EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT MANUKAU

FAM-2014-092-1369
[2016] NZFC 7039

IN THE MATTER OF	The Adoption Act 1955
BETWEEN	JOANNE BARTHA CHRIS HAWK Applicants ARAHI CLARK FINN BARTHA-HAWK Children whom the application is about

Hearing:	18 August 2016
Appearances:	Ms N Cramer for applicants Mr K Goldsbury Lawyer to Assist
Decision: Reasons:	30 August 2016

RESERVED REASONS FOR DECISION OF JUDGE M L ROGERS

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[1] On 18 August 2016 I granted Joanne Bartha and Chris Hawk final adoption orders in respect of Arahi Clark, born on [date deleted] 2012 and her younger brother Finn Bartha-Hawk born on [date deleted] 2014. Arahi is usually known as Rose and I will refer to her by that name in this decision.

[2] Due to time pressures on that day I reserved these reasons for later delivery.

Background

[3] The children's birth mother is Abby Clark. Although the children's father was not recorded on their birth certificate, Abby Clark's affidavit says that she believes their birth father is Fabian Vince. Abby Clark and Mr Vince were not married, nor did they live together between the conception and the birth of the children. There was allegedly domestic violence in their off and on relationship and Child, Youth and Family records indicate that Mr Vince may have gang affiliations. He has been reported to them as a perpetrator of violence.

[4] Even before Rose was born there were concerns about Abby Clark's ability to care for a child. Not only was Abby Clark in a difficult relationship but she was also said to be transient and abusing drugs. It was initially hoped that with support from her adoptive mother, Ms Sandra Clark, Abby Clark might be able to look after Rose. For the first three months of Rose's life she and her mother lived in Sandra Clark's home. Despite that support and oversight, Abby Clark was not able to adequately parent Rose and the responsibility for that role fell to Sandra Clark. Sandra Clark was in due course appointed a legal guardian for Rose.

[5] Sandra Clark is employed with [name of employer deleted]. She was not in a position to give up her fulltime employment and of necessity placed Rose in a Kohanga Reo during her work hours. Sandra Clark was not entirely happy with this arrangement and began to actively consider other care options. She then came to know Joanne Bartha and Chris Hawk, a married European couple [age details deleted]. Although Mr Hawk and Ms Bartha had previously provided transitional placement for children through Child, Youth and Family, they did not have children of their own.

[6] Significantly the children who Mr Hawk and Ms Bartha had previously cared for on behalf of Child, Youth and Family were all of Māori ethnicity. Although not themselves Māori, Mr Hawk and Ms Bartha have close ties with the Māori community in their local area.

[7] Mr Hawk, who is [ethnicity deleted], has had experience working for and with indigenous communities [details deleted] and on the basis of that background experience was [employment details deleted]. [Details deleted].

[8] [Details deleted].

[9] Once the connection had been made between Sandra Clark and Mr Hawk and Ms Bartha, whānau hui were convened to discuss the proposal that they care for Rose. By the time of the first whānau hui Mr Hawk and Ms Bartha had already formed a strong attachment with Rose as a result of their relationship with Ms Sandra Clark.

[10] The first whānau hui occurred when Rose was approximately 16 months old. I understand from the evidence of Ms Bartha and Mr Hawk that it was a relatively small hui that took place about a week before Rose was placed in the day to day care of Ms Bartha and Mr Hawk. From the outset maternal family were entirely supportive of Mr Hawk and Ms Bartha seeking adoption orders to confirm the placement. The general consensus was that an adoption order would provide far greater certainty, stability and security of care. Both Sandra Clark and Ms Bartha has a clear understanding of the Home for Life policy and the structure of parenting orders and additional guardianship due to their experience of working alongside Child, Youth and Family. They did not feel that anything less than an adoption order would be adequate in their circumstances.

[11] Rose was settled with Mr Hawk and Ms Bartha in March 2014. Subsequently Abby Clark gave birth to another child Finn, who is believed to be a full sibling to Rose. Finn was born on [date deleted] 2014. On 9 June 2014, a second more extensive whānau hui was held involving 10 members of the maternal family, including Sandra Clark but not including Abby Clark. That hui determined that Finn should also be placed with Ms Bartha and Mr Hawk so that he and Rose

could be raised together. Finn has now been living with his sister in the care of Mr Hawk and Ms Bartha since the date of that hui.

[12] On 7 October 2014 Ms Bartha and Mr Hawk applied for adoption orders in respect of both children. Abby Clark provided her consent to the applications along with an affidavit advising that she believed this way the children would be in a much better, safer environment than if they were to stay with her. It was her clear preference that the children be raised together.

[13] On 8 May 2015 the standard report from Child, Youth and Family was provided to the Court. That report was entirely positive about the applicants and their care for the children and deemed them to be fit and proper people as required by s 11(a) of the Adoption Act 1955. The social worker also concluded that an adoption order would be in the children's welfare and best interests pursuant to s 11(b) of the Act and noted there were no relevant religious considerations pursuant to s 11(c). The social worker went on to recommend that if an adoption orders were to be made they should in the first instance be final orders on the basis of special circumstances pursuant to s 5(b) of the Act. It was noted that the applicant and the children had been living together as a family unit for some time and that the placement was with the full support of the maternal birth family. The social worker therefore saw no benefit in a monitoring period.

[14] When the matter came before Judge Skellern, she expressed some reservations about the extent of the birth mother's understanding of adoption. A supplementary social worker's report was directed.

[15] On 5 June 2015 Mr Goldsbury was appointed as counsel to assist and he subsequently filed a memorandum dated 5 July 2016. In that memorandum Mr Goldsbury also expressed some concerns, primarily regarding the social worker's inability to make contact with the children's birth mother or establish with any degree of certainty, the identity of children's biological father (or fathers). Mr Goldsbury also noted the concerns Judge Skellern had previously identified. At the time of filing his report Mr Goldsbury had not had an opportunity to read the social worker's supplementary report filed on 22 June 2016, which largely addressed those issues.

[16] The supplementary report from Child, Youth and Family confirmed that the social worker had been able to meet with Abby Clark and satisfy herself that Abby Clark had an appropriate understanding of the effects and implications of an adoption order.

[17] Abby Clark was very positive about the applicants, their care for the children and the [details deleted] lifestyle they are able to offer. Ms Clark was clear that if she was not able to parent the children herself, then it was best that they be adopted by the applicants and further she acknowledged that she was not in a position to care for the children herself. Abby Clark had no reservations about her children being raised by people of European heritage and noted that she herself had a mixed [ethnicity details deleted] heritage.

[18] The social worker made enquiries with Louise Darroch, the solicitor who certified Abby Clark's consent in June 2014 and Ms Darroch advised that if she had had any reservations about the natural mother's capacity to consent, she would not have proceeded with taking her consent.

[19] That supplementary report effectively resolved the concerns about capacity and consent while confirming the reality that paternity cannot be definitively confirmed. That meant that by the time the matter came before me the key issue outstanding was whether I could be satisfied that it would be in the welfare and best interests of these children, who whakapapa to [iwi details deleted], for them to be parented by people of European descent.

[20] The effect of an adoption order is to create a new parent-child relationship between the adoptive parents and the child and to extinguish the relationship between the birth parents and the child. All other relationships are affected accordingly.

[21] This reflects the more traditionally 'European' concept that responsibility for a child lies with the parents as legal guardians. This concept is inconsistent with traditional Māori concepts that a child is a child of the whānau and hapu. The Māori concept has been described thus:

> The Maori child is not to be viewed in isolation, or even as part of nuclear family, but as a member of a wider kin group or hapu community that has traditionally exercised responsibility for the child's care and placement.
>
> (*Puao-te ata-Tu*, Report of the Ministerial Advisory Committee on a Maori perspective of the Department of Social Welfare, September 1988, page 29).

[22] In commentary and case law dealing with the issue of the adoption of Maori children Dame Joan Metge's paper "*Ko Te Wero – The Maori Challenge*" in Family Court, Ten Years On (NZ Law Society, 1991) at 24-25 has been and continues to be frequently cited:

> In Maori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately and in association, outrage Maori sensibilities. Children belong to the whanau (and beyond that to the hapu and iwi) as members, not as possessions. They are taonga, highly valued "treasures" held collectively and in trust for future generations. In whanau which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whanau members. Sometimes, especially with the eldest, this means relinquishing their daily care, for a short or long period, to a grandparent or other relative. Generally it means that other whanau members carry out the same functions as parents do, as occasion arises and in their presence as well as their absence.

[23] In addition, the decision of the Full Court of the High Court in *BP v D-GSW* [1997] NZFLR 642 has made clear that the Adoption Act is "….to be interpreted as

coloured by the principles of the Treaty of Waitangi" (at 646). The Court accepted the contention of counsel for the Māori appellant that:

> "…the cultural background of the child is significant and that, in addition, the special position of a child within a Maori whanau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child."
>
> Ibid at 647.

[24] The Court in *BP v D-GSW* also noted the relevance of the ability or otherwise of the child's whānau to affirm Māori values and norms in the following passage:

> "
>
> It is also necessary to say, without implying any criticism of the whanau in this case, that the appellant's contention [that the welfare of the child is inextricably linked to an affirmation of Maori values and norms in her everyday life] involves to some extent at least, an idealised concept of the obligations and supportive responsibilities of the whanau. While there are still many whanau which do accept and in their own ways exemplify the standards and values referred to by the appellant, it is also true that there are dysfunctional whanau amongst Maori, as well as amongst the other communities within our society. There are also situations where, whatever the intentions of whanau may be, the circumstances under which they live or operate prevent them from providing the nurture which is desirable. In every case therefore, there will need to be an assessment of the extent to which the values for which the appellant contends, can reasonably be expected to be maintained and available and the place of the particular

> child within the particular whanau must be considered. The fact that a distinction is drawn between the values and advantages of the traditional organisation of Maori society and its application in a particular case is in no way denigratory of those standards, values and organisation." Ibid at 648.

[25] It was of considerable assistance to me to have the children's maternal grandmother, Sandra Clark, at Court. She has been a consistent and stalwart supporter of the applicants and I particularly note her evidence at paragraph [6] of her affidavit dated 5 March 2016.

> "In the first instance the whanau decision to give Rose to be raised with Joanne and Chris was guided by the principles of whangai; to be raised as if she were their own, as if born to them. These principles also include; the right to know who she is and where she comes from (whakapapa) and whanaungatanga; to always have a direct connection to biological whanau."

[26] In granting the applicants a final adoption order I was satisfied as to all of the s 11 criteria, including that the order would be in the children's welfare and best interests notwithstanding that this was a an adoption of Māori children by non-Māori applicants. That care for Māori children should first and foremost be provided by whānau, iwi or hapu is the ideal but the reality is that is not always a feasible option. In this case the whānau themselves identified and approved the applicants as parents who would support the children's whakapapa and whanaungatanga and who would walk alongside the whānau. That is consistent with the Māori view that whatever the law might say, adoptive parents do not replace a child's blood whānau but rather add to it. This perspective was noted by Judge Inglis in *B v M* [1997] NZFLR 126 at 135.

[27] Further, in circumstances where Rose has been living with the applicants since she was approximately 16 months old and Finn virtually since his birth without any concerns whatsoever for their welfare, I agreed with the social worker's view that there was no merit in ongoing monitoring and found special circumstances satisfying the s 5(b) criteria so that a final order could be made in the first instance.

[28] Accordingly both applications were granted and final adoption orders were made in respect of each of the children.

M L Rogers
Family Court Judge