

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

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**IN THE FAMILY COURT  
AT KAIKOHE**

**I TE KŌTI WHĀNAU  
KI KAIKOHE**

**FAM-2024-027-000020  
[2024] NZFC 10405**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[KAHU NGATAI] Applicant
AND	[KIRI TOPIA] Respondent

Hearing: 26 July 2024

Appearances: T Manuel-Belz for the Applicant  
A Peacock for the Respondent  
R Harte as Lawyer for the Children

Judgment: 26 July 2024

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**ORAL JUDGMENT OF JUDGE L KING**

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[1] It is now 4.20 pm. Today was set down for a half day hearing to progress [Kahu]’s request to see his five tamariki. There are other applications before the Court but when Judge Howard-Sager conferenced this matter on 22 May, her Honour

recognised that the most pressing issue was that of getting contact in place for [Kahu] and his tamariki.<sup>1</sup>

### **Procedural matters**

[2] Today's hearing has proceeded in a different way because we have a whānau: Mum, Dad and their tamariki who are immersed in Te Ao Māori. Tikanga is very much alive and well within this whānau and is a way of life that these tamariki have been living.

[3] Therefore, in terms of procedure I have come off the bench and we are in a joined up octagonal layout.<sup>2</sup> We commenced the hearing with our Te Aō Mārama karakia with mihi from myself and then each of the parties.

[4] Each party has a support person seated alongside them. [Kahu] has his partner, [Awhina] and [Kiri] has one of [Kahu]'s sisters, [Ātaahua] as her support person. Their lawyer is seated on their other side.

[5] Both parties were sworn in at the commencement of the hearing and today's hearing, at the request of counsel, has proceeded on an inquisitorial basis. As well as the parties, [Kahu]'s paternal aunty, [Hine Teremoana] and [Ātaahua] have given evidence.

[6] Some of the kōrero today has been *tino taumaha*, very heavy. I appreciate that it may be hard for the whānau to hear some of the evidence, and I know that [Kahu] in particular and his partner, [Awhina] became upset with certain statements that were made. However, I have intentionally asked those questions about the two hui that have taken place because I wanted to understand just how much of the parents' dispute the children were exposed to.

[7] I direct the notes of today's hearing be typed up. I appreciate that the stenographer may have some difficulty with that because we have gone between

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<sup>1</sup> At the outset, both parties requested to be called by their Māori names, [Kahu] and [Kiri].

<sup>2</sup> I met with counsel immediately prior to court commencing to discuss the tikanga, the way the hearing would proceed and asked that counsel discuss the matter with their client and come back to me before court starts.

formal evidence and then discussion, however the notes of the hearing are to be typed up.

## **Introduction**

[8] [Kahu] and [Kiri] have five tamariki together: [Hemi] is 15, [Tama] is 13, [Hohepa] is 12, [Nikora] is 9 and a half, and [Aroha] turns four in a couple of months.

[9] I started off by referring to these children being steeped in tikanga and set out some of the background.

[10] Three years ago, [Kahu], some of his siblings and their partners and tamariki/mokopuna decided to quote a phrase from the pleadings: “To decolonise and re-indigenise.”

[11] That to me is about going along a pathway of mana Motuhake; of putting to one side the laws of the Pākehā to reclaim and to live by or at one with the teachings and *kōrero tuki iho* handed down by their tūpuna. E mihi ana ahau ki te whānau. That is *mahi rangatira*.

[12] The collective is referred to by both parties as [name deleted – “the collective”].

[13] [Kahu]’s older sister [Marama] is a key member of [the collective] and from the pleadings she holds a position of leadership within the whānau. [Marama] is the second eldest in the [Teremoana] whānau. [Tui] who is the mātāmua, or first born, is not involved. [Kahu]’s evidence is that she chose not to go the way of him and his other siblings.

[14] This arrangement or way of living went well until it did not go so well.

## **The two hui**

[15] In April 2023, a hui was called when [the collective] were staying at [town A]. That hui involved the parties and [Kahu]’s siblings. Their tamariki were present.

[16] At that hui, [Kahu] was challenged about a sexual relationship he had with his cousin [Iria]. As to the specific details, [Kiri]'s evidence is at odds with [Kahu]'s evidence however they agree that [Kahu] had an extramarital relationship with his cousin. His evidence was he and [Iria] had sex on three separate occasions. This started shortly after the COVID lockdowns.

[17] Both parties agreed that the children became upset whilst this korero was being shared. [Kahu] described the children as being disgusted with him and became visibly upset when he recounted what was shared that day. My impression is the children were encouraged to participate in that hui and to express their feelings to their father.

[18] [Ātaahua] gave evidence about how her and her siblings were themselves the subject of sexual abuse and how important it is for them to ensure their *uri*, their children/descendants do not suffer the same consequences. [Ātaahua] expressed that the way to protect children is to discuss openly their concerns around sexually inappropriate behaviour.

[19] The phrase *tūkino ai* was used. When asked to explain what that means to them, the parties and [Ātaahua] agreed that it refers to the wrong way of having sex or in my words, inappropriate sexual relationships. That is clearly what was discussed at that hui openly with the children and has continued to impact on these tamariki and on their relationship with their father.

[20] The outcome of that hui was that [Kahu] would leave the whare where they lived, move into a nearby whare and would work through the *hara*, the wrong that he caused to his whānau.

[21] [Kahu] does not accept that his sexual relationship with [Iria] who was in her early 20's at the time, poses any safety risk to the tamariki. In hindsight, he questions whether they needed to be part of that hui. However, they were; they know about what happened and I have no doubt that the children's loyalties lie with their mother.

[22] There was a second hui about a month later. The evidence is unclear about who called the hui, but it may have been [Kahu]'s older sister, [Marama].

[23] That hui was prompted at least in part, by two videos posted on social media. One video showed [Kahu] being interviewed about [details deleted]. The second video was when he was out with another woman [Awhina] with whom [Kahu] is now in a committed relationship. My impression is that [the collective] was unhappy with [Kahu]'s conduct after the first hui which was to give him time to reflect on the errors of his ways. Although not present for the first part of the hui, the parties tamariki were included towards the end.

[24] The consequence of that second hui was that [Kahu]'s relationship with his tamariki and his siblings deteriorated even further.

[25] Since then, [Kahu]'s contact with his children has been fairly non-existent and earlier this year, he commenced this court case seeking contact.

[26] I find the children have been embroiled in these adult discussions. I understand about the voices of the tamariki being heard. Now the parties are before Te Kōti Whānau, the Care of Children Act 2004 places real emphasis on children's participation and their voices being heard.

[27] However, the Care of Children Act also says that this Court must make decisions that will benefit the children's welfare and best interests. Whilst their views are particularly important, there are other principles the court must consider in determining welfare and best interests.

[28] I am satisfied that these tamariki need to be able to see their dad in a positive way and child-focused manner.<sup>3</sup> They have not had any contact with him since January this year.

[29] There was a bit of a kerfuffle in February or at least some postings on Facebook in which [Kahu] did not do himself any favours. I understand your frustration, but the reality is, [Kahu] your tamariki saw what was posted on Facebook and would not have reacted in your favour.

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<sup>3</sup> *Brown v Argyll* [2006] NZFLR 705.

## **Restarting contact**

[30] There is agreement today that contact needs to start.

[31] I am grateful to Mr Harte who is the children's lawyer. He has worked hard in meeting with the tamariki beforehand and in a sensitive and culturally appropriate way Mr Harte. Ngā mihi ki a koe.

[32] There is agreement for there to be three consecutive visits on Friday 9 August, Saturday 16 August and then Friday 23 August.

[33] The first visit will take place at Mr Harte's office. The agreed supervisor for the next two visits will be [Kahu]'s aunty, [Hine Teremoana]. She gave evidence also; I was impressed with [Hine]. She is the sister of the children's paternal grandfather who is deceased and is known to these tamariki. Although [Kiri] was initially reluctant to agree to [Hine], by the end of [Hine]'s evidence she did agree.

[34] So, [Hine] will supervise the two following visits. The reason for supervision is encapsulated in the draft order. The concern is to ensure the children are not involved in any further korero which led to their parents separating; either by the children raising matters themselves or someone else discussing those matters with them.

[35] The wording in the draft interim parenting order is that the parties, so that is both of them, will not expose their tamariki to:

- (a) talk about [the collective] and the children's life within it,
- (b) any talk of conflict between [Kahu] and [the collective],
- (c) hostility or conflict between [Kahu] and ngā tamariki,
- (d) any negative or disparaging talk or online postings about their parents or any of their whānau and any such postings currently online will be removed.

[36] Those are the concerns and that is why there is the supervision. But it is not something that needs to continue.

[37] These children need to be able to have a relationship with their dad that recognises what is best for the tamariki. They have been raised by both parents until April 2023. Two years' prior, [the collective] was established and [Kahu]'s siblings became more involved. I absolutely accept and endorse the importance of aunties, uncles and nannies in the lives of their tamariki/mokopuna. I take no issue with that and in a well-functioning whānau that works really well.

[38] However, what has happened here is that we have had a falling out between the two main people, which is the children's parents and so relationships are having to adjust.

[39] The parties, with the assistance of the lawyers, had a private discussion today about what contact looks like after those three visits. When I returned, I was advised one party proposed four hours for the fourth visit and the other party proposed six hours. I disagree.

[40] I find that welfare and best interests requires the children's relationship with their father to firstly be re-established in a positive way, and then to be strengthened. There is a particular principle in the Care of Children Act which guides me in my decision: s 5(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.

[41] That is not what is happening here in terms of the children's relationship with their father. It also says at principle 5(b):

a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians.

[42] I make that point clearly because the parents and guardians are [Kiri] and [Kahu]. Other whānau are very important and if this matter was not in Court, it would

be up to the whānau to determine the tikanga around all of that. However, this dispute has come into my arena, and I must apply the law.

[43] There is another principle that the tamariki's care, development, and upbringing should be facilitated by ongoing consultation and cooperation between their parents or guardians. We are not yet at that stage; we are at the stage where both agree any communication will be through the FamilyWizard app which will monitor the tone of the kōrero or messages.

[44] The final principle is that a child should have continuity in his or her care, development and upbringing.

[45] For the purposes of this hearing, I must look back at when the parties separated in April 2023. At that point the children were in their parents' care; that is all they had ever known. Whilst the last year or so has been difficult for each of the parties, I have no doubt that the children's lives have been turned upside down. Let us not forget that the tamariki are the focus of the Family Court's decision.

[46] Both [Kiri] and [Kahu] must encourage their tamariki to move beyond all that they have heard about the *hara* that their dad did in having a sexual relationship with his cousin, [Iria]. [Iria] herself is part of [the collective] although she lives in the home at [town B] whereas [Kiri] and the tamariki live with [Ātaahua] and her tamariki [in town C].

[47] Therefore, contact will not need to be supervised after the third visit, subject to Mr Harte's endorsement. Furthermore, after the first visit, Mr Harte will make the decision about whether the next two visits are for two or three hours. I am hoping it will be for three hours.

[48] Moving forward, what does contact look like after the third visit?

[49] There is agreement that contact will be fortnightly on Fridays and unsupervised. The first visit will be Friday, 6 September 2024 from 10 am to 5 pm and fortnightly thereafter. If the children are involved in activities that day then



contact is to take place on the Saturday unless the children are involved in weekend activities. But my expectation is that [Kiri] and [the collective] will work in and make sure this arrangement work.

[50] I have heard evidence and counsel seek that these be declared as complex proceedings. Accordingly, I declare these proceedings complex and will case manage.

[51] Contact will be 10 am to 5 pm on 6 September, 20 September and 4 October.

[52] I leave it with Mr Harte to meet with the children and file a report with their updated views and submissions around what contact looks like thereafter. If the children are enjoying contact, then it may be extended to include overnight.

[53] It is not unusual when parents separate for their tamariki to spend every second weekend with the parent who does not have primary care. It is also not unusual for that parent to have contact midweek. However, the distance between [town D] and [town C] probably means that midweek is not achievable, but I really do urge Mum and Dad to move beyond their dispute and focus on getting contact up and running.

### **Next steps**

[54] I have heard that the children want to hui with Dad to talk about the *hara*, the wrong that he has committed. I am not keen on that hui at this point. Even if Mum and Dad agree on such a hui and I am uncertain they do, I am concerned that things will go backwards for the tamariki. This is not an issue for me to determine today, however I signal I do not support such a hui at this point.

[55] Instead, I grant leave to Mr Harte, if you need any urgent time in front of me, we could do a Teams meeting. Just file a memo and ask for it to be referred to me in chambers. It may mean for the lawyers that we join up at 9 am and your clients may not be there but as long as you have instructions, or they can join by video link, but it will be for no more than half an hour.

[56] In the meantime, the r 132 application for filing of evidence is granted. The affidavit of [Kiri] is accepted for filing.

[57] [Kahu] no longer seeks to strike out any of the information in evidence in that document therefore I discontinue that application. [Kahu] no longer seeks an order preventing the children's removal from certain areas in the mid-North. The reality is that the tamariki are happy living in [town C] with their Māmā and that will continue. I therefore discontinue the s 46R application. If there is an interim order in terms of the parents' dispute, then that is simply discharged.

[58] One issue for me is that [Kahu] as the children's father and guardian, needs to be advised on all guardianship issues. In fact, the law says he must be consulted, and parents have to make decisions together. I do not have time today and it was not set down for today.

[59] I simply ask both Mum and Dad to recognise that before their *raruraru* in April last year, they were coparenting their tamariki. That is the reality, and my expectation is that even though they are separated, they must respect each other's rights as a parent.

[60] I direct a case management conference before me for 30 minutes in the month of October. That is to be by video link so that either it is in Kaikohe when I am up here because I am not here all the time, or it can be set down in the Whangārei list. I do not expect Mum and Dad to travel [to Whangārei]. You will be able to join by video link. It will not be a hearing where evidence will be given. In fact, you have been fortunate today that other matters have fallen over and the Court has been able to provide nearly a whole day today.

[61] For the record, [Hine] has signed a supervision agreement. I leave it with Mr Harte to file the draft order, which I have read, for sealing on the basis of my decision.

[62] If anything arises in the meantime, Mr Harte will let me know and I am sure your lawyers will let you know if you have not figured it out yourselves, I am pretty straight-up with people, so my expectation is, stick to what has been agreed upon today.

[63] [Ātaahua], I ask you to go back to your whānau and let them know, it is now up to me as the Judge, whether people agree or disagree, *kei te pai*. It is still the court's decision to determine [Kiri] and [Kahu]'s parenting dispute.

[64] In terms of my decision, it is important for the parties to know that tikanga is recognised as being part of New Zealand's common law. There is a recent High Court decision: *Hopkins v Jackson*.<sup>4</sup> It involved an appeal from a Family Court decision determining a dispute between guardians about relocation. In that instance McQueen J, held:

It is well established that tikanga is part of the common law in Aotearoa New Zealand. It is also the case that the Courts may assume that Parliament intends legislation to be interpreted in keeping with te Tiriti o Waitangi |Treaty of Waitangi unless Parliament expressly indicates otherwise. In the very recent judgment of the Supreme Court in *Ellis v R*, Glazebrook J observed that in "simple cases where tikanga is relevant and uncontroversial, submissions may suffice", recognising that expert evidence may not always be required.

[65] I want the whānau to understand that how we have conducted today's hearing, the decision I am making, I am very much keeping one eye on tikanga but I have to balance both.

[66] There has been some consideration around a specialist psychological report. I am not convinced at this stage that such a report is essential. Now that I have heard evidence and understand exactly the kōrero that the children were exposed to and the way the hui, and their participation in the hui proceeded, I am hopeful that the children will simply be able to try and put that to one side and focus on re-establishing their relationship with their father.

[67] In terms of what you cannot talk about, [Kahu], you need to think about what you can talk about because a lot of things you cannot talk about. I ask that you really give some thought to that because they are quite wide ranging conditions and I understand why it is necessary, but again I ask the lawyers to reflect and consider how the conditions can be simplified or narrowed down.

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<sup>4</sup> *Hopkins v Jackson* [2022] NZHC 2649 at [66].

[68] I have just heard from the parties about the language of communication for these tamariki. [Kahu] is fluent in Te Reo Māori, their mother is not but has come leaps and bounds over the past three years. The point is that [Kahu]'s Aunty [Hine], her primary language of communication is in English. Her evidence was she understands some Māori but certainly not to the level that [Kahu] and the children can converse at. The issue there really is that, in terms of whether there is any inappropriate kōrero, whether it is from [Kahu] or whether in fact he is getting grilled by the children, it is important that [Hine] can understand what is being said. So [Kahu] in some ways that is on you. [Āe.]

[69] Case management conference before me on 18 October 2024 at 11.45 am for 30 minutes.

[70] Mr Harte will see the children next week so he can explain the order to them. Ms Manuel-Belz has suggested a letter from me, Ms Peacock of the younger generation has said a video, let us just consider all of that. I am not going to commit myself because Mr Harte will be able to do a good job as well.

[71] If I have left anything out I will just add it on into my judgment but I think I have tried to cover everything, in the time available today.

[72] In closing, thank you for everyone for persevering today. You came here thinking you would be here for a half day, and it is now 5 pm. I know it is tiring, and by that, I mean mentally exhausting, being involved in a kaupapa like this. But when I heard that you have day long hui, and if you are used to wānanga, well wānanga can go all night. But thank you everybody.

[73] Ka nui te mihi ki a kōutou e te whānau [Teremoana], te whānau [Topia] hoki, ki ngā roia hoki, ki a kōutou katoa.

## **ADDENDUM**

[74] The hearing concluded with each party standing to mihi to all those present and concluded with karakia.

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Judge L King

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 13/08/2024