adopted Samoan values, and that cutting a child's hair before the age of five was contrary to both cultures.

[85] Belatedly, eight months later, in May 2021, [Manaia] agreed to a trim and since then, [Michael] has had two haircuts.

[86] Under cross-examination and with the benefit of being fully informed of [Michael]'s discomfort, [Curtis] explained he had not fully understood the reasons for seeking a haircut, and accepted it had been a fair call to arrange one.

[87] The consequence of [Curtis] fully exercising his guardianship rights, professed to be for cultural reasons via [Manaia] as his agent, who was informed but chose to overlook the adverse health consequences for [Michael], was to [Michael]'s detriment. [Michael] suffered unnecessarily and for an extended period of time. The decision originally exercised by [Manaia] and [Curtis] was made in ignorance and had not been focussed on [Michael]'s well-being.

[88] These circumstances amplified the illogicality of decision-making being left solely in the hands of guardians, who, by choice, were having limited involvement with their children and knew little about their daily care needs, having shown little agency in discharging their guardianship responsibilities.

Overseas Travel

[89] [Maude] has [family members] who live in Australia. She and [Ritchie] would like to travel to Australia in the medium to long-term to facilitate relationships between the children and extended whānau members. [Manaia] had previously expressed opposition for reasons relating to her own needs. She wanted to be the first person to take them overseas.

[90] Her position had changed by the time of the hearing. Under cross-examination, [Manaia] explained she no longer has any difficulty with overseas travel. Her primary concern, she said, had been apprehension the children would not return to New Zealand. In response, [Maude] gave an assurance she and [Ritchie] had no intention of remaining permanently in Australia.

[91] On this issue, [Curtis] is opposed, because the people they intend to visit are not the children's biological relatives. His opposition appeared to be interrelated with his resentment that his older children do not have a relationship with [Jody] and [Michael], an understandable grievance. Nevertheless, [Curtis] could not appreciate that the two issues were mutually exclusive, that his wish for [Jody] and [Michael] to have contact with his children could be addressed separately. There was no evidence adduced to suggest [Curtis] had conveyed his objection to Oranga Tamariki, or [Maude] or [Ritchie].

[92] Those persons in Australia are [Maude] and [Ritchie]'s extended whānau members, of which [Jody] and [Michael] are integral, cherished members. The psychological importance of those relationships for the children appeared to be lost on [Curtis] who declared he places value on biological relationships only. Yet, in contrast and quite hypocritically, he had said in his oral evidence, he had adopted himself into a Samoan family at the age of 19, and Samoan values were identified as a reason for objecting to [Michael]'s hair being cut. When challenged, [Curtis] could not appreciate the hypocrisy.

[93] I have no doubt that if the children are permitted to travel to Australia for the reasons proposed they will benefit not only from the establishment or development of

relationships with extended whānau members, but also the opportunity of the diverse experience of travelling to a different country. [Curtis]'s objection fails to acknowledge those people are members of the children's family group and is at odds with the statutory definition of family group and several s 5 principles. His objection is also premised on a grievance he is able to advance separately provided he engages in communication through appropriate channels.

Generally

[94] Oranga Tamariki's evidence was that attempts to communicate with [Manaia] were frustrated by her refusal to engage with the social worker or to reply to text messages and phone calls. Those attempts culminated in [Manaia] accusing the social worker of harassment. Due to the ongoing difficulties encountered by the social worker in securing [Manaia]'s agreement to important guardianship decisions for the children, it was necessary for Oranga Tamariki to seek appointment as the children's additional guardian. The following passage during Ms [Franklin]'s oral evidence was particularly telling, illustrating [Manaia]'s strained relationship with the children's social worker Ms [Hawes]:

> Q Has Ms [Hawes] found communication with [Manaia] difficult?
> A She has found it very difficult to the extent that she has come to me on several occasions and said: "I can't do this anymore." So that's when I have often taken over communication myself.
> Q Ms [Hawes] is a very senior, experienced social worker, isn't she?
> A Yes, she is.
> Q She's done this job a long time?
> A She has.
> Q And on this occasion, she's got to a point where she just wasn't coping.
> A Several occasions.
> Q Because of [Manaia] and her behaviour?
> A Yes.

[95] At the conclusion of the first day of the hearing, all participants witnessed first-hand, a pronounced example of [Manaia]'s poor emotional regulation, behaviour readily capable of interpretation as aggressive and intimidating. While [Maude] was giving evidence unfavourable to [Manaia], [Manaia] repeatedly vocalised her disapproval despite my instruction to desist. Unable to comply, [Manaia]'s agitation escalated rapidly and ultimately necessitated intervention by the court security staff,

bringing the day to an abrupt end. This behaviour is similar in nature to the unregulated behaviour Dr Ward had recalled in his oral evidence.[51]

[96] [Curtis] had not been directly involved in any communication about medical decisions, contact arrangements or any other guardianship issues despite knowing the name of the children's social worker and Oranga Tamariki's contact information. He attributed his lack of communication to ongoing issues with his other children, none of whom reside with him. It was the social worker's unchallenged evidence he has not been contactable.

[97] Having listened to the repeated concerns about [Manaia]'s difficult and sometimes intimidating behaviour, he remained steadfast in his view that she is capable of making the right decisions for the children.

Dr Ward

[98] In his last report, Dr Ward said the following about guardianship issues:[52]

> (a) The grandparents and parents have been unable to cooperate, in [Jody]'s and [Michael]'s best interests and there is no indication [Manaia] will change her approach in future. Contrary to her professed acceptance of permanency with the grandparents, there is evidence to suggest that [Manaia] harbours a wish to challenge this in future.
>
> (b) Oranga Tamariki's involvement has provided a buffer between the grandparents and parents thus avoiding any repeat of unpleasant interactions. In future, it is key that the children can have contact with their parents which is planned and confirmed, something Oranga Tamariki has ensured to date.
>
> (c) He could foresee benefit in Oranga Tamariki remaining involved in future to insulate the grandparents and children from any potential adverse consequences arising from [Manaia]'s unaddressed mental health issues and disposition. There is however, the possibility of the children feeling differentiated and a perception that the children are in need of care and protection from its continued involvement.
>
> (d) Against the context of the children's parents blocking guardianship decisions which had been directly related to developmental issues, the children would benefit from their grandparents being able to make these decisions having informed and consulted the parents without the parents retaining a right of veto.

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51 When meeting with both [Maude] and [Manaia] at an early stage of these proceedings.
52 Dated 10 May 2022.

(e) He also noted that these issues needed decisions to be made, not a lack of decision. He could see benefit in the grandparents being able to seek the parents' views without the ability for a dispute to arise and held a degree of confidence the grandparents would consult the parents based on past interactions. He was also confident in the merits of the grandparents' decision making in future given their respective connections to healthcare. Their promotion of contact between [Manaia] and her biological mother, who had faced her own challenges with her mental health, together with their promotion of contact with the children's parents also instilled confidence, their future decision making would place the children at the centre of their thoughts.

(f) With a focus on the advantages and disadvantages of special guardianship, Dr Ward recognised the frustrations experienced by the caregivers from the consistent blocking of day to day care decisions essentially rendering care arrangements ineffective and the carers to become paralysed such that they are afraid to make decisions. That impedes the promotion, protection and nurturing of the tamariki and is psychologically instrumental for the development cultural and psychological needs of the children.

(g) Dr Ward was unaware of any information suggesting that [Maude] and [Ritchie] would make health decisions other than what are in the best interests of the children. He also noted they had consistently sought to involve [Manaia] and [Curtis] in decision making therefore even if they were able to make decisions themselves he would expect, regardless, that they would consult the parents without having to enter into a dispute over their views.

Discharge of orders in favour of the Chief Executive

[99] The obvious starting point for discussion is whether the orders in favour of the Chief Executive should be discharged. The evidence satisfies me the children are in a stable and loving placement where they are well-care for and their needs for care and protection have long since been addressed. Other than acting as a conduit for communication between [Maude], [Ritchie], [Manaia] and [Curtis], there is no ongoing identified role for Oranga Tamariki. Whether Oranga Tamariki should remain involved is intrinsically linked to the answers I will give to the successive issues - of whether the outcome should be absent any orders, or orders under the Care of Children Act, or the third option, of additional guardianship and special guardianship orders.

No orders

[100] A commonly held misconception by parents and caregivers alike, is guardianship is a right held in relation to the upbringing of child. The misconception arises as the belief is only partially accurate. The concept of guardianship also

encompasses the duties and responsibilities held in relation to the child's upbringing. Such duties and responsibilities require informed and timely child-focussed actions and decision-making. It is implicit that these obligations necessitate their guardian(s) making adequate enquiries before exercising the right to make a decision, to establish the underlying reason for the decision and to ensure a fully informed decision is made based on the information available, which will enhance the child's well-being. By necessary inference, it entails consultation with any other relevant persons and taking their interests and responsibilities into account.

[101] The evidence clearly establishes past incidences when [Manaia] and [Curtis] have been remiss in making timely decisions for the children's well-being without justification. There were detrimental consequences for the children from their inaction relating to the choice of Kōhanga Reo and [Michael]'s need for a haircut. The delay of six months in enrolling them at a Kōhanga Reo meant they missed out on regular opportunities for socialisation and education. [Jody], who was and still is encountering challenges with her speech would have benefitted from as much stimulation as possible which a Kōhanga Reo setting offers. [Michael] endured months of the avoidable discomfort of excessive sweating from lengthy hair in warm summer months.

[102] By choice, [Manaia] and [Curtis] have exercised limited supervised contact for a sustained period. Their limited involvement with the children and absence of a working relationship with [Maude] and [Ritchie], leads to the inference they have exercised their guardianship responsibilities with a poverty of information. That then begs the question of how they could in good conscience, make child-focussed decisions for the children's well-being.

[103] [Manaia]'s wish to resume care in future, the ongoing uncertainty around the contact arrangements and the absence of a working relationship between herself and [Curtis], and [Maude] and [Ritchie], necessitates the making of orders. If there were no orders in place, there is a certain inevitability the children's stability would disintegrate.

Care of Children Act orders

[104] On the face of it, a Parenting Order vesting the responsibility for the children's day to day care in [Maude] and [Ritchie] and defining the form and frequency of [Manaia]'s and [Ritchie]'s contact would provide the children with stability of care and certainty of contact arrangements. But, the potential to revisits its terms within two years of its making if a material change of circumstances is established, remains. At first blush, it appears a parenting order would suffice as [Manaia], both in her affidavit and oral evidence agreed to the making of the order. Contradicting her evidence was a Facebook post she made just prior to the hearing affirming her intention of revisiting the care arrangements in future:

> Got a three day trial in the Family Court commencing Monday next week. The trial is in relation to my parents as Oranga Tamariki carers to apply for special guardianship (sic), additional guardianship and a parenting order.
>
> Myself and [name deleted] are not in support of the special guardianship because that will be hard to rescind but I am in support of additional guardianship and a parenting order for my parents so that I can have more time to gather further evidence on top of the three/four years of evidence that I already have.
>
> The main concerns from Oranga Tamariki in the Family Court are my mental health (which is fine), and domestic violence callouts between the twin's Dad and I, which we have been doing relationship counselling for coz (sic) in the long run, [name deleted], the twins dad and I want the time to address concerns so that we can be a family with all his kids and moko and children's mums and the wider family.

[105] In her oral evidence, she repeated her wish for greater time to complete the personal work identified by professionals involved in these proceedings. Despite my iterations that the intention of the hearing was to bring about finality, there was a certain disconnect, with [Manaia] remaining intent on her pursuing her stated plans.

[106] It is said that past behaviour is a predictor of future behaviour. If I apply that maxim to the evidence about [Manaia]'s motivation to address the identified issues, I could reach the conclusion her intentions are stated and there is an appreciable likelihood they will not materialise. To do so would fail to recognise the adverse psychological impact on [Maude] and [Ritchie] of [Manaia]'s and [Curtis]'s oppositional stances and the potential for re-litigation.

[107] If [Maude] and [Ritchie] are appointed guardians in addition to [Manaia] and [Curtis], they will each be obliged to consult with one another with the intention of reaching agreement about future guardianship decisions for the children. Even though [Maude] and [Ritchie] remain apprehensive about the potential of [Manaia] and/or [Curtis] engaging in abusive behaviour towards them, they are willing to consult and give effect to their wishes provided they consider they will enhance the children's well-being. Absent Oranga Tamariki acting as an intermediary, they will instead utilise the Open Home Foundation to communicate about any guardianship decisions requiring consultation.

[108] The likely efficacy of this legal scenario is a significant stumbling block as the evidence suggests the underpinning of past guardianship difficulties by adult power struggles. In the background and no doubt contributing to those difficulties were [Manaia]'s untreated mental health issues and drug use. A recent Facebook post made by [Manaia] on 9 March shows instability of her mental health which sits in combination with her violent behaviour towards [Curtis] and an alleged assault on a former work colleague for which she has been charged.[53] There are no indications [Manaia] intends to address her mental health issues in accordance with Dr Kumar's recommendations in the foreseeable future.

[109] Of [Curtis]'s own admissions, methamphetamine, cannabis and alcohol use have been prevalent and are ongoing regular features of their joint lifestyles.

[110] Neither [Manaia] nor [Curtis] offered any evidence suggesting the dynamic between them and [Maude] and [Ritchie] would be different in future, or of their motivation to have greater and more meaningful involvement in the children's lives in future rendering this legal option inadequate.

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[53] Affidavit of [Maude Ngaire] and [Ritchie Isaac] dated 13 May 2022; - [Manaia] alleges, while being held in the Police cells, the Police tried to make her mentally ill, she was interrogated for what seemed like eight hours, an officer was smelling her, because she declined sexual contact with the officer, he continued to rape several people in the shower above her cell, including a child. She proceeds to allege the officer had said family members had raped her twins, passed them to another gang and her daughter had been placed in sulphuric acid.

Special guardianship order

[111] As to the primary reason for seeking a special guardianship order, [Maude]'s oral evidence summarised her and [Ritchie]'s position succinctly:

> Q That's the reason why you're asking the court to grant you a special guardianship order reserving the right to make guardianship decisions in relation to the issues we just talked about, isn't it?
>
> A Yes. Because of what's gone down in the past, we can't - we need the special guardianship to make it more stable for the children. So we know what we're doing and we know that we can say, okay, this is happening, we can go and do it without having a brick wall put up.

[112] The threshold for making special guardianship orders is high. The reason Parliament enacted the special guardianship provisions was to protect children from the misuse of guardianship powers and to alleviate care-givers apprehensions about the potential for future litigation. I am mindful that at the time of writing this decision, Parliament is in the process of reviewing provisions in the Oranga Tamariki Act, including the special guardianship provisions. The review has evolved out of a divergence of views in the judiciary and the legal profession about the impact on mana tamaiti, and the perceived irreconcilable conflict between the provisions and the principles contained the Act. No changes to the provision are proposed and there is now the *McHugh* decision.

[113] At each and every step, as the need has arisen, [Maude] and [Ritchie] have sought and where possible respected [Manaia]'s and [Curtis]'s views about the children's upbringing, instilling confidence about their likely future interactions with [Manaia] and [Curtis]. They were responsible for raising [Manaia] and so it stands to reason there is likely to be close alignment of their views on education and health, a sentiment expressed by Dr Ward and which I accept.

[114] [Manaia]'s counsel submitted, the making of a special guardianship order is uncalled for, because eventually, agreement was reached on all contentious guardianship decisions. While that was the case for the haircut and travel issues, the delay and detrimental consequences for the children were contrary to their well-being. Decisions were required to be made in a timely manner and were not. And, while it

may be [Manaia]'s wish to work as a team with [Maude] and [Ritchie], her past interactions with them are contraindicators. [Manaia]'s and [Curtis]'s various behaviours as discussed, easily lend themselves to categorisation of the types identified in *BH* of being "obstructive", "threatening", "abusive" and "destabilising".

[115] Counsel for Oranga Tamariki submitted the grounds for making a special guardianship order are met, and the Court should be concerned about [Manaia]'s intentions to revisit the issue of the children's care responsibilities in future. There is a need to guard against her intentions in the interests of preserving the children's stability which will be achieved first and foremost by [Maude] and [Ritchie] having a sense of security. I concur, that in [Jody]'s and [Michael]'s circumstances, this submission has merit. I have reached the view they should be appointed guardians of the children as they require it most as their caregivers, and the grounds under s 113A are met.

Whakapapa and whanaungatanga responsibilities

[116] [Maude] was formerly married to [Manaia]'s Uncle for 27 years and considers she is well accepted as part of their [whānau]. Another unchallenged aspect of her evidence was her contention she is better placed to promote and strengthen the children's whakapapa connections due to [Manaia]'s estrangement from whānau. In her oral evidence she added, she had followed through on the commitment, having taken the children to three tangihanga at their marae.

[117] The children's whakapapa is inherent and would be unaffected by the making of additional guardianship or special guardianship orders as proposed. Because [Maude] and [Ritchie] undertake to consult with [Manaia] and [Curtis] regarding future guardianship decisions, the making of special guardianship orders will not diminish their mana in any respect. The ability to have input will continue to be respected, the only difference would be that in respect of certain decisions, they will not retain the right of veto.

[118] The children have four half siblings – [Malena Winston] [age deleted], [Ruiha] aged 18 years, [Moana Winston] aged 18 years and [Rangi Winston] aged 22 years. A

matter [Curtis] was perturbed by, was the absence of any relationship between [Jody] and [Michael] and his older children, at least one of whom is keen to meet them. Indeed, his point has validity however, arguably, as the children's guardian, the responsibility to facilitate those important relationships rests with him to a greater extent. In that regard both he and [Manaia] have been neglectful of their whakapapa and whanaungatanga responsibilities to the children, leaving a void, by default, to be filled by [Maude] and [Ritchie]. Except for [Malena], the sibling's interests and ability to have recourse to the court will remain untouched by this decision.

[119] In light of the comments in the *McHugh* decision, I reviewed the evidence posing specifically the question of whether this Court or Oranga Tamariki have undertaken adequate research to promote the values of mana tamaiti, whanaungatanga and whakapapa in [Jody]'s and [Michael]'s well-being and best interests in the context of the children's long-term care and contact arrangements being settled. Applying a subjective lens to the children's circumstances, any whanaungatanga responsibilities should be recognised and respected for the purpose of protecting and maintaining their sense of identity and connection in accordance with tikanga Māori *or* its equivalent in their culture.

[120] The concept of whakapapa extends beyond knowledge and promotion of the more immediate whānau and family group relationships of mātua, kaumātua, tuākana and tēina. Both inherent in the term whakapapa and explicitly referred to in its statutory definition are the children's tūpuna. The absence of any evidence about the children's tūpuna on their maternal side and the dearth of evidence about their whakapapa on their paternal side gave me cause for disquiet. To a reasonable extent, such disquiet is addressed by [Maude]'s evidence, which I have accepted, of her intention and ability to promote the children's engagement with their wider whānau, hapū, iwi and Te Ao Māori. While I accept the authenticity of [Maude]'s assurances, I wonder whether some aspects of those responsibilities could prove onerous, such as fully researching their whakapapa. I do not know the answer to that.

[121] There appears to remain an imbalance of knowledge relating to the paternal side of the children's family and their Scottish heritage. The children's siblings have been identified but no direct contact has been facilitated. [Curtis] offered limited

evidence about his heritage, and I speculate that providing such whakapapa equivalent information may prove to be taxing on him for a myriad of reasons as touched on earlier in this decision. I could be wrong about that, and again, I do not know the answer.

[122] Those knowledge gaps lead me to invite counsel to file submissions as to whether a s 187 cultural report should be called for, to assist the children's guardians and parents to fully discharge their whakapapa and whanaungatanga responsibilities to the children.

[123] To avoid any doubt, I wish to make it clear that despite the gaps, I am exercising the discretion to make the special guardianship orders as sought in combination with the prerequisite additional guardianship orders under the Oranga Tamariki Act. The children's well-being requires the making of this combination of orders. If a cultural report is directed, any information it contains will not alter the outcome of these proceedings, rather, its contents will enhance the ongoing whakapapa and whanaungatanga responsibilities of the key people in the children's lives.

Outcome

[124] Accordingly, I make the following orders and directions:

(a) I discharge the s 101 Custody and s 110 Additional Guardianship orders in favour of the Chief Executive of Oranga Tamariki.

(b) I appoint [Maude Ngaire] and [Ritchie Isaac] as guardians of the children for all purposes pursuant to s 110 of the Oranga Tamariki Act 1989, and pursuant to s 113A, special guardians of the children. They shall have exclusive guardianship rights in respect of:

(i) education;

(ii) medical and all other health issues;

(iii) national and international travel.

(c) Fortnightly supervised access of duration is reserved to [Manaia Ngaire] and is to occur on a day and at times suitable to the children and the Open Home Foundation. Supervision shall be provided by the Open Home Foundation or any other approved supervised contact facility.

(d) Monthly supervised access of between 1½ to 2 hours' is reserved to [Curtis Winston] to occur on a day and at times suitable to the children and the Open Home Foundation. Supervision shall be provided by the Open Home Foundation or any other approved supervised contact facility.

(e) It is a condition of the order the children's primary place of residence is New Zealand.

[125] The following orders remain in effect:

(a) The s 87 Restraining Order in place against Mr [Winston] dated 14 November 2019.

(b) The Protection Order in favour of [Maude Ngaire] and [Ritchie Isaac] against [Manaia Ngaire] dated 24 November 2019.

(c) The Protection Order in favour of [Manaia Ngaire] against Mr [Winston] dated 1 December 2020.

[126] The parties are directed to file submissions within seven days addressing the issue of whether a cultural report should be called for. The registry is to allocate a case management review to monitor receipt and the submissions should be referred to me for consideration.

[127] I direct the registry to provide Dr Ward with a copy of this decision.

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Judge M Broek
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 02/08/2022