

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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE <https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT HAMILTON**

**I TE KŌTI WHĀNAU
KI KIRIKIROA**

**FAM-2021-019-000331
[2024] NZFC 1891**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[LORENA KAWHENA-KENNEDY] Applicant
AND	[HEMI FRANCIS] Applicant
AND	[JODI KAWHENA] Respondent
AND	[VINCE JOHNSON] Respondent

Hearing: 5, 6 and 7 December 2023

Appearances: B Nordstrom for the Applicants [Kawhena-Kennedy] and [Francis]
M Barnett for the Respondent [Francis]
Respondent [Johnson] appears in person
M Hope as Lawyer for the Child

Judgment: 1 March 2024

RESERVED JUDGMENT OF JUDGE R H PAUL

[1] [Amiria Kawhena] (“[Amiria]”) was born on [date deleted] 2015 now aged eight years. [Amiria] is a beautiful and bright girl who is much loved by many people in her whanau.

[2] [Amiria]’s mother is [Jodi Kawhena] (“[Jodi]”) and her father is [Vince Johnson] (“[Vince]”). [Lorena Kawhena-Kennedy] (“[Lorena]”) and her partner [Hemi Francis] (“[Hemi]”) seek leave to apply for a parenting order and for the day-to-day care of [Amiria].

[3] [Lorena]’s mother is [Dinah Kawhena]. [Dinah Kawhena] and [Jodi] are sisters and their parents, [Ruhi Kawhena] and [Patariki Kawhena]. [Dinah Kawhena] was only sixteen when [Lorena] was born, and [Lorena]’s care was shared between [Dinah Kawhena] and her parents during [Lorena]’s formative years. [Jodi] is much younger than [Dinah Kawhena] and therefore [Lorena] and [Jodi] were brought up like sisters.

[4] [Jodi] and [Vince Johnson] had four children, [Rangi Kawhena] born on [date deleted] 2012 now aged 10 years, [Hanu Kawhena] born [2015] now aged eight years, [Makoro Kawhena] born [2016] now aged seven years and [Amiria].

[5] By the time [Amiria] was born [Jodi] had four children under the age of four and the primary caregiver of the children on her own most of the time. Her evidence, which is not disputed, was that [Vince] came and went from the children’s lives leaving the parenting to her.

[6] Mr [Patariki Kawhena] actively assisted [Jodi] care for the children. However, he became unwell in 2018. During the latter part of 2018 [Lorena] and [Hemi] spent more time looking after [Amiria] and had formed a relationship with her in particular, [Hemi].¹

[7] As [Patariki Kawhena]’s health declined [Amiria] went into the care of [Lorena] and [Hemi] in [2018]. [Patariki Kawhena] sadly passed away on [date

¹ Evidence of [Ruhi Kawhena] in cross-examination.

deleted] 2019. In March 2019 a decision was made for [Amiria] to remain in the care of [Lorena] and [Hemi Francis].

[8] On 19 March 2019 [Jodi] gave permission for [Lorena] and [Hemi] in writing to care for [Amiria] and to allow them to make any decisions regarding her needs such as medical care, day care, travel and any other permission required.

[9] In January 2021 a meeting occurred in Hamilton resulted in [Amiria] remaining in the care of [Lorena] and [Hemi] though [Jodi] appeared to change her mind about this arrangement from time to time.

[10] In Easter 2021 during a planned changeover from [Amiria]’s holiday with her mother to Hamilton [Jodi] advised [Amiria] would not be returning with [Lorena]. An argument ensued between [Jodi] and [Lorena]. There are different versions of what occurred, but it is agreed that [Jodi] punched [Lorena] in the face. Both acknowledge this has never occurred before. [Lorena] reacted and hit [Jodi] back. [Jodi] then drove off with all of her children including [Amiria]. All were present and would have witnessed the situation.

[11] Following that incident [Hemi] and his sister travelled to [town A] to pick [Amiria] up having reached a prior agreement by text to do so.²

[12] On 2 May 2021 [Jodi] sent a text to [Hemi] to say that she is coming to collect [Amiria] from Hamilton. She was not interested in having any more hui about it. As a result of this communication [Lorena] and [Hemi] filed an application for leave to apply for and for a parenting order in respect of [Amiria] and also applied without notice to be appointed additional guardians.

[13] Leave to apply for a parenting order was granted on 4 May 2021 but the application for a parenting order was placed on notice. [Lorena] and [Hemi] were granted an interim order appointing them additional guardians.

² Attachments C – Affidavit of applicants 4 May 2021.

[14] On 19 May 2021 [Jodi] filed her notice of response and cross-application for parenting order on notice and an application to revoke the guardianship order granted on an interim basis.

[15] An interim variation order was granted providing supervised contact to [Jodi] with supervision to be undertaken by [Ruhi Kawhena]. That was further varied on 28 June 2021.

[16] On 21 September 2021 it was varied to provide that the contact could be monitored as opposed to supervised and a further person appointed to monitor being [Dinah Kawhena]. The requirement for supervision or monitoring of contact was discharged on 17 December 2021 and unsupervised holiday contact and weekend contact during the school term was granted on 17 December 2021.

[17] The order presently in place provides that [Amiria] be in the day-to-day care of [Lorena] and [Hemi] and contact occur with [Jodi] as follows:

- (a) Two weeks during the school term from Friday after school until Sunday at a time suitable for each party to travel back to [town A] from Hamilton during week three and six of the school term.
- (b) During the school term, holidays from the first Saturday after school is finished until Thursday before school resumes.
- (c) For the 2021 summer holidays 18 December until 8 January and every other year from 18 December until 3 January.
- (d) For an additional one week during the summer holidays as agreed.
- (e) Video/telephone contact each Tuesday, Thursday and Sunday from 6 pm until [Amiria] is ready to hang up.
- (f) Any other contact as agreed.
- (g) Transport is shared.

[18] The conditions of that contact provided that:

- (a) [Amiria] shall not be exposed to family violence while in either party's care.
- (b) Neither party will make derogatory or negative comments about the other not discuss the Court proceedings with [Amiria] when she is in their care or having contact.
- (c) [Jodi Kennedy] and Mr [Francis] shall be informed about [Amiria]'s whereabouts and who she is with when [Amiria] is in her care.

What issues to be determine?

[19] The issues that I need to determine are as follows:

- (a) Should [Amiria] remain in the care of [Lorena] and [Hemi] in Hamilton or return to the care of [Jodi] in [town A]?
- (b) Should the interim order appointing [Lorena] and [Hemi] additional guardians be discharged or made final?
- (c) What contact should that non-primary caregiver/s be granted?
- (d) Whether there are any safety concerns for [Amiria] in the care/contact of any party and if so what supervision or conditions of a parenting order should apply?

Each party's proposal

[20] [Lorena] and [Hemi] say that [Amiria] should remain in their care with contact with [Jodi] and her brothers in [town A] for the times currently provided for in the interim order with contact at any other times that maybe agreed between them with reasonable notice. They acknowledge that given the high cost of living it may work

better for [Jodi] if a mid-term contact weekend was included rather than week three and six provisions.

[21] They are happy to share travel responsibilities to facilitate contact between [Amiria] and her family in [town A]. They say [Amiria] is being provided a good level of care, that all her cultural, environmental, educational and emotional needs are being met within their care. They further say they have concerns for [Amiria] returning to the care of her mother given the reports of concern that have been raised over the years and more recently in respect of [Jodi Kawhena].

[22] [Jodi Kawhena]'s position is that there are no concerns for [Amiria] in her care. She gives a blanket denial to all reports of concern relating to her and seeks a final parenting order granting her the day-to-day care of [Amiria]. She proposes that [Lorena] and [Hemi] have contact for half of the school term holidays, three weeks during Christmas Holidays and telephone contact when [Amiria] wants it at any other times as agreed.

[23] A three-day hearing to determine the applications commenced on 5 December 2023. [Jodi] filed an affidavit on 29 November 2023 advising that she had recently begun a relationship with [Taito Savou] ('[Taito]') and they have been in a relationship for six months. She disposed that [Taito] moved into her home approximately three months ago, around the end of August 2023/beginning September 2023. This was the first indication that another person apart from [Jodi] and her three boys were living in the home. It was not until partway through the hearing that it was disclosed to the court that [Jodi] was pregnant with [Taito]'s baby.

Credibility

[24] [Taito] attended the hearing with [Jodi] as her support. I explained to him that because I had to make a decision about [Amiria]'s future care it was important that I know about the people living in each of the homes and that I knew nothing about him.

To his credit he provided written consent to social worker Ms Pazini to obtain his criminal conviction history and enquire as to whether he has been the subject of any reports of concern to Oranga Tamariki of family violence reports. I then called him as a witness on the start of day two of the hearing.

[25] In [Jodi Kawhena]'s affidavit dated 29 November 2023 she deposed:

[Taito] does not have any criminal convictions or family violence that I know of as far as I am aware he has not used any illicit drugs or drink alcohol.³

[26] [Taito] took the witness stand and swore to tell the truth. He gave evidence that he did not have any criminal convictions and that he stopped drinking alcohol a year ago to be a better father to his five-year-old daughter to a previous relationship.

[27] Following that evidence, I received the updated s 132 report. Having read that information I put to [Taito] that he had lied, that he in fact did have a criminal conviction and that he has consumed alcohol recently, to which his head dropped.

[28] [Taito] then confirmed that he was convicted of driving with excess breath alcohol on 16 November 2023 (only three weeks prior to the hearing) for driving with excess breath alcohol and on 1 October 2023 with a blood/breath alcohol level of 787 being nearly twice the legal limit. He has a disqualification from driving for a period of six months. He further admitted that [Jodi] was aware that he has been arrested and aware that on 16 November 2023 he was convicted of that offence. It was then clear that [Jodi] had also misled the Court in her affidavit evidence.

[29] On further cross-examination [Taito] confirmed that on occasion when he and [Jodi] were on their own at home, he would consume a box of 18 beers and she would consume a six pack of Woodstocks (pre-mix drinks).

[30] [Taito] was born in Fiji and came to New Zealand in 2015. He has worked in the [detail deleted] industry since 2018 and is in New Zealand on a work visa. He has been with his present employer since the beginning of the year. He works five days a week 8 hours a day but is picked up between 4 and 5 in the morning and returns

³ Affidavit of [Jodi Kawhena], 29 November 2023 at [44].

between 6 pm and 7pm on workdays. He says he helps with the outside jobs doing the lawns, clearing etc, and also helps to cook and clean inside the house and supervised the boys at times. Other than his alcohol use I did not identify or have any evidence of safety concerns for any child in his care.

[31] I found [Taito] to be a quietly spoke, hardworking man who wants to do the best for [Jodi], but in doing so has mislead the Court to paint a better picture for [Jodi].

[32] When [Jodi] took the stand, she attempted to amend her affidavit stating that she wanted it to now read, “[Taito] does not have any family violence criminal convictions”. I found this to be another attempt to mislead the Court.

[33] I find that [Jodi] has attempted to mislead the Court about [Taito]’s criminal convictions on the basis, she was fully aware that he did have criminal convictions. I find that she attempted to mislead the Court when she deposed, he does not drink alcohol.

[34] Section 5A of the Care of Children Act 2004 requires that I consider the safety of [Amiria] where a protection order has been granted as between any party to proceedings. [Jodi] obtained a temporary protection order and by operation of law that became final on 8 September 2014.

[35] I put to [Jodi] that the contents of her affidavit in support of the protection order was in direct conflict with her affidavit responding to family violence reports of concern in s 132 reports that occurred on 15 October 2012 and 12 December 2013.

[36] In the affidavit in support of her protection order she referred to [Vince]’s serious physical violence upon her, but in her evidence in these Court proceedings she minimises any concerns relating to [Vince].

[37] In the witness box she stated that the evidence she was providing in these proceedings was true and that she had lied in her evidence in 2013. She says that her evidence for the protection order was exaggerated to get [Vince] into trouble. I put

her directly, “So do you have a practice of exaggerating evidence to the Court and lying to the Court to get what you want?” Her answer was, “I am not sure.”

[38] The only conclusion that I can take from this evidence and [Jodi Kawhena]’s response is that she either lied in her affidavit of 18 December 2013 or she has lied in her affidavit of 29 March 2022. She lied to the Court in two affidavits and within the witness box attempting to change her evidence.

[39] I also note that the report of concern dated 15 October 2012 from a medical professional confirmed that [Jodi] had informed the hospital she had been assaulted which resulted in minor facial injuries. I prefer the evidence within the report of concern and the original affidavit regarding violence inflicted by [Vince].

[40] I also note that the affidavit evidence was not denied, the application unopposed and I am able to accept that evidence proved.

[41] Overall I found that the evidence of [Jodi] lacks credibility as there appears a pattern of changing evidence to suit the particular outcome sought at the time.

The applicant’s situation

[42] [Lorena] and [Hemi] have welcomed their daughter [Rakina Kawhena-Kennedy Francis] born [2022] to their whanau. [Hemi] works fulltime with flexible hours as an [occupation deleted]. [Lorena] is studying at [details deleted].

[43] [Amiria] lives with [Lorena] and [Hemi] within a papakainga on a large piece of land in [location deleted]. The property is owned by [Hemi]’s parents. [Lorena] and [Hemi] have a new whare next to the main homestead. It comprises of a kitchenette, dining living area, bathroom, toilet, laundry and three bedrooms. The whare is still in the process of renovation but is functional. Also living at the property are other whānau support, [names deleted].

[44] [Amiria]’s aunties and grandparents adore her. All reports are that she likes to be the centre of attention.

[45] No party to proceedings or report writer have ever raised concerns about the safety, care or environment for [Amiria] with [Lorena] and [Hemi].

Within the house Māori is the primary language. The [Francis] whānau are a family who practise Tikanga Māori in their daily lives.

[Jodi Kawhena]’s situation

[46] [Jodi] lives in a Kainga Ora three-bedroom home in [town A] with her three boys and [Taito Savou]. She is in receipt of a benefit. She is involved with the boys’ schooling and sporting activities. Sport is clearly an important part of that family’s daily lives. [Jodi] continues to coach rugby with the boys’ school.

[47] [Jodi] has the support of her mother who lives nearby and other whanau. Te reo Maori and tikanga Maori in particular that of [iwi name deleted] is important to this whanau.

The law

[48] When considering any application under the Care of Children Act 2004 s 4 of the Act states that the welfare and best interest of a child in his or her particular circumstances for the first and paramount consideration.

[49] When considering the welfare and best interest for [Amiria] in her particular circumstances I must take into account the principle that decisions effecting [Amiria] should be made and implemented within a timeframe that is appropriate to her sense of time and the principles of s 5 of the Act.⁴ I may take into account the conduct of any person who seeks to have a role in the upbringing of [Amiria] to the extent that conduct is relevant to her welfare and best interest.⁵ I consider that all principles as set out in the below s 5 are relevant to my decision making for [Amiria].

[50] Section 5 principles:

⁴ Section 4(ii).

⁵ Section 4(2)(b) Care of Children Act 2004.

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.
- (g) a child must be given reasonable opportunities to participate in any decision affecting them.

Section 5A

[51] Section 5A obliges any Court to take into account the principles in s 5(a) where there is or has been a temporary protection order or a protection order enforce against one or more of the parties. The circumstances in which such order was made, and the reasons given by a Judge for the making of the order.

[52] As referred above a final protection order exists in favour of [Jodi] against [Vince].

Section 5(a)

[53] Section 5(a) is the principle that a child's safety must be protected in particular from all forms of violence. The definition of violence is defined in the Family Violence Act 2018, broadly in ss 9, 10 and 11 of that Act and include physical, sexual and psychological abuse. There is no allegation in this case of sexual abuse relating

to any party. There are, however, allegations of physical abuse and psychological abuse. Psychological abuse includes but is not limited to:

- (a) Intimidation
- (b) Harassment
- (c) Damage property
- (d) Ill treatment of household pets or other animals connected to the victim.
- (e) Threats of physical abuse, sexual abuse or psychological abuse.
- (f) Financial or economic abuse.

[54] Section 11(2) states that psychological abuse can occur in situations where a person:

- (a) Causes or allows a child to see or hear the physical, sexual or psychological abuse of a person with whom the child has a family relationship.
- (b) Puts the child or allows the child to be put at real risk of seeing or hearing that abuse.

Physical violence

[55] I have already accepted [Vince] has inflicted physical harm upon [Jodi].

[56] [Vince] has a conviction of assault on a female on 22 February 2009 and two unlawful damage convictions from 2009 and 2022.⁶ There are family harm reports where [Vince] is the aggressor in 2022, 2013 on three occasions again in 2009 and 2007. He was noted as the victim of an assault on 10 October 2013 by [Jodi]. [Vince] has taken no steps in the proceedings following service. Attempts were made by social

⁶ Section 132 report dated 30 October 2023.

workers to attend with [Vince] but were unsuccessful.⁷ [Vince] declined to provide his consent to the social worker to obtain disclosure about family harm and criminal convictions.

[57] Ms Pizzini social worker noted in her report that she would be concerned if [Amiria] would have unsupervised contact with [Vince Johnson] due to his current lifestyle and circumstances not fully known or assessed.⁸

[58] On that basis I am not satisfied that [Amiria] would be safe in the care of [Vince] and cannot undertake an assessment on the matter. He has not participated in these proceedings as such his contact with [Amiria] needs to be supervised. There are no supervisors put forward for him and therefore no other option, but Court approved supervision.

[59] [Jodi] in her evidence has accepted that she punched [Lorena]. [Jodi] says [Lorena] was pushing her, and her response was to punch her in the face. This occurred in [2021]. The children were present on this occasion and were exposed to physical violence which is violence against the children.

[60] To her credit [Jodi] accepted and wanted to take responsibility for her violent behaviour. She said she had worked on herself and had not behaved like that since punching [Lorena] in the face.

[61] [Jodi] also accepts that she assaulted [Dinah Kawhena] some years ago in her home over a dispute about some hair straighteners.

[62] [Jodi] accepts that she punched [Vince Johnson] in the face in December 2015. The report of concern from this incident confirms that [Rangi], [Hanu] and [Amiria] witnessed this incident.

[63] It is clear that [Jodi] has inflicted violence against others in front of her children.

⁷ Section 132 report dated undertaken by Sonja Taare-Kowhai filed 8 December 2021.

⁸ Section 132 report dated 30 October 2013 at page 6 [f2].

[64] There is a report of concern that on 24 January 2023 [Jodi] put her arms through the front seats and started punching [Makoro] although the notifier could not see whether her hand was directly connecting to him.

[65] The notifier reported [Makoro] had cried, and [Jodi] had informed she had scratched him and shown remorse. The notifier observed scratch marks and bruising on the neck around [Makoro]. The notifier was an extended family member and a church friend. [Jodi] denied the allegation but said that she had turned to put on [Makoro]'s seatbelt because he would not put his seatbelt on, and he was fussing.

[66] When Ms Pizzini was being cross-examined on the report of concern, she said a decision had been made after hearing from the notifier to undertake a child focussed interview. However, after interviewing the child and speaking with [Jodi] the social worker did not proceed with that action. Ms Pizzini could not explain the decision. She said the notifier had not ever made any other allegations and was happy to talk with both social workers and police about the notification.

[67] It is not known from the information Ms Pizzini has as to what engagement with iwi or social services had been undertaken by or for [Jodi]. Her evidence is that she would be worried about [Amiria] returning to her mother's care because of the number of allegations relating to the children in her care, pressures and stress, post-natal depression and past concerns. It was her view that the placement in [town A] provided more uncertainty for [Amiria] including safety risks around changeovers, lack of honesty about the state of relationship between herself and [Vince Johnson], concern about ability to resolve issues and relationship, hygiene for the house and violence in her relationships. Mr Konja the social worker who observed [Makoro] did see some scratching, but [Jodi] reported that it was from a dog bite. The file was then closed.

[68] Given that there had been previous reports of concern and a high level of cooperation from the notifier I am surprised that the child was not interviewed.

[69] On 5 June 2013 there was a report of concern from a confidential professional that [Jodi Kawhena] had slapped her son [Rangi] across the face once. The

professional reported [Jodi Kawhena]’s mother witnessed the incident and [Rangi] was safe. The professional reported that [Jodi] had postnatal depression and was not coping well. The Ministry completed a child and family assessment and the police decided not to charge [Jodi] as they believed it was a one-off incident due to stress and [Jodi] had whānau that were protective of [Rangi]. The Ministry did not substantiate the allegations and closed the file.

[70] [Jodi Kawhena] and her mother in cross-examination denied this ever happened. I do not have sufficient evidence to make a positive finding in respect of this allegation.

[71] The evidence establishes that [Jodi] has a pattern of lashing out physically and violently. There is concern that she has lashed out at her children physically when stressed.

Psychological abuse

[72] In cross-examination [Taito] confirmed that he has seen [Jodi] raise her hand to the children and that she had sworn at the children. When [Jodi] was later cross-examined, she accepted that she had raised her hands to her children in a threatening manner. She accepts this is not good. Her explanation is that it is a reaction because she gets hoha (annoyed). She accepted that her way of dealing with the boys was often wrong and she is not a perfect mum. She also accepted that she swears at the children, she says a few times.

[73] [Jodi] confirmed to Ms Taare-Kowhai on 6 December 2024 that when disciplining the children, she does not give them time out or take away privileges she just yells at them.⁹

[74] I am satisfied that [Jodi]’s children have been exposed to family violence. I am satisfied that [Jodi] continues with threatening language, threatening behaviour and abusive language towards the children when she is frustrated as a form of discipline and that this has been a pattern of discipline.

⁹ S.132 report BOD page 35 blue book.

[75] I now turn to consider what steps have been taken to address these behaviours. The only steps taken to address violent behaviours is a letter confirming that [Jodi] attended a Landmark Forum online over a four-day period in June 2021. Though some information about the programme has provided it does not address emotional regulation or family violence.

[76] The nature and seriousness of the violence is certainly not at a serious end. However, the frequency and pattern are of great concern. The physical and emotional harm caused by [Jodi] is somewhat difficult to ascertain, but when [Lorena] was recalling the incident where she was punched in the face that clearly had taken an emotional toll on her. [Lorena] confirms that she continues to be scared of [Jodi] and that is the reason why she finds it difficult to have any contact with her or communicate directly with her about [Amiria].

[77] [Amiria]’s brothers have not been interviewed for the purpose of these proceedings.

[78] [Amiria] has expressed to her lawyer that her brothers fight lots and they push and hit her and get angry and will tell “mumma”. When asked if she had a wand what would she wish for, her first response was, “my brothers will stop fighting”. The boys’ behaviour may be a response to exposure to family violence and psychological abuse.

[79] All parties have agreed that [Jodi]’s contact should be unsupervised and [Amiria] has not expressed any feelings of being unsafe with her mum.

[80] I am highly concerned that [Jodi] would allow unsupervised contact with [Vince] and sees no safety concerns for the children in his care.¹⁰ [Amiria] has reported that she spent time with her father and that he gave one of the boys a hiding.¹¹ This shows a lack of insight into [Amiria]’s safety.

[81] I am satisfied that protective conditions may address the issues of safety for [Amiria] while having contact with her mother, but I am not convinced by any means

¹⁰ Section132 report BOD page 36 blue book.

¹¹ Section132 report dated 5 July 2022 at page 4 paragraph 5.

that she is no longer at risk of exposure to family violence. There is never a situation where no risk exists, and this may will affect the final care arrangements for [Amiria].

Mental Health

[82] Within these proceedings there are no issues of mental health concerns for the applicants.

[83] There is however some concern in regard to [Jodi]. The first report relating to the mental health for [Jodi] was on 5 June 2013 with a report of concern from a confidential professional to Oranga Tamariki. In that incident [Jodi] had slapped her son across the face once. The professional reported that [Jodi] has post-natal depression and was not coping well and that she was in a relationship with the child's father.¹²

[84] Evidence was provided to Sonja Taare-Kowhai from [details deleted] Community Health Centre, undated. Dr Alison MacFarlane reported that she saw [Jodi] in June 2021 when she was very stressed regarding events in her relationship. She was prescribed anti-depressant medication but choose not to take it and preferred to focus on her lifestyle and activities. To a large extent the report is based on what [Jodi] has told the doctor, but in summary the doctor states that [Jodi] has been able to make changes and is able to prove this with diplomas, photos and newspaper articles. All of these changes have resulted in good mental health. She feels uplifted and today she cannot detect any symptoms of depression and suicidal thoughts at all. She is able to focus on the children and as a result of all these changes feels they are very happy. The doctor has no concerns about her mental health.

[85] There is a letter provided from the boys' school, [school name deleted].¹³ The report is very positive about [Jodi].

[86] This information was put to Susan Thomas the senior practitioner for the [town A] site. She was asked by lawyer for child whether an inability to maintain a home is

¹² Section 132 report dated 14 December 2021 at paragraph [4].

¹³ Attachment to s 132 report dated 5 July 2022, bundle of documents yellow section page 56.

a function of mental illness. In response Ms Thomas stated that she was in no way trained or specialised in that area, but through statutory practice for nine years she would be concerned about that.

[87] From the evidence of [Jodi] in cross-examination she advised that she has not been told that she had post-natal depression by professionals. After the birth of a child, she was struggling with being bullied by her aunty at work after her father passed away. She became panicked and crying when she would see her aunty and was diagnosed with anxiety and given prescriptions, but she chooses to deal with it in a different way.

[88] Though I do not need anything more specific than the letter from Dr MacFarlane I am satisfied that [Jodi] has suffered anxiety as a result of passing of the father, bullying at work, post-natal depression and feelings of loss around [Amiria].

[89] There is insufficient evidence from a mental health professional to confirm that there are any concerns presently for [Amiria] in her mother's care from a mental health perspective. What I do have though is a background of mental health concerns when under pressure and certainly [Jodi] has been under pressure. Concern from lawyer for child was that the mother's ability to care for the children and provide a safe and hygienic environment was impacted by mental health concerns. I will deal with the issue of environment next.

[90] The evidence that I do take regard of is that [Jodi]'s parents decided that [Jodi] was not in a position to care for [Amiria] and that she would be better placed with the applicants following the passing of Mr [Kawhena].

[91] I also take note that it was Mr [Kawhena] who was providing support even though he was ill to [Jodi] and the children. What that indicates to me is that Mr and Mrs [Kawhena] had concern for [Jodi]'s abilities to care for all of the children following the passing of Mr [Kawhena] and acted in what they believed was the best interest of [Amiria] at the time by placing her with the applicants.

Hygiene

[92] During these proceedings a direction was made for a s 132 report to assess the home environment of the parties. A separate report was undertaken in respect of [Jodi] by Sonja Taare-Kowhai from the [town A] site with the report undated.

[93] On 19 November 2021 Ms Taare-Kowhai attended the home of [Jodi] and was able to look at the exterior of the home and the ground which was in a ‘derelict state with overgrown grass and furniture and debris all around the home.’ On that occasion [Jodi] refused to see the social worker which she presumed was because [Jodi] wanted an opportunity to tidy up the home.

[94] Ms Taare-Kowhai referred to a skip bin on the property filled with furniture and debris from the home. When Ms Tarre-Kowhai was able to enter the home, she noted the home was in a clean and tidy state. Certainly, [Jodi] would have had an opportunity by that stage to tidy up the house. Ms Taare-Kowhai recommended that [Jodi] continue to maintain a healthy and clean home environment for her children.

[95] When cross-examined Ms Taare-Kowhai states in regard to the outside of the home that she sited, she said, “I got a bit of a fright actually.”¹⁴ In her evidence she confirmed that two weeks later after the “cold” call to the property there was a large skip filled with rubbish and furniture outside which confirmed that [Jodi] needed an opportunity to try and tidy up her property before an assessment. The reason for the delay was to address that issue. She also confirmed that her random visit to the home was a more accurate reflection of [Jodi] kept the property.¹⁵

[96] A report was undertaken by Susan Thomas dated 5 July 2022. On 7 June 2022 Ms Thomas went to [Jodi]’s home for the purpose of making time to meet and complete the report. On arrival the yard was clear but at the back door there was a full open rubbish bag and a large pile of washing.

¹⁴ Note of evidence page 4 line 31.

¹⁵ Notes of evidence page 5 line 30.

[97] Though a number of attempts were made to meet with [Jodi] they were always cancelled, and Ms Thomas was unable to gain an update from [Jodi] to address the concerns raised by the previous s 132 report writer.

[98] A second report was undertaken by Ms Thomas dated 23 August 2022. On 15 August 2022 she made a visit to [Jodi]'s home and saw a large skip bin in her driveway. There was a pile of rubbish at the rear of the property. In cross examination Ms Thomas agreed that another large skip bin within 10 months would ring warning bells as to whether [Jodi] would be able to provide a clean environment for [Amiria].¹⁶

[99] [Jodi] said she had been working with Kainga Ora and a skip bin is for moving some of her things. On the same day Ms Thomas spoke with Ms Williams the Kainga Ora tenancy manager for [Jodi]. Ms Williams said she planned to visit with [Jodi] and that she will talk with [Jodi] about making a time for Ms Thomas to visit.

[100] Ms Thomas then attended the home on 18 August 2022 where she referred again to the large skip bin which had a strong waste smell.¹⁷ When asked about Ms Taare-Kowhai's concerns [Jodi] replied, "Everyone's house a paru anyway, just as long as the basics are taken care of." [Jodi] went on to say that the house is her last priority, she then said the outside of the house is her last of her priority just so long the children and fed and clothed. [Jodi] stated she concentrated on the basic care of her children.¹⁸ The report writer was unable to comment on the natural state of [Jodi]'s living arrangement because [Jodi] declined her request to obtain information from Kainga Ora. The report writer believe that [Jodi] had been delaying visits with her due to her home being messy and needing to be decluttered and organised. As a result of the report writer noted:

I am concerned about the ability and capacity of [Jodi] to maintain and sustain a tidy, unchaotic home for her tamariki...the home environment can directly impact children's ability to control or direct their attention, thoughts, emotions, and actions in childhood, UCL Institute of Education research reveals.¹⁹

¹⁶ Referred to cross-examination in notes of evidence page 22 lines 10-20.

¹⁷ Section 132 report dated 3 August 2022 page 2.

¹⁸ Abid at page 3.

¹⁹ Abid at paragraph 5.

[101] Further the report writer states:

This is concerning as having a build up of rubbish and mess is not physically, emotionally and developmentally healthy for a child's wellbeing. Environmental chaos is being proposed as a central influence in children's health and development. (Research gate).²⁰

[102] Positive reports from the children's school and Dr McFarlane were put to Ms Thomas. In response she said the school had written positive things and noted that the school was the mother's employer however "if this is the home, this is the home environment, this is the real day to day stuff of how a child lives, play – the area a child plays."²¹

[103] When questioned about reference to a chaotic environment and to provide better detail Ms Thomas referred to her attempts to complete the report and stated:

My opinion was very avoided ([Jodi]). I was particularly surprised and concerned that such an important matter as your daughter's custody, care and custody arrangements was just met by delay, delay, delay that was significant concern for me considering the importance of the matter.²²

[104] When asked Ms Thomas' view of [Jodi]'s comment about everyone's home being paru, she agreed [Jodi] cannot manage anything more than the basic care of her tamariki and referred to the issue of ability versus capacity. She further agreed that it reflected emotional unavailability, not be able to cope with the things that are important and not prioritising them. Ms Thomas said that [Jodi] seemed really preoccupied with her cell phone and emotionally unavailable to be part of the conversation, a very important conversation about her daughter.²³

[105] A third report was undertaken by Ms Harema dated 1 November 2023. In conclusion the report writer was not able to identify any care and protection concerns. It is reported that [Jodi]'s home was clean and tidy, her lawns had been freshly mowed and there was no evidence of any rubbish or rubbish bags lying around outside.

²⁰ Abid at page 5.

²¹ Note of Evidence at page 47 lines 15 to 20.

²² Abid line page 49 19 to 25.

²³ Abid at page 48 lines 5 to 15.

[106] On this occasion [Jodi] gave verbal consent for the report writer to contact Kainga Ora. Krystal Williams was spoken to on 17 October 2023, the Kainga Ora Housing manager. She informed that she does regular house inspection at [Jodi]'s home to insure she is maintaining the condition of the property as there had been concerns in the past regarding rubbish building up, lawns not being maintained and the house being in a unkept position.

[107] All of the independent reports from social workers confirm a pattern of avoidance and delay in order to try to address issues of hygiene and chaos within [Jodi]'s home. All the reports recognise the continued pattern of avoidance and confirm that Kainga Ora has had existing concerns as to her ability to maintain the property.

[108] When cross-examined Ms Harema accepted that she was simply going off what she saw at the time and the information provided by [Jodi] and her mother. I accept that Ms Harema's view was a snapshot for the purpose of an update report. It does not negate the concerns raised within the previous reports and confirms the need for oversight by Kainga Ora.

[109] I am satisfied on the evidence that [Jodi] has for some time struggled to maintain and sustain a tidy, unchaotic home for her children. I agree with Ms Thomas' view that [Jodi] was unable to see the natural state of the environment of how [Jodi] and her children lived daily.²⁴

Transparency and honesty

[110] I have already referred to the issues of credibility. The evidence of avoidance and delay. Ms Thomas raised her concern as to [Jodi]'s level of transparency and honesty. [Jodi] refused to allow Ms Thomas consent to communicate with the manager of Kainga Ora at the time of her report. When Ms Harema attended the home [Jodi] did not advise that she was expecting a new baby. She did not advise that her partner was living at the home nor did she advise of his recent criminal convictions.

²⁴ Notes of Evidence pages 41 and 62.

[111] These are all relevant issues when determining the matter of [Amiria]’s care. [Taito] gave evidence that [Amiria] was aware of her mother’s relationship with him for some time, but this was not shared with the applicants.

[112] There is a concern that [Amiria] was trying to keep the relationship secret. Where there has been such a level of dishonesty by the applicant and her partner the lack of transparency of information and engagement with service of Oranga Tamariki creates for this child a risk to her safety. If [Amiria] is placed in [Jodi]’s care this Court cannot be satisfied that there would be engagement or honest communication about matters relating to [Amiria]’s safety or care. This then places her at risk.

Supervision and neglect

[113] Oranga Tamariki was contacted by [Jodi]’s family member. That family member, a sister to [Jodi] also contacted the applicants who instructed their counsel to communicate with counsel for [Jodi].

[114] Counsel sent a letter on 16 June 2023.²⁵ The applicants advised that they have been contacted and told that [Amiria]’s three brothers were found at the home of the grandmother [Ruhi Kawhena], cold, hungry and alone. The children have been reported sleeping within the roof of the shed for at least two days before the sister found them and took them to her home. As such the applicants were unwilling to let [Amiria] go to [Jodi]’s home based on safety and welfare concerns.

[115] A response was not received until 15 August 2023, a month later. [Jodi] denied the allegations and did not understand why her sister would have said this happened.

[116] The applicants wanted more detail about what had happened, but that was unfortunately not forthcoming in the communications.

[117] This is a concerning allegation. However, the only person who can give evidence about these allegations is [Jodi] and she denies it. The person who made the report of concern, [Jodi]’s sisters have not given evidence. I have no witness evidence

²⁵ Attachment “C” affidavit of applicant dated 13 November 2023.

to substantiate the allegation. Therefore, I have insufficient evidence to make a finding of supervisory neglect.

Section 5(b)

[118] Section 5(b) is the principle that parents should be primarily responsible for their children. The applicants are not parents to the children, but all of the parties confirmed that this was a whangai situation. There was however a difference of opinion of the meaning of whangai.

[119] What was clear from the evidence in this hearing is that there was a lack of certainty and clarity around the parties' expectations of the care arrangements for [Amiria]. It is clear that [Jodi] was highly reluctant to agree that [Amiria] be placed in the care of [Lorena] and [Hemi]. This decision was implemented by her parents when [Jodi]'s father became ill.

[120] Having heard all of the parties I am satisfied that [Ruhi Kawhena] and her husband believed it was the best arrangement for at that time [Amiria]. I can only conclude then that [Jodi] was not in a position to provide the same level of care as [Lorena] and [Hemi]. I am further satisfied that [Jodi] was struggling to meet her responsibilities parenting all of her children at that time.

[121] [Ruhi] gave evidence that she thought a whangai arrangement may place [Amiria] at risk of entering into unhealthy relationships. I give little weight to this view as it was, she who implemented this whangai care arrangement.

[122] I found [Hemi] to be a credible witness. In respect of this issue his evidence was that when [Amiria] was placed in their care there was no timeframe given to him as to how long she would remain with them. He said it was difficult to understand [Jodi]'s position because she would at times want to keep [Amiria] in her care following visits but then would give her back directly. It is his evidence that following discussions with [Jodi]'s parents, [Amiria] came into their care in December 2018 and that his experiences with the whānau it was [Ruhi Kawhena] who made most of the decisions. There was a further hui in March 2019 at [Jodi]'s home where [Jodi] wanted

to retain [Amiria] in her care and discussions were tense. However, at the conclusion of those discussion that [Jodi] walked [Amiria] to [Hemi] and passed her to him saying, “[Amiria] is yours take her back with you take her back to Hamilton”. [Ruhi Kawhena] was also present during this meeting, and she agreed that [Amiria] should return to Hamilton with the applicants.

[123] There was reference in the evidence from [Ruhi Kawhena] that a whānau hui occurred after [Amiria] was placed with the applicants in Hamilton. [Amiria]’s continue care in Hamilton was discussed. [Ruhi Kawhena] was present, and it was her evidence [Amiria] was settled and doing well in the applicants care and she talked [Jodi] into allowing [Amiria] to remain there. Unfortunately, [Ruhi Kawhena] was unable to tell the Court when this meeting took place.

[124] Whatever the case, [Amiria]’s continued placement with the applicants has been reviewed and remained. [Jodi]’s evidence is that she did place [Amiria] in the care of the applicants reluctantly and never really wanted her to be removed from her care.

[125] In regard to the issue of whangai I found the evidence of Mr [Napō Francis] (Mr [Francis] Senior) of great assistance. I would class his evidence as that of a cultural report but accept that his view is not entirely unbiased as he is the father of the applicant.

[126] Mr [Francis] Senior holds a master’s degree from [details deleted]. His evidence was that a whangai relationship is that it is to feed and nature, protect and ensure a safe environment for any tamariki that you have been made responsible for.²⁶

[127] He was asked what might cause a return of a whangai. His response was, “That if any whangai was returned it was because whoever was doing the whangaing was useless”. It was put to him that [Amiria] was being provided in his extended whanau home the care that could not be matched elsewhere to which he agreed.²⁷

²⁶ Notes of Evidence page 124.

²⁷ Notes of Evidence page 1 to 6.

[128] On the question of whangai Mr [Francis] Senior gave a very helpful context. In summary he referred to modern context and a traditional context. In terms of a traditional context a whangai family, respecting the hugeness of that gift, is required to provide the best of care to the child and a return to the biological family would be rare.

[129] However, in a modern context people are not concerned about family reputation:

We are in a demanding consuming kind of society where attitudes differ and long term commitments that people used to make about whangai... In the traditional context when a child is given the most important thing in the world, placed in your care and protection you are only required to do one thing and that is to move heaven and earth to make sure that the job is done to its up most.

[130] In this case Mr [Francis] Senior's view was that the whangai relationship was unclear because of both the lack of specific expectations and perhaps people's different view on what whangai is, given the change from the traditional to the modern context.

[131] This evidence was helpful because it allows me to consider the issue of parenthood in a Māori context based on the facts of this case. This reflects s 4 of the Care of Children Act 2004 which requires that I consider this child in this child's particular circumstances. In this case the facts indicate to me that this child was placed with the applicants and entrusted to provide ongoing and committed care, love, protection to the best of their ability. Having heard the evidence I am satisfied that they have done the one job that was required of them when [Amiria] was placed in their care as described by Mr [Francis] Senior. They were in my view asked to parent this child and bring her up as a member of the applicant's family.

[132] It is clear that s 5(b) provides a preference to a biological parent, but I am able to take into account this child's circumstances and the responsibilities placed upon the applicants to provide all the responsibilities of a parent. It is but one factor I must take into account. There is simply insufficient evidence for me to determine whether there was clear certainty that this would be a long-term placement when [Amiria] was whangai'd to the applicants in March 2019. What I am certain of is that it was a serious commitment made by the applicant to provide a home and family for [Amiria]. It was

also a serious and considered decision by the maternal whanau. Both committed to this care arrangement for [Amiria]'s best interests.

Section 5(c) – Consultation and co-operation

[133] Section 5(c) states that a child's care be facilitated by ongoing consultation and co-operation. In deciding care arrangements, the Court will consider which party might better facilitate consultation and co-operation so as to facilitate good care and contact for [Amiria]. [Jodi] raised concern that the applicant was not consulting her on guardianship matters and she had learned about [Amiria] enrolled in school and various activities from her mother.²⁸

[134] She also raises concerns that she was not given regular updates or photos of [Amiria] nor invited to any parent teacher interviews and that she has only been allowed contact when it suits her. When she has come to [town A], [Amiria] was dropped off expectantly. There was no communication that they were coming.²⁹ She alleged the applicants had stopped her from having contact.

[135] In cross-examination [Jodi] accepted that the applicants had provided a safety net for [Amiria] and that this was a whangai situation. Her concern was that she would not be heard and that all decisions would be made by her mother and not her. She took responsibility for broken communication between herself and [Lorena] after she assaulted her.³⁰

[136] She agreed to engage in a hui to forgive and move on. She also agreed that the applicants haven't stopped her contact and that she did not push the issue of contact with [Amiria]. She also accepted that it is only been the last school holidays before the hearing that she exercised contact for some time. She also accepted that following the applicants concern that [Amiria]'s brothers have been left unsupervised in June 2023 as she did not pursue contact because she knew their concerns were valid.

²⁸ Affidavit of [Jodi Kawhena] dated 2 June 2021 at paragraph [8].

²⁹ Abid at paragraph [11].

³⁰ Notes of Evidence page 272.

[137] I give credit to [Jodi] for accepting her part in the breakdown of communication and not engaging in communication thereafter. Having heard the evidence of [Hemi] and [Jodi] it is clear that [Hemi] has continued to promote communication as [Jodi] and [Lorena] were unable to do so.

[138] I am satisfied that as a result of [Jodi]'s actions and lack of engagement regarding communication, she has not practiced the principle of consultation and co-operation in the best interest of [Amiria].

[139] It is positive that [Jodi] wants to communicate directly with the applicants which may well improve communication. There is a willingness for them to meet, forgive and hopefully move forward.

Section 5(d)

[140] In respect to the principle of continuity of care it is necessary to assess which party is best able to provide stability and certainty of future care arrangements.

[141] For the applicants they have demonstrated continuity of a high level of a stable and loving care of [Amiria] since December 2018. There have not been any concerns raised about their ability to provide stability and certainty within the assessments undertaken by Oranga Tamariki. There have been no criticisms of the applicants care of [Amiria] throughout and in fact both [Jodi] and her mother acknowledged she is well cared for with the applicants.

[142] [Jodi]'s commitment to contact and care has been less predictable. She has been unable to commit to face-to-face contact and telephone contact for long periods of time. When this was put to her in the meeting with the social worker Ms Thomas she reported as follows:

When asked about her contact with [Amiria] [Jodi] stated there are certain days and times where she can telephone [Amiria]. When I asked [Jodi] how this is going [Jodi] states she is too busy to telephone [Amiria] during those times, "I will phone her when I can". [Jodi] stated she has seen [Amiria] in holidays and also again for her birthday.³¹

³¹ Section 132 report dated 23 August 2022 at paragraph [2].

[143] As previously noted [Jodi] detached from contact for a period and did not pursue it until the school holidays just before the Court hearing. The evidence shows that [Jodi] has been inconsistent with her contact. She has not prioritised her relationship and contact with [Amiria].

[144] [Jodi]'s personal circumstances have changed, and the Court was notified during the proceedings. [Jodi] is pregnant to her partner. The dynamics in [Jodi]'s home will change. There be four children and [Jodi]'s partner in the home.

[145] To change the present care arrangements for [Amiria] would be an extreme difference of environment, a change of school, a change of parenting style. More importantly [Amiria] would enter a household with a fourth child, a young and vulnerable baby in an untested environment.

[146] The evidence is that [Jodi] has struggled under pressure. She is in a very new relationship and a new baby. This will place greater stress on [Jodi], the effects of which are unknown and untested.

Section 5(e) – Continuity of relationship

[147] There was concern raised that [Amiria]'s relationships with her siblings was compromised by the present care arrangements and that she would benefit from living with her brothers to strengthen that sibling relationship.

[148] The dynamics of [Amiria]'s relationship with her brothers, unsurprisingly, is somewhat challenging. Her view about their relationship will be referred to later. Whether the relationship will improve or deteriorate within the household is unknown. I acknowledge that sibling relationships are very important. There was no real argument within the hearing that the sibling relationship could not be promoted during the periods of holidays.

[149] Certainly, the relationship between the applicants and [Amiria] would change if she were to move to her mother's primary care. The difficulty in this case is that the

distance between the parties means that [Amiria]'s relationship with the non-day-to-day caregiver is limited to school holidays only.

[150] Contact continues by Facetime or telephone calls. That is not the same. Sadly, [Jodi]'s inability to commit to continuing her relationship with [Amiria] via face-to-face contact and telephone confirms that she has not been able to strengthen and preserve her relationship with her daughter. In this case I am satisfied that the present care arrangements are more likely to promote continuity of relationships.

[151] Further given [Jodi]'s lack of continuity of contact with [Amiria], this indicates a risk to future contact between the applicants and [Amiria] if she returns to her mother's care. There is little evidence to support the proposition that [Jodi] would actively promote continuity of relationships for [Amiria].

[152] It is accepted that there is a limited relationship between [Amiria] and [Vince]. Given his lack of participation in these proceedings and evidence relating to his violent background it is appropriate that any contact he has is supervised.

Section 5(f) – Child's identity

[153] [Amiria]'s [iwi name deleted] heritage and religious faith of her maternal whānau as members of the [church details deleted] were noted aspects of her identity in the evidence presented by [Jodi]. It was counsel for the applicants' submission that the heavy weight placed on that by [Jodi] was overstated when tested in reality. Having considered the evidence, I take into account the following factors relating to [Amiria]'s cultural identity:

- (a) It has been accepted that [Amiria]'s knowledge of Te Reo Māori has been highly promoted within her present home environment.
- (b) [Amiria] is a proficient speaker of Te Reo as a result of her education and home environment with the applicants.
- (c) I am not satisfied that the same level of proficiency of Te Reo Māori would be present within [Jodi]'s home.

- (d) [Amiria] has not been taken to her marae since she was a baby.³²
- (e) [Jodi] has not taken her sons back to the marae in [town B] for some time because of the roads but was unable to tell me the last occasion they attended.³³
- (f) There was no specific evidence around what steps [Jodi] has taken to promote [Amiria]’s knowledge of [iwi name deleted].
- (g) [Amiria]’s aunts and uncles live in the Waikato away from their turangawaewae and there is no issue with that raised by [Jodi] or her mother.
- (h) Counsel for the applicants refers me to the evidence of Mr [Francis] Senior, “Many people can live away from their tribal areas and still are able to connect strongly and powerfully to who they are, where they come from and their language and their tikanga...living in the Waikato does not lessen the [iwi name deleted] whakapapa of [Amiria].”³⁴
- (i) [Amiria] and [Lorena] share the same maternal whakapapa and [Jodi] and [Lorena] were brought up together.

[154] Given the above factors I am not satisfied that a change of care is necessary in order to promote [Amiria]’s [iwi name deleted]. I am satisfied that her cultural identity Maori is being well promoted.

[155] In respect of religious beliefs [Lorena] is well versed in [their faith]. [Jodi]’s expectation is that [Amiria] understand the principles and the teachings of the church and would attend about twice a month. However, I was not clear from the evidence as to how often [Jodi] and [Amiria]’s brothers attend church in [town A].

³² Notes of Evidence page 282.

³³ Note of Evidence page 283.

³⁴ Notes of Evidence page 128.

[156] Having considered the evidence I am satisfied that [Amiria]’s knowledge and engagement with [the church] can be promoted within the care of the applicants.

Section 5(g) and section 6

[157] [Amiria] has been well represented by Ms Hope in these proceedings. In Ms Hope’s first report of 25 June 2021 [Amiria] had nothing negative to say about her mother’s home or the applicants home. She preferred to remain living with the applicants and was concerned her mother may not return her to school.

[158] In her second report of 17 September 2021 [Amiria] had nothing negative to say about her visit with her mother. Ms Hope reported from [Amiria]’s school where her teacher informed that she herself was of [iwi name deleted] descent and was aware of [iwi name deleted] Waikato group who had their whānau days and other such activities as a means of maintaining wānanga, pūanga, cultural and whānau connections outside of their common [iwi name deleted] iwi boundaries.

[159] In the third report of 17 December 2021 [Amiria] reported feeling good about having contact with her mother and going to nannie [name deleted] and about living with the applicants. She was excited about spending time at her mothers’ during the holidays. When asked about how she felt about living with her mother she provided a positive response picking up a smiley face. When the same question was asked about the applicants with a big smile on her face picked up the grimace face emotion and made a big cheeky smile towards [Hemi] who she wanted to remain with her. I took this to be a positive response with a cheeky side to [Amiria]’s personality.

[160] In the fourth report on December 2023, she talked about the applicant’s daughter who she referred to as her teina (baby sister). She also referred to her as pepi (baby). [Amiria] also talked lovingly about her brothers. She is acutely aware of what is going on between the adults and became teary until distracted by Ms Hope. She did not know about living with her mother but said that she likes going to her mother’s home. She reported that her brothers fight a lot, and they push and hit, and she get sad and angry and then she tells “mumma” ([Jodi]). She would prefer that [Jodi] and the

applicants all live together. She then became teary. She did not know if she wanted to talk to the Judge and became upset.

[161] It was clear from the last report that [Amiria] has become distressed by the adult conflict and Court proceedings. It is essential that the adults in this case ensure any further conversations relating to care, contact or guardianship issues are between them alone and do not involve [Amiria] in order to protect her. What is also so clear is that [Amiria] loves all her family. She is privileged to have so many people be concerned about what is best for her future. It is clear that she did not wish to express any preference as between those people that she loves.

Discussion and decision

[162] Having assessed each of the issues as they relate to the principles of the Act, I must now weigh them and determine what would be in the best interests of [Amiria].

[163] The following are factors which would weigh in favour of [Amiria] returning to the care of her mother:

- (a) As the only parent participating in these proceedings, she has a priority to care for her children as opposed to 3rd parties pursuant to s 5 (b) of the Act. This position was recognised in the case of *B v Department of Social Welfare*³⁵, where Justice Tipping stated, “ordinarily, the interests and welfare of children are best served by their being in the custody of the biological parents, or at least one of them; that is to do no more than state the obvious and to recognise the fundamental role of the biological family and our society.”
- (b) There is greater opportunity to strengthen the relationship between mother and daughter.
- (c) There is great opportunity to strengthen the relationship between [Amiria] and her brothers.

³⁵ *B v Department of Social Welfare* [1998] 16 FRNZ 522.

- (d) There is greater opportunity to strengthen relationships between [Amiria] and her family who live in [town A].
- (e) [Jodi] has the support of her mother [Ruhi].

[164] The factors which impact negatively upon placement of [Amiria] in the care of her mother are as follows:

- (a) [Jodi] has inflicted physical violence upon members of the family including [Lorena].
- (b) There is a history of the children of the family being exposed to family violence by both the father and the mother.
- (c) There is a history of reports of concern for children in the care of [Jodi].
- (d) There have been recent reports of concern for children in her care,
- (e) [Jodi] has not been honest within her affidavit evidence to the court and has attempted to mislead the court.
- (f) [Jodi] lacks insight into the risk of harm to her children posed by [Vince].
- (g) There is insufficient evidence to satisfy the court that [Jodi] has addressed her anger issues or propensity to lash out physically.
- (h) The evidence shows a pattern of psychological abuse by [Jodi] towards her children by physical and verbal threats. There is no evidence that [Jodi] has addressed this behaviour.
- (i) [Jodi] has evidenced a lack of capacity to maintain and sustain a tidy and unchaotic home for a sustained period.

- (j) [Jodi] has shown a lack of commitment to her contact both in attitude and practically with [Amiria].
- (k) [Jodi] has evidenced a lack of commitment to communication with the applicants and has jeopardised communication by assaulting [Lorena].
- (l) [Amiria] has not lived with her mother and siblings for the last five years and this would be a significant change to her continuity of care. It would also be a change of school.

[165] Conversely the factors in favour of [Amiria] remaining in the care of the applicants are as follows:

- (a) The applicants provide a violence free and safe home. There have never been any family harm reports, reports of concern or issues raised about [Amiria]'s safety in the care of the applicants.
- (b) [Amiria] has been well cared for by the applicants and she is seen as a part of the family.
- (c) [Hemi] has continued to actively promote communication.
- (d) The applicants provide continuity of care to a high level. This is a tested and positive environment for [Amiria].
- (e) [Amiria] is thriving at her school.
- (f) [Amiria]'s cultural identity is strongly promoted within the care arrangement. [Lorena] and [Amiria] share the same maternal whakapapa.
- (g) [Jodi]'s other siblings and their families live in the Waikato area.
- (h) The applicants are not biological parents, but they are whangai parents.

- (i) The applicants are able to actively support the relationship between [Amiria] and her siblings and mother.
- (j) Both [Jodi] and [Ruhi] agree that the applicant have cared for [Amiria] very well.
- (k) The applicants and [Amiria] are well supported within the Papakainga whanau relationship.

[166] The disadvantage for [Amiria] remaining in the care of the applicants is that she would not have the same opportunity for a relationship with her mother and siblings as her siblings do in [town A].

[167] [Jodi]'s Counsel places great weight on section 5 (b) and refers me to the case of *Fletcher v McMillan*³⁶, that the status quo for a child should not be disturbed unless the welfare of the child simply put the court noting further the appellant authorities indicate that such intercession should only be undertaken on a convincing proof. This case is a precedent case when considering interim care arrangements. In my view it does not apply to this case. In any event the status quo in this case would be to remain in the care of the applicants. They have had the care of [Amiria] for the majority of her life.

[168] He also submits there are no care and protection concern for [Amiria] in the care of [Jodi]. Given the findings I've made in this case I cannot accept that there is no risk to [Amiria] in [Jodi]'s care.

[169] Having considered all of the factors above I've come to the overwhelming conclusion that [Amiria]'s welfare and best interests would best be served by confirming the status quo in which she is safe, stable, and thriving as opposed to [Jodi]'s care which has many risk factors, has recently changed and is now untested.

[170] I turn to consider the contact provisions. [Jodi] has not been able to commit to term contact and given the travel it is quite arduous for [Amiria] and the parties both

³⁶ *Fletcher v McMillan* [1990] NZFLR 302.

in time and cost. I will reduce the term time contact to one visit in [town A] but provide an opportunity for contact to occur in Hamilton if [Jodi] is able to travel.

[171] Against that background I grant the following orders and directions:

- (a) The interim parenting order dated 17 December 2021 is discharged.
- (b) I grant a final parenting order providing to [Lorena Kawhena-Kennedy] and [Hemi Francis] the day-to-day care of [Amiria Kawhena] born on [date deleted] 2015.
- (c) That order shall provide to [Jodi Kawhena] contact as follows:
 - (i) During the school term,
 - 1. the third weekend of the term to take place in the Waikato from Friday after school until Sunday 6 pm; and
 - 2. the sixth weekend of the term to take place in [town A] from Thursday after school until Sunday 6 pm.
 - 3. This contact is conditional on [Jodi Kawhena] confirming in writing that she is exercising the contact no later than 3 days before the scheduled contact visit.
 - (ii) During the school term holidays,
 - 1. From Saturday after school finished, until Thursday before school resumes.
 - 2. This contact is conditional upon [Jodi Kawhena] confirming in writing that she is exercising contact no less than 7 days before the scheduled visit.

- (iii) [Jodi Kawhena] shall be responsible for transport at the commencement of contact. [Lorena] and [Hemi] shall be responsible for transport at the conclusion of contact.
 - (iv) Video/Phone call each week on Sunday from 6pm until [Amiria] is ready to hang up.
 - (v) Any other contact as agreed.
- (d) The parenting order shall provide to [Vince Johnson] supervised contact at a court approved centre.
- (e) Conditions:
- (i) [Amiria] is not to be exposed to any person either using or under the influence of illicit drugs, or any person abusing alcohol (beyond the legal limit of that person to drive).
 - (ii) [Amiria] is not to be exposed to any form of family violence, which includes any physical discipline or threats of the same.
 - (iii) Should any family violence incidents or investigations by police or the Ministry for Children occur, the non-caring party/s shall be notified immediately by the party/s involved.
 - (iv) In each school term, [Amiria] is to attend church on at least one occasion with any maternal whanau nominated for that purpose, provided that no less than 14 days prior notice is given by [Jodi Kawhena] to the applicants in writing.
 - (v) Consent to [Amiria] travelling overseas is not to be unreasonably withheld by any party on the condition that the following information is provided by the travelling party no less than six weeks prior to the intended travel;

- a. itinerary of travel dates and accommodation
 - b. contact details while travelling overseas; and then
 - c. confirmation of travel documents no less than 21 days before intended travel.
- (f) Lawyer for child's appointment is terminated with thanks of the Court once she has reported to [Amiria].
- (g) [Jodi] is legally aided and therefore exempt from a cost contribution order.
- (h) If the applicants are not legally aided I determine that as they are the primary caregivers any cost contribution would detrimentally effect [Amiria] therefore is inappropriate. Pursuant to s.134A(4) of the Act the contribution is nil.

Judge R Paul
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 01/03/2024