

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

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**IN THE FAMILY COURT
AT HAWERA**

**I TE KŌTI WHĀNAU
KI HĀWERA**

**FAM-2017-021-103
[2022] NZFC 702**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[HINE KELLEY] Applicant
AND	[JORDAN WASHER-KELLEY] First Respondent
AND	[LAURINE WREN] Second Respondent

Hearing: 24, 25 and 26 January 2022

Appearances: E Butler for the Applicant
E Stannard for the First Respondent
Second Respondent is self-represented
A Laurenson as Lawyer for Child
S Dodunski as Lawyer to Assist

Judgment: 30 March 2022

JUDGEMENT OF JUDGE L HARRISON

Introduction

[1] This case is about [Jack Wren-Kelley], born [date deleted] 2017.

[2] On 21 January 2019, [Jack]'s paternal grandmother, Ms [Kelley], urgently obtained an interim parenting order for [Jack]'s day-to-day care. [Jack]'s parents, who are the first and second respondents, were permitted contact.

[3] [Jack]'s father, Mr [Washer-Kelley], was granted reasonable contact, but on the condition that Ms [Wren] was not present.

[4] [Jack]'s mother, Ms [Wren], was granted supervised contact by a person approved by the Court or an approved supervised contact provider, on the condition that Mr [Washer-Kelley] was not to be present.

[5] A warrant was also granted to enforce the interim parenting order and [Jack] was uplifted from Ms [Wren]'s care with the involvement of the police.

[6] Ms [Kelley] also applied without notice to be appointed as an additional guardian for [Jack]. That order was not made on an urgent basis. That application has proceeded on notice.

[7] At the time of the applications, Mr [Washer-Kelley] consented to [Jack] being in his mother's interim day-to-day care. He was silent on the matter of additional guardianship.

[8] Ms [Wren] defended the applications. In her initial affidavit, she stated that she wanted [Jack] returned to her and that she be granted day-to-day care. Ms [Wren] wanted Mr [Washer-Kelley]'s contact to be supervised because of the violence he had inflicted on her, his mental health issues and his past neglect of [Jack].

[9] Ms [Wren] disagreed with Ms [Kelley] being appointed as an additional guardian on the basis there would be no need for it as she was seeking the return of [Jack] to her care.

The hearing

[10] A three-day defended hearing took place between 24 and 26 January 2022 to determine what day-to-day care and contact arrangements are in the welfare and best interests of [Jack]. The contenders for day-to-day care are Ms [Kelley] and Ms [Wren].

[11] Further, I need to determine whether it is in [Jack]’s best interests for Ms [Kelley] to be appointed as an additional guardian.

[12] The parties gave oral evidence in addition to their affidavits and were subject to cross-examination. Ms [Wren] was self-represented.

[13] Due to issues of violence between Ms [Wren] and Mr [Washer-Kelley], counsel to assist was appointed and she cross-examined Mr [Washer-Kelley] on behalf of Ms [Wren]. Other than that, Ms [Wren] conducted her own case.

[14] During the course of the hearing, lawyer for child raised issues regarding the cross-examination of Mr [Washer-Kelley] by Ms Butler, counsel for Ms [Kelley]. I gave a ruling under s 93 of the Evidence Act 2006, which is referred to in a separate minute, limiting the extent leading questions could be asked by Ms Butler of Mr [Washer-Kelley] and allowing cross-examination where there is a conflict of evidence between Ms [Kelley] and Mr [Washer-Kelley]’s evidence.¹

[15] Ms[Pippa Rhetta] gave evidence in support of her sister, Ms [Wren]. She had sworn an affidavit.

[16] The Court heard evidence from Mr [Brodie Washer-Kelley], who is [Jack]’s paternal uncle and a person that [Jack] lives with although no affidavit had been filed from Mr [Washer-Kelley]. I considered his evidence to be relevant and necessary for my determination of the case.

[17] The s 132 report writer was not required to give evidence. The report pre-dated Ms [Kelley]’s proceedings.

¹ [Kelley] v [Washer-Kelley] [2022] NZFC 572.

[18] The s 133 report writer, Dr Rai, gave evidence.

[19] Mr Laurenson, as lawyer for the child, made submissions that the Court should grant an interim order of six months duration to provide for a transition towards a shared care arrangement over a period of 16 weeks. This would enable time for a whānau hui to take place, which is needed to address the significant level of estrangement that exists between both sides of [Jack]’s family.

[20] At the conclusion of the evidence, the parties, their witnesses and Ms [Wren]’s support person, Ms [Adeline Wren], all either swore, affirmed or confirmed their intention and willingness to be involved in a reconciliation process to restore the trust and confidence which has vanished from both sides of [Jack]’s family. They all committed to doing so for the sake of [Jack].

[21] Following the hearing written closing submissions were invited and filed.

Positions

[22] The positions of the parties and lawyer for child are summarised as follows:

- (a) Ms [Kelley] seeks to retain [Jack]’s day-to-day care and proposes an increase in contact for Ms [Wren] whereby [Jack] is in Ms [Wren]’s care from Thursday after kindergarten/school to the start of kindergarten/school on a Monday.
- (b) Ms [Kelley]’s preference is for a final parenting order to be made.
- (c) Mr [Washer-Kelley] is supportive of Ms [Kelley] having the day-to-day care of [Jack]. He proposes a supervised contact arrangement for himself that over time, namely nine months, becomes unsupervised.
- (d) Mr [Washer-Kelley] agrees to Ms [Kelley] being appointed an additional guardian if she has day-to-day care of [Jack].

- (e) Ms [Wren]’s closing submission is hard to understand. She simply provided a copy of the Court transcript of what was said from the Bench on the last day of the hearing, before the Court adjourned at 3 pm and a handwritten document referring to #1 Atua and #2 Paipera Tapu without providing any context or explanation for those words.
- (f) Mr Laurenson as lawyer for child implores the Court to grant an interim order of six months duration to provide for a transition towards a shared care arrangement over a period of 16 weeks. This will result in [Jack] being in the care of Ms [Wren] on one week from Wednesday 3 pm to Monday 9 am, and on the other week from Friday to Saturday. [Jack] would be in the care of Ms [Kelley] for the balance of the time.
- (g) He supports Ms [Kelley]’s proposal for holiday and special occasions contact.
- (h) He proposes Dr Rai be engaged to undertake an updated report in six months.
- (i) Mr Laurenson submits an interim order will enable time for a whānau hui to take place. It is needed to address the significant level of estrangement that exists between both sides of [Jack]’s family and that the mana of his whānau and the lack of trust and confidence between the [Wren] and [Kelley] whānau must be restored for the benefit of [Jack].

The law

[23] Whenever the Court makes decisions about care and contact arrangements for children s 4 is the critical provision in the Care of Children Act 2004 (“the Act”).

[24] Section 4 of the Act provides:

4 Child’s welfare and best interests to be paramount

- (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
 - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
 - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
 - (a) must take into account—
 - (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child’s sense of time; and
 - (ii) the principles in section 5; and
 - (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child’s welfare and best interests.
- (3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person’s gender.
- (4) This section does not—
 - (a) limit section 6 or 83, or subpart 4 of Part 2; or
 - (b) prevent any person from taking into account other matters relevant to the child’s welfare and best interests.

[25] Section 5 is also relevant. It provides:

5 Principles relating to child’s welfare and best interests

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

- (a) a child’s safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child’s family, family group, whānau, hapū, and iwi:
- (b) a child’s care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation between

his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[26] Section 49 is the relevant provision for the making of interim parenting orders.

It states:

49 Interim parenting orders

- (1) At any time before an application for a parenting order is finally determined in a court, a Judge may make an interim parenting order that has effect until—
 - (a) a specified date; or
 - (b) a specified event; or
 - (c) it is replaced by—
 - (i) another interim order; or
 - (ii) a final order.
- (2) However, a Judge must not make an interim order unless the Judge is satisfied that an interim order serves the welfare and best interests of the child better than a final order.

[27] Section 6 is also relevant. It provides:

6 Child's views

- (1) This subsection applies to proceedings involving—
 - (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
 - (b) the administration of property belonging to, or held in trust for, a child; or
 - (c) the application of the income of property of that kind.
- (2) In proceedings to which subsection (1) applies—

- (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
- (b) any views the child expresses (either directly or through a representative) must be taken into account.

[Jack]’s views

[28] Mr Laurenson filed a memorandum dated 21 January 2022. It sets out his meeting with [Jack] on 20 January at [Jack]’s home at [address deleted].

[29] Mr Laurenson refers to the difficulty in having a coherent conversation with [Jack], largely given his young age. However Mr Laurenson was able to ascertain that [Jack] is happy and [Jack] wants to stay living with his grandmother and uncle. [Jack] seems to enjoy his time with his mother when he sees her and he enjoys playing cards.

[30] [Jack] did not express anything that made him unhappy. [Jack] did ask: “Do I have to go to my mother’s?” When Mr Laurenson questioned why he was asking that, he said: “I want to stay here with my tractors.” That was the extent of [Jack] being able to express a specific view on matters impacting the outcome of the proceedings.

[31] No party took issue with any matter reported on by Mr Laurenson.

[Jack]’s particular circumstances

[32] Decision-making about day-to-day care, contact and guardianship requires the Court to consider the particular child in their particular circumstances. [Jack]’s particular circumstances are outlined below.

[33] [Jack]’s father is Pākehā. His paternal family comes from [region 1]. His mother is Māori. His large maternal whānau reside in [location deleted]. His iwi is [iwi deleted] and his hapū is [hapu deleted].

[34] His parents were in a relationship for about six years, on again and off again. They have two children, [Jack] and his younger sister, [Elyse], born in 2019.

[35] [Jack] spends time with [Elyse] only when he is with his mother. [Elyse] lives with Ms [Wren] and has no relationship with Mr [Washer-Kelley]. [Jack] sleeps in the same bed as [Elyse] and his mother.

[36] The relationship between [Jack]'s parents was fraught with difficulty and there were family violence incidents. Mr [Washer-Kelley] has a conviction for assaulting Ms [Wren].

[37] In 2017 when [Jack] was three months old, his father obtained an urgent order for his day-to-day-care. A medical emergency was the event that triggered those legal steps being taken. It is alleged Ms [Wren] failed to respond to [Jack]'s medical needs at the time as well as on other occasions.

[38] [Jack] was suffering from a severe chest infection and ultimately was airlifted to [region 2] Hospital from [location deleted]. Medical notes in the evidence refer to it being a life-threatening event and that he could have easily died if urgent steps had not been taken.

[39] [Jack] continues to have respiratory issues.

[40] Other concerns about [Jack] being in the care of his mother that were raised in the initial litigation included Ms [Wren]'s transience, living in overcrowded houses, having a lack of attachment with [Jack] and using cannabis.

[41] Since October 2017 [Jack] has lived with Ms [Kelley]. In reality Ms [Kelley] was [Jack]'s main caregiver when Mr [Kelley] had the interim parenting order and was living at home with his mother. Her status as the day-to-day caregiver was subsequently confirmed by a further urgent court order on 21 January 2019, having failed to achieve an urgent interim parenting order on 21 December 2018. Ms [Kelley] took steps to secure the care of [Jack] because of her concern about his parents continuing their relationship, their involvement with violence, arguments and illicit drug use.

[42] As a result of the successful application, [Jack] was uplifted from his mother's care with police involvement by way of warrant.

[43] [Jack]'s mother and her wider whānau members believe [Jack] was stolen from them.

[44] There is a high level of conflict between both sides of [Jack]'s family, exacerbated by the uplift and the steps taken by Ms [Kelley] in the Family Court. Both sides have literally clashed at times with police reports of confrontations and altercations.

[45] There has been a high level of conflict between [Jack]'s paternal grandmother and his father at times.

[46] At his current age [Jack] is oblivious to the inter-whānau/family conflict and it is not having a significant impact upon him. However unless this issue is resolved, it is likely to have an impact on his development in the future, as he grows older.

[47] There are members of [Jack]'s maternal whānau known for their views about Māori Sovereignty and challenges made to the Court's jurisdiction. Ms [Wren] has demonstrated such views during the course of the litigation.

[48] [Jack]'s primary attachment is with Ms [Kelley].

[49] [Jack] lives with Ms [Kelley] and his uncle, [Brodie Washer-Kelley], on a farm property where his uncle is a lower order sharemilker and has a five-year contract on that farm. His intentions are to acquire his own dairy farm in the future.

[50] [Jack] has a close and significant relationship with his uncle [Brodie].

[51] Since April 2018, [Jack]'s contact with his mother has been unsupervised, initially from a Thursday to a Saturday. Since June 2020, [Jack] has been in his mother's care each week from after kindergarten on a Friday until 5.30 pm Sunday.

[52] [Jack]'s contact with his father has been sporadic due to the geographical distance between them and his father's unavailability due to being incarcerated for arson and his mental health issues.

[53] [Jack] starts school in [mid- 2022]. There is no suggestion that he is not ready for school and it is expected that he will start upon turning five. The kindergarten reported to Dr Rai that [Jack] is a very social boy achieving his milestones. There is no difference in his behaviour or mannerisms regardless of being picked up from kindergarten by his mother or his grandmother.

[Jack]'s day-to-day care arrangements

Analysis

[54] I consider the following s 5 principles to be relevant:

Principle 5(a)

[55] [Jack]'s safety must be protected and in particular he must be protected from all forms of violence, as defined by the Family Violence Act 2018, from all persons including members of his family, family group, whānau, hapū and iwi.

[56] The family violence reports document difficulties between Mr [Washer-Kelley] and his mother around July 2019. Since then, Mr [Washer-Kelley] has lived away from [region 2]. He has been living in [region 1] and his mother and brother have a zero-tolerance policy with regards to any inappropriate or abusive conduct from him.

[57] For instance, in January 2020 when Mr [Washer-Kelley] appeared at the farm uninvited and unannounced and slept in the dog's bed, he was verbally trespassed by his brother [Brodie]. When he returned, the police were involved and removed him from the property.

[58] In August 2018 there was an incident that gave rise to both Ms [Kelley] and Ms [Wren] accusing each other of assault. It occurred at a handover of [Jack] at the

home of his late maternal grandfather. Ms [Wren] was charged with assault. She was found later not guilty in the Criminal Court.

[59] [Jack] is at risk of harm if he were to be in the company of both of his parents, due to their history of family violence against each other. Their relationship has been described as toxic. Mr [Washer-Kelley] has difficulty with his emotional regulation and has violent tendencies when he is acting out.

[60] If [Jack] was in the sole day-to-day care of his mother, I consider the risk of harm through parental conflict would be enhanced.

[61] Ms [Wren] would like to work things out amicably with Mr [Washer-Kelley]. As she said in evidence, they have never had a chance to co-parent [Jack], and if Mr [Washer-Kelley] is getting the help that he needs then there should be no issue.

[62] I consider Ms [Wren]'s view to be naïve given Mr [Washer-Kelley]'s longstanding personal issues that continue to impact upon his life. Her views are also inconsistent given her approach to [Elyse]'s relationship with Mr [Washer-Kelley]. [Elyse] is not permitted a relationship with her father, Mr [Washer-Kelley]. Furthermore, Ms [Wren] has said that if she has the day-to-day-care of [Jack], she will not allow any contact between [Jack] and his father either.

[63] Ms [Wren] acknowledged her anger and emotions needed sorting out. She said that she had sought help from the [Iwi deleted] Authority in January 2019 when [Jack] had been uplifted. She has never heard back from that agency. She said she has followed up on her enquiry and is yet to hear back.

[64] There is another matter that is likely to impact on [Jack]'s emotional and psychological safety. I accept the opinion expressed by Dr Rai that [Jack] is at risk of psychological harm if the two sides of his family do not resolve their differences and find a way to work co-operatively for his benefit.

[65] With regards to [Jack]'s safety, I consider there are no safety issues for [Jack] being in the day-to-day care of his grandmother. Although I am unable to determine

what precisely happened between Ms [Wren] and Ms [Kelley] in August 2018, that event happened over three years ago. There has not been a repetition of the behaviour from either of Ms [Kelley] or Ms [Wren].

Principle 5(b)

[66] [Jack]'s care, development and upbringing should be primarily the responsibility of his parents and guardians.

[67] Although [Jack]'s care, development and upbringing should be primarily the responsibility of his parents, the reality for [Jack] is that his care has been undertaken by his paternal grandmother since he was very young and she has been closely involved with his development and upbringing. [Jack]'s father has been unable to discharge his obligations and responsibilities as a parent towards [Jack]. [Jack]'s mother has been involved with [Jack]'s care, development and upbringing albeit not to the extent that she would like.

Principle 5(c)

[68] [Jack]'s care, development and upbringing should be facilitated by ongoing consultation and co-operation between his parents, guardians and any other person having a role in his care.

[69] Sadly a high level of conflict exists between the important people in [Jack]'s life. The way in which [Jack] came into his father's day-to-day care in 2017, and then subsequently his paternal grandmother's care, has only served to fuel long-standing grievances between both sides of his family. Having said that, as between Ms [Kelley] and Ms [Wren] there has been a period of relative calm since 2020. However because of the difficulties that exist, communication has been difficult. This is illustrated by the fact that Ms [Kelley] made the unilateral decision about the kindergarten that [Jack] would attend. Unfortunately for [Jack], principle 5(c) has not been met. This situation does need to change for his benefit going forward.

Principle 5(d)

[70] [Jack] should have continuity in his care, development and upbringing.

[71] The current care arrangement is a longstanding and settled arrangement. The evidence supports the fact that it is meeting [Jack]'s needs. He is doing well in all regards.

[72] By all accounts, [Jack] is well adjusted to his respective homes, notwithstanding the fact that each environment is very different to the other. Overall, he appears to be a well-adjusted little boy.

[73] There is a lack of evidence with regards to Ms [Wren]'s current living situation. The Court has no independent evidence or verification of her current housing situation.

[74] When Dr Rai carried out her enquiries for her report in 2021 there was a reluctance from Ms [Wren] and her support person [Adeline Wren], to provide open and frank information regarding her home environment. Because of their approach the report writer was unable to assess the situation.

[75] When Ms [Wren] gave oral evidence, she said that she was now living with a friend and he had secured accommodation on a farm through his employment as a sharemilker for a period of five years. She has recently moved into the property.

[76] She said she wanted to be on her own and to be an independent solo mother.

[77] That being so, [Jack]'s current living situation with his mother is a very different living arrangement to what he has been used to, which has been whānau-based with multiple family members coming and going from the various houses, all of whom appear to support and assist with the care of [Jack] when he is present.

[78] The way Ms [Wren] described her current and foreseeable living arrangement is that it is one without whānau members.

[79] Dr Rai queried Ms[Wren]'s ability to cope with two children and again there is insufficient data on her living situation and her supports that are in place.

[80] There is evidence that Ms [Wren] has struggled from time to time to meet the commitment to collect [Jack] after kindergarten. She acknowledged only two occasions, but I prefer the evidence of Ms [Kelley] that there have been more occasions than that.

[81] A complete reversal of the care arrangement would not be in [Jack]'s welfare and best interests.

[82] Weekly contact is a longstanding arrangement but one that needs to change when [Jack] starts school. This is to ensure he has some weekend time with Ms [Kelley] and Mr [Brodie Washer-Kelley] on the farm.

Principle 5(e)

[83] [Jack] should continue to have a relationship with both of his parents and his relationships with his family group, whānau, hapū or iwi should be preserved and strengthened.

[84] [Jack] has contact with his maternal whānau through his mother. He is a special member of a large whānau.

[85] [Jack]'s paternal family members live at a distance and there has been opposition by Ms [Wren] to [Jack] being away from [region 2] to visit [region 1]. The genesis of this appears to be the dispute that occurred in 2018 that resulted in [Jack] being prohibited from leaving [region 2] again. Consequently, he has been denied contact with members of his extended parental family.

[86] If [Jack] were to be in the day-to-day care of his mother, I would have concerns and reservations about Ms [Wren]'s willingness and ability to ensure [Jack] kept a close connection to his grandmother and uncle under the terms of a parenting order that provided for contact. In the past there have been occasions when Ms [Kelley] had needed to apply for warrants to ensure the return of [Jack] to her care.

[87] It was only under careful cross-examination from lawyer for child that Ms [Wren] came to the realisation that it would not be right for her to deny the

relationship between [Jack] and his paternal grandmother and father, and that she would promote the relationship and encourage the bond to continue if she had [Jack] in her care. This is a new way of thinking for Ms [Wren] and is untested.

Principle 5(f)

[88] [Jack]’s identity, including, without limitation, his culture, language and religious denomination and practice, should be preserved and strengthened. [Jack] is of mixed race, both Pākehā and Māori. Quoting from the s 132 report:²

Ms [Wren] is from a very large whānau in the [location deleted] area of [location deleted]. She tells me she has 16 siblings or half siblings and has many aunts, uncles and cousins living in the area. Mr [Washer-Kelley] on the other hand hails originally from [location deleted] and most of his extended family still reside in [region 1]. Ms [Purdie], Mr [Washer-Kelley]’s sister-in-law and long-time friend of Ms [Wren] informed me that Ms [Wren]’s father ([Rowland]) [Wren] “runs [location deleted]” and a lot of suspicion is directed at Mr [Washer-Kelley] and his family because they are considered to be outsiders.

[89] In my view, long-held attitudes and views have the ability to undermine [Jack]’s sense of identity, where all parts of his makeup ought to be celebrated and cherished by all of his family members.

Outcome

[90] The evidence before me leads me to conclude the day-to-day care of [Jack] will remain vested in Ms [Kelley]. It is an arrangement that is meeting his needs. He is thriving in his current day-to-day care arrangement.

[91] It is important that [Jack] continues to have regular contact with his mother.

[92] I take into account the significant change for him that is approaching in starting school. In my view, it is of utmost importance that [Jack]’s mother is involved with his schooling and has opportunities to connect with his school. It is just as important that [Jack] has the chance to have weekend days with his grandmother and uncle on the farm.

² Bundle page 53, s 132 report page 2 dated 7 February 2018.

Interim or final parenting order?

[93] During the course of proceedings, [Jack] has been represented by three different lawyers. The two appointees prior to Mr Laurensen have been appointed to the Bench. Mr Laurensen was only appointed as [Jack]'s lawyer in late November 2021 and is therefore new to the case. He brings fresh eyes to [Jack]'s situation.

[94] Mr Laurensen has reasonably identified that Ms[Wren]'s approach to the litigation has not served her interests nor that of [Jack]'s and has left the Court in a position whereby it is without all relevant and easily available information.

[95] Ms [Wren] was initially represented by counsel, but her lawyer sought leave to withdraw citing a loss of trust and confidence in the solicitor/client relationship in September 2019. Aggressive communication and behaviours from Ms [Wren] and her family members, accusations that the lawyer had acted unlawfully, and filing her own affidavit evidence without her lawyer's knowledge all contributed to the breakdown of the relationship.

[96] Support from whānau has been misguided. Their views on the jurisdiction of the Family Court have not been helpful and have served to undermine and delay the process of determining [Jack]'s case. For instance, six months on from the s 133 report referral, Dr Rai was unable to make contact with Ms [Wren]. At a directions conference, the reason given by Ms [Wren] was the lack of a phone to be able to make contact. This was not accepted when a cell phone in the possession of her support person, rang in Court. Ms [Wren] was directed to engage with the report writer within 14 days, or the report writer's attendances would be at an end and the report concluded without her input.

[97] Mr Laurensen submits Dr Rai ought to be retained to undertake an assessment of Ms [Wren]'s living situation and the supports available to her.

[98] Furthermore, he advocates for an opportunity for whānau to mend their differences before a final order is crafted.

[99] Ms [Kelley]'s preference is for a final parenting order to be made. She remains willing to engage in a reconciliation process.

Analysis

[100] Section 4 of the Act requires the Court to make decisions bearing in mind the child's sense of time. [Jack]'s case is the longest running case in the [region 2]. The Court has failed to make a final decision in a timely way. Proceedings started when he was three months old. He will be five years old [soon].

[101] I am mindful that Ms [Wren] is a self-representing litigant. However, she has had opportunities to engage in the Family Court process. I balance giving her a further opportunity to place evidence before the Court with the need for the applicant to achieve certainty and finality after three years of litigation.

[102] Tikanga principles are increasingly forming part of our case law, such as the well-known case of *Takamore v Clarke*.³ Further, the need to recognise obligations under the Treaty of Waitangi is longstanding. I refer to the High Court case of *BP v Director-General of Social Welfare*, where Gallen and Goddard JJ state:⁴

We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute...Accordingly we take the view that all Acts dealing with the status, future, and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi.

[103] The notion of a reconciliation process by way of whānau hui is not unreasonable. It is a culturally sensitive approach. Both sides have acknowledged, in their own way, a commitment to such a process. I am mindful of the evidence of the possible long-term detrimental effects on [Jack] if the family feud is to continue unresolved. However, whether it is resolved or not does not change the view that I have reached that his current day-to-day care arrangement with Ms [Kelley] is the best arrangement for him.

³ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁴ *BP v Director-General of Social Welfare* [1997] NZFLR 642 (HC).

[104] In my view, a reconciliation process involving extended family members is best left as an “out of court” process as opposed to being mandated by the Court, and particularly in this case where the Court is an institution not fully embraced and recognised by one side of [Jack]’s family.

[105] Making a final decision about [Jack]’s care and contact will not prohibit or interfere with a whānau hui being organised by his whānau. Given the level of commitment and willingness to exploring reconciliation and the settlement of their difference, I see no impediment to it occurring after this case has been closed.

[106] The making of a final order will provide certainty and clarity on [Jack]’s care and contact arrangements. In my view, this will be useful to the participants of any reconciliation process. It ought not be a forum for ongoing debate about his care and contact arrangements, but rather a process to help each side understand why steps were taken, the impact of those steps on the aggrieved and a commitment to come together and work co-operatively for [Jack]’s future benefit.

[107] Furthermore, any mutually agreed changes to a final parenting order can be ratified by the Court, should the parties want those changes embodied in a court order.

Outcome

[108] I make a final parenting order for [Jack]’s day-to-day care and contact.

[109] The terms of the order are as follows:

- (a) Ms [Kelley] shall have the day-to-day care of [Jack].
- (b) Ms [Wren] shall have [Jack] in her care from after kindergarten on a Thursday until 5.30 pm on a Sunday.
- (c) When [Jack] starts school, contact will change to Thursday after school to his return to school on a Monday for two consecutive weeks. On the third week, contact will occur after school Thursday to a return to school Friday. Thereafter the cycle continues during term time.

- (d) Ms [Wren] is to have contact five nights during the school term holidays commencing at 3 pm on the last Friday of the school term until 3 pm the following Wednesday.
- (e) Ms [Wren] is to have contact during the Christmas holidays for one week in December and one week in January. Unless the parties agree otherwise in writing these weeks shall occur:

December

- (i) On the years that Ms [Wren] has [Jack] in her care for Christmas, from 3 pm 19 December until 3 pm 26 December.
- (ii) On the years that Ms [Wren] does not have [Jack] in her care for Christmas, from 3 pm 26 December until 4 pm 2 January.

January

- (iii) From 3 pm 17 January until 4 pm 24 January.
- (f) Changeovers are to be done by way of pick up and drop offs from kindergarten/school. If it is a non-school day the parties will meet at the FourSquare in [location deleted] at the change over time.
- (g) Christmas Day will be alternated:
 - (i) In even numbered years commencing 2022, Ms [Wren] shall have [Jack] from 3 pm Christmas Eve until 3 pm Boxing Day.
 - (ii) In odd numbered years commencing 2023, Ms [Kelley] shall have [Jack] from 3 pm Christmas Eve until 3 pm Boxing Day.
- (h) [Jack]'s birthday shall be alternated:

- (i) In even numbered years commencing 2022, Ms [Kelley] shall have [Jack] on his birthday from 9 am until 5 pm (unless it is a school day in which case she will have him from 3 pm until 7 pm).
- (ii) In odd numbered years commencing 2023, Ms [Wren] shall have [Jack] on his birthday from 9 am until 5 pm (unless it is a school day in which case she will have him from 3 pm until 7 pm).

Conditions

[110] [Jack] shall not live permanently out of the [region 2]. In all other respects, [Jack] is not prohibited from travelling out of [region 2]. The travelling party shall provide the other parties with the details of the travel, including destination, length of time away, departure and return date and mode of travel.

[111] No party shall expose [Jack] to illicit drug use, either by them or other people.

Contact for Mr [Washer-Kelley]

[112] Mr [Washer-Kelley] will be 26 years old [soon]. He became a father to [Jack] at the age of 21.

[113] He is from [location deleted] in [region 1]. At the time of the hearing, he is of no fixed abode and is living in his car at a residential property occupied by his stepfather, Mr [Norton Kelley], in [region 1].

[114] Mr [Washer-Kelley] has [several learning disabilities and mental health conditions] and addictions to drugs and alcohol.

[115] He started using cannabis when he was 13 or 14 years old.

[116] He had involvement in the Youth Court in 2010 for unlawfully taking a motor vehicle. Between 2013 and 2016 his offending history is in respect of property,

alcohol-related offending, possession of a knife, common assault and possession of a weapon.⁵

[117] Since [Jack] has been in the day-to-day care of Ms [Kelley], Mr [Washer-Kelley] has had ongoing involvement in the Criminal Court including convictions for:

- (a) assault on a person in a family relationship [date deleted] 2019. This relates to punching Ms [Wren] in the face;
- (b) speaking threateningly [date deleted] 2019;
- (c) possession of a knife in a public place [date deleted] 2019;
- (d) unlawfully in a building and possession of a weapon [date deleted] 2019;
- (e) wilful trespass [date deleted] 2020;
- (f) other arson [date deleted] 2020; and
- (g) operating a vehicle with sustained loss of traction [date deleted] 2021.

[118] With regards to the most recent offending in [late] 2021, he ended up crashing his vehicle down a bank. In evidence, he said the offending arose due to him being a bit stressed out.

[119] Mr [Washer-Kelley] has had involvement with the Mental Health Service, as recently as three or four weeks before the hearing. He described having a downfall and seeking admission to the [location deleted]. In 2021, he was suicidal.

[120] He is currently awaiting a referral for drug and alcohol counselling and anger management.

⁵ Section 132 report.

[121] Mr [Washer-Kelley] is currently on medication to treat his [mental health conditions]. He is not taking any medication for his [learning disability] because drugs and alcohol interfere with its effectiveness.

[122] He acknowledged having extreme alcohol consumption in the past and that he still has urges to drink. He acknowledged he has been described as an alcoholic.

[123] Mr [Washer-Kelley]'s contact proposal is as follows:

- (a) His contact is to be supervised by his brother, [Brodie Washer-Kelley].
- (b) Two consecutive nights a month with [Jack] at [address deleted], in a dwelling on the property close to the main house where [Jack] lives with his grandmother and uncle [Brodie].
- (c) After three months, contact to become monitored.
- (d) After six months and provided there are no family violence callouts involving himself, and a clear six-month hair follicle drug test from illicit drugs, then contact becomes unsupervised.
- (e) Thereafter, two overnight stays a month and video contact at least once a week.
- (f) He also proposes four days each school term holidays and for two weeks in the summer holidays. He proposes that he have time with [Jack] on [Jack]'s birthday or the following day which is his own birthday.
- (g) He would like to have contact with [Jack] for a few hours for a couple of days around Christmas and will work around his mother's Christmas plans.

- (h) He suggests there ought to be a condition of contact that Ms [Wren] and himself are not to have contact with each other unless it occurs at a public event such as a birthday party or school event.

Analysis

[124] Presently, [Jack]’s safety is at risk if contact with his father is not supervised.

[125] [Jack]’s safety is also at risk if Mr [Washer-Kelley] presents for supervised contact either under the influence of alcohol or drugs or is mentally unwell.

[126] [Jack]’s safety is at risk if he were to be alone in the company of his parents, given their history of perpetrating family harm against each other, even against the background of no reported family harm events since January 2020.

[127] [Jack]’s father has struggled with behavioural issues from a young age. The first report of Oranga Tamariki involvement is in 2011 because of behavioural issues and truancy.

[128] The s 132 report dated 7 February 2018 refers to a turning point in Mr [Washer-Kelley]’s life when he became a father. However, as the social worker noted, only time will tell if he can sustain the positive change in his behaviour.⁶

[129] Unfortunately, time has shown that Mr [Washer-Kelley] has been unable to address and manage his issues.

[130] By his own admission he has problems with self-regulation. It is difficult for him to try to cope and to manage his emotional needs. Although he showed insight into his mental health difficulties and said that if he had an outbreak he would not want to endanger others, he gets himself wound up. Despite having insight, I assess the risk of harm to others or himself as high.

⁶ NOE page 61, s 132 report.

[131] When giving his evidence, he acknowledged under cross-examination from Mr Laurenson that he had a lot of work to do to maintain a stable life. I also acknowledge the significant concession he made when he said he is not the best person to care for [Jack].

[132] Whilst there is evidence of past conflict between Mr [Washer-Kelley] and his brother [Brodie], and such interactions have involved the Police, I consider Mr [Brodie Washer-Kelley] to be an appropriate person to supervise contact for the following reasons:

- (a) Despite being only one year older than his brother, Mr [Washer-Kelley] clearly took it upon himself to be a father figure to him.
- (b) He has actively pulled back from that role and has adopted more of a tough love approach.
- (c) He is clearly protective of [Jack] and would take the appropriate steps to ensure [Jack] is kept safe. I am left in no doubt that [Jack] dotes on his uncle and has a special relationship with him. This is mutual. Mr [Brodie Washer-Kelley] dotes on [Jack] and has a special relationship with him.
- (d) He has a vested interest in ensuring [Jack]'s safety because [Jack] currently lives with himself and Ms [Kelley].
- (e) His unconditional love and devotion for his nephew are protective factors.
- (f) He understands his brother's challenges and difficulties and acknowledged under oath that he would be assisted in his role as supervisor if it were a condition of contact that Mr [Washer-Kelley] would not be present for contact under the influence of illegal drugs or alcohol or if he is mentally unwell.

- (g) I consider [Brodie Washer-Kelley] to be suitably qualified to undertake the role as a supervisor.

Interim or final order for contact?

[133] I do not consider it to be in [Jack]'s welfare and best interests for an interim parenting order to be made for contact, pursuant to s 49(2) of the Act. In my view, an interim order would not serve the welfare and best interests of [Jack] better than a final order.

[134] Mr [Washer-Kelley] has long standing significant personal issues that are not realistically able to be resolved within the proposed timeframes, such that contact will move seamlessly from being supervised to unsupervised within the period proposed.

[135] The timeframe only adds to the stressors confronting Mr [Washer-Kelley] and will inevitably lead to disappointment, frustration and anger if unable to be achieved.

[136] A final parenting order reflects reality and although s 139A applies, there is scope and potential for Mr [Washer-Kelley] to return to the Court to change the supervised contact order if there is a material change in his circumstances. In my view this is the most realistic way of progressing contact.

Outcome

[137] Against that background I include the following provisions in the parenting order:

- (a) [Jordan Washer-Kelley] will have contact with [Jack] as follows:
- (i) Contact shall be supervised by [Brodie Kelley].
 - (ii) Contact is permitted to occur on two consecutive days and nights at the bach dwelling on the property at [address deleted]. [Brodie Washer-Kelley] is to be present at all times, including for overnight stays.

- (iii) Contact days will be agreed with Ms [Kelley] but shall not fall on days that [Jack] will otherwise be with his mother.
 - (iv) Contact is permitted during term time school holidays for four consecutive days and nights on the terms above.
 - (v) Two periods of four days shall occur during the summer holidays and one of those periods shall fall on Christmas Day when [Jack] is to be in Ms [Kelley]'s care.
- (b) I permit video contact for [Jack] not less than once a week.
- (c) The following conditions are imposed:
- (i) Mr [Washer-Kelley] shall not be permitted contact when he is under the influence of illicit drugs or alcohol nor when he is mentally unwell.
 - (ii) When [Jack] is having contact with his father, Ms [Wren] is not permitted to be present unless such contact involves other people being present such as at a birthday party for [Jack], or a school event.
 - (iii) When [Jack]'s parents are present in accordance with the above condition, then there shall be no adult conflict.

Additional guardianship

[138] Pursuant to s 27 of the Act, Ms [Kelley] has applied to be appointed as a guardian of [Jack]. Her first application was filed without notice in December 2018. It was directed to proceed on notice. She applied again on 21 January 2019 and again it was directed to proceed on notice.

[139] Section 27 states:

27 Court-appointed guardians

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

[140] Section 15 defines the term guardianship and what it means to be a guardian of a child as follows:

15 Guardianship defined

For the purposes of this Act, **guardianship** of a child means having (and therefore a **guardian** of the child has), in relation to the child,—

- (a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child;
- (b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment;
- (c) every duty, power, right, and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.

[141] Section 16 sets out what the duties, powers, rights and responsibility of a guardian of a child include as follows:

16 Exercise of guardianship

- (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
 - (a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a

child has that role just because of an appointment under section 26); and

- (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
 - (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
- (2) **Important matters affecting the child** include (without limitation)—
- (a) the child's name (and any changes to it); and
 - (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; and
 - (c) medical treatment for the child (if that medical treatment is not routine in nature); and
 - (d) where, and how, the child is to be educated; and
 - (e) the child's culture, language, and religious denomination and practice.
- (3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a court order provides otherwise.
- (4) **Court order** means a court order made under any enactment; and includes, without limitation, a court order that is made under this Act and embodies some or all of the terms of an agreement to which section 40(2) or section 41(2) applies.
- (5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.
- (6) Subsection (5) does not apply to the exclusive responsibility for the child's day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.

Analysis

[142] Ms [Kelley] has been granted [Jack]'s day-to-day care. He is to remain living with her.

[143] She has been involved with [Jack]'s upbringing since he was about three months old.

[144] She was closely involved with his medical needs and there is evidence that she was involved with a further hospitalisation for [Jack] in 2018.

[145] Ms [Kelley] made the decision about what kindergarten [Jack] would attend albeit without consultation with Ms [Wren]. Her unilateral decision making must be seen against the context of a complete breakdown of her relationship with Ms [Wren] and Ms [Wren]'s extended whānau.

[146] The reality for [Jack] is that Ms [Kelley] has been a de facto decision maker of guardianship issues for him and when viewed objectively the decisions she has been involved with have been reasonable and sound.

[147] During the hearing, Ms [Wren] acknowledged and accepted that Ms [Kelley] ought to be appointed as a guardian for [Jack].

[148] Given Ms [Kelley] has an ongoing role in [Jack]'s life having the responsibility for his day-to-day care, it is necessary and appropriate, and in [Jack]'s welfare and best interests, that she be formally recognised as an *additional* guardian. I emphasise the word *additional*.

[149] An upcoming guardianship issue confronting the parties is what school [Jack] will attend. The Court expects all guardians will consult with each other about the options and will co-operate and mutually agree his school. [Jack] is reliant on his guardians to make this decision. He needs them to be able to do so so he is not disadvantaged and his schooling career is not delayed.

Outcome

[150] I grant an order appointing [Hine Kelley] an additional guardian of [Jack Wren-Kelley] pursuant to s 27 for guardianship matters generally, without restriction.

Final matters

[151] I bring to an end all COCA applications filed by all parties.

[152] I bring Mr Laurenson's appointment to an end with the thanks of the Court.

[153] I impose no cost contribution orders for the reimbursement of any part of lawyer for child's costs and the costs of Dr Rai. To impose a cost contribution order against any party would be inappropriate considering all of the circumstances of the case.

[154] Interparty costs shall lie where they fall.

Judge L Harrison

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 30/03/2022