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

NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989, 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 MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2016-092-000955
[2020] NZFC 3632

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[JS] Respondent
AND	[LS] born on [date deleted] 2016 Child or Young Person the application is about

Hearing:	22 May 2020
Appearances:	Ms Bava for the Chief Executive No appearance by or for the Respondent A Gluestein as Lawyer for Child Ms Porio as Social Worker
Judgment:	26 August 2020

RESERVED JUDGMENT OF JUDGE K TAN

Introduction

[1] These proceedings relate to the young child, [LS]. He is in the custody of the Chief Executive of Oranga Tamariki. There are the following orders in place for [LS]:

(a) An order preventing his removal from New Zealand dated 6 September 2016.

(b) A declaration under s 67 that he is a child in need of care and protection dated 21 March 2017.

(c) A s 101 custody order granting the Chief Executive of the Ministry of Social Development custody dated 21 March 2017.

(d) A ss 110(1) and (2)(b) order appointing the Chief Executive additional guardian of [LS] dated 21 March 2017.

[2] This matter first came before me on 14 May 2020, to consider the revised plan and the social worker's report. On 14 May, I declined to conduct the review and adjourned the matter to 10.00 am on Friday 22 May 2020. The reason for that adjournment is that Mr Gluestein as lawyer for [LS], in his report of 13 May 2020 raised some issues about the plan and sought clarification from the social worker as to whether a whānau member, [TH], was being actively assessed as a caregiver for [LS].

Background

[3] [LS] is the child of [JS]. [JS] has whakapapa to [iwi deleted] on the [area deleted] of Aotearoa. It is unclear as to whether she also has other whakapapa connections. In terms of [LS]'s paternity, his father is not named and his father's identity is recorded as unknown so for [LS], there is a gap in terms of knowing one half of where he is from.

[4] The day after [LS] was born, Oranga Tamariki filed without notice and were granted a s 78 custody order for him. He only spent one day in his mother's care before being uplifted. In summary, the issues that resulted in [LS] being a child in need of care and protection include:

(a) [JS]'s previous history of care of her children (she had five children prior to [LS] removed from her care and not returned).

(b) Her use of methamphetamine including during her pregnancies and a history of being involved in relationships involving serious violence, where she has been a victim of assault during her pregnancies.

[5] For all his life [LS] has been in state care. A review of the affidavit by the social worker in support of the s 78 custody order shows that there have been extended whānau that have been available to care for some of [LS]'s half siblings at different times. His half-siblings have been cared for by paternal whānau, and one of his siblings cared for by a maternal grandmother. There is also a brother who has been in the care of non-kin caregivers since birth in 2008. When [LS] was uplifted he was placed in non-kin care.

[6] [JS] has not formally participated in the court process. She has not filed any formal response to the documents and does not appear to have turned up to any Court events. In fact, this is one of the cases where it appears that even at the initial family group conference there was no attendance from [LS]'s mother or in fact, from any of [LS]'s whānau. This is a tragedy for [LS] but what occurred back then should not define his relationships and connections moving forward or the approach to be taken when it comes to practically engaging and seeking out his connections.

[7] The family group conference record is dated 17 November 2016. In that record there were three persons in attendance, specifically; lawyer for child, the social worker and the care and protection co-ordinator. The record states that there were whānau invited but they did not attend. This includes [LS]'s mother, [JS], an aunty [AL] and other persons listed as cousins, being [four names deleted].

[8] The matter came before the Court for disposition in March 2017 and at that time the Court made the orders that I have referred to above, and approved the initial plan filed by the social worker. The initial plan is dated 24 November 2016. Since that time, there have been the six-monthly statutory reviews and further social worker plans and reports that have been filed. By and large the pattern has been the same,

there has been no appearance at any of the Court reviews for any whānau members and the Court has conducted each review by approval of the plans and continuation of the existing orders. I doubt that any member of [LS]'s whānau has even been aware of these Court events.

[9] [LS] remained in the care of his first caregiver until approximately September 2017. He then moved into the care of the family that is caring for him now. [LS]'s current caregivers lived next door to the Ministry caregiver who cared for him from birth but could not continue looking after [LS] because of health reasons.

[10] In terms of [LS]'s current care, he is in a safe and stable home environment and has been with his current caregivers for almost three years.

The issue with the current plan

[11] The plan that is before the Court for me to consider is dated 13 February 2020. It is accompanied by a s 135 review of plan social worker report of the same date.

[12] On first blush the plan appears unremarkable. It is seeking the continuation of the s 101 custody order and has very similar contents as what has previously been put before the Court. That is, that [LS] is to remain in a safe environment where all his physical, emotional and developmental needs are met and his education and health to be supported. The plan also has the goal that [LS] is "to be supported to develop a strong sense of identity and build whānau connection." That goal to be achieved via the following actions:

(a) Contact to be arranged for [LS] with his extended whānau.

(b) Explore the whereabouts of [LS]'s half-siblings and arrange contact.

(c) [LS] will be supported to know his pepeha and significant people in his life through a social story book.

(d) Referral to Kaitiaki team regarding whānau Rangahau.

[13] Despite the plan being 'standard' when it is read in conjunction with the social worker's report there are some issues with it. Lawyer for child brought this to the

court's attention in his report dated 13 May 2020. There are two issues that he raises that concern him:

(a) The uncertainty around any permanency objective for [LS], in particular that under the heading of "actions required to achieve objectives" the Ministry has stated it is to continue to explore whānau for [LS] and that they have not yet begun the process of supporting the current caregivers to apply for day-to-day care.

(b) Secondly in the social worker's report an extended whānau member, [TH], has been identified as a prospective long-term caregiver and the report states that applications have been received and were being processed.

[14] This is raised as a concern by lawyer for child because he fully supports [LS] remaining with his current caregivers, who he says have provided a safe and stable home for him, and that [LS] has been with them for over half of his life. Whilst he readily accepts and respects the original need to explore the possibility of whānau placement, he has expressed real concerns about the prospect of [LS] being removed from his current caregivers who are the only family that [LS] has ever known. He states in his report:

> Importantly, in the course of his short life, [LS] has had no contact with his mother or any whānau members notwithstanding the best efforts of the Ministry. While it would be good for [LS] to have contact with his half-siblings at an appropriate time, the position as I understand it is that all the half-siblings are placed with non-whānau. This may need to be confirmed by the Ministry.

[15] Because of these concerns raised, I adjourned the matter for the social worker to get confirmation as to where matters were at with the identification of whānau and more specifically, with the application for [TH] as a prospective long-term caregiver.

[16] Counsel for Oranga Tamariki filed a memorandum dated 21 May 2020 addressing that issue. The response from the Ministry confirmed that there is incorrect information in the social worker's report dated 13 February 2020 where it is stated the

caregiver application from [TH] had been received and is being processed. The correct position as set out in the 21 May 2020 memorandum is:

> ….that the caregiver application was withdrawn by [TH] for personal reasons. The Chief Executive closed the caregiver application process on 18 June 2018. Counsel can confirm that there are no current caregiver applications that have been received or are being processed.

[17] Counsel then sought in her memorandum that the plan and report of 13 February be accepted, noting that the reference to caregiver applications filed by [TH] is historical and was closed on 18 June 2018.

[18] I declined to simply conduct the review, noting that matter. I indicated to counsel in Court that I would be issuing an oral decision as to my reasons for that but highlighted to them that my view is that the plan is inadequate, and a new plan will need to be filed.

[19] I now set out my reasons why the plan is inadequate.

[21] The aspects of the plan that troubles me is twofold. Firstly the uncertainty around a permanency plan for [LS] and secondly the lack of meaningful provision for [LS] to establish let alone maintain, strengthen or be connected to his whānau, siblings, hapū and iwi or to maintain any whakapapa connections.

[22] There has been quite a bit of commentary about the changes made to the Oranga Tamariki Act that came into force on 1 July 2019. These changes demand a new way of practice in terms of Oranga Tamariki meeting their obligations to Māori whānau and tamariki and how the Court . There has been much discussion about s 7AA and the chief executives' obligations under the Treaty of Waitangi and recognition of tikanga Maori, mana tamaiti, whakapapa and whanaungatanga. The purposes and the principles of the OT Act also applies to the Court through section 7AA is exclusive to the Chief Executive.

[23] The purposes and the principles in the OT Act set out these new obligations. Below are the provisions that emphasis obligations to Māori whānau and tamariki.

4 Purposes

(1) The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—

(a) establishing, promoting, or co-ordinating services that—

(i) are designed to affirm mana tamaiti (tamariki), are centred on children's and young persons' rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them:

(ii) advance positive long-term health, educational, social, economic, or other outcomes for children and young persons:

(iii) are culturally appropriate and competently provided:

…….

(c) assisting families, whānau, hapū, iwi, and family groups to—

(i) prevent their children and young persons from suffering harm, abuse, neglect, ill treatment, or deprivation or by responding to those things; or

(ii) prevent their children or young persons from offending or reoffending or respond to offending or reoffending:

(d) assisting families and whānau, hapū, iwi, and family groups, at the earliest opportunity, to fulfil their responsibility to meet the needs of their children and young persons (including their developmental needs, and the need for a safe, stable, and loving home):

(e) ensuring that, where children and young persons require care under the Act, they have—

(i) a safe, stable, and loving home from the earliest opportunity; and

(ii) support to address their needs:

(f) providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act:

(g) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department:

(h) maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their—

(i) family, whānau, hapū, iwi, and family group; and

(ii) siblings:

…….

(2) In subsection (1)(c) and (d), *assisting*, in relation to any person or groups of persons, includes developing the capability of those persons or groups to themselves do the things for which assistance is being provided.

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

…

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

…

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(iv) mana tamaiti (tamariki) and the child's or young person's well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

…

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

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

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

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

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

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

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

…

7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)

(1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).

(2) The chief executive must ensure that—

…

(b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:

13 Principles

…

(2) In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:

…

(g) a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers only if there is a serious risk of harm to the child or young person:

(h) if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:

(i) if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—

(i) be consistent with the principles set out in sections 4A(1) and 5:

(ii) address the needs of the child or young person:

(iii) be guided by the following:

(A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:

(B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:

(C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:

(D) where practicable, a child or young person should be placed with the child's or young person's siblings:

(E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:

[24] What is perturbing when there is a closer scrutiny of the plans and reports that have been filed for [LS] since he has been in care is in fact the actual progress (or lack thereof) that has been made in maintaining and strengthening [LS]'s connections with his whānau, hapu, iwi and siblings. Also, a lack of action in terms of how [LS]'s sense of belonging, whakapapa, and the whanaungatanga responsibilities of his family, whānau, hapū, iwi, and family group are recognised and respected. There is a sense that recognising his connection to his whānau has become a tick box exercise which rather than enhancing his well-being has the unintended consequence of creating uncertainty with his current placement.

[25] I have purposely set out the principles above because it is clear from the wording of [LS]'s new plan that the Chief Executive is wanting to meet its obligations under the Act in terms of [LS] being with and connection to his whānau. However, a review of [LS]'s situation shows that what has happened in his case is words without substantive action. This means [LS] is currently in limbo. He is in a situation where he is now attached and in a stable placement with his current caregivers. They are seeking certainty about his long-term care but there is uncertainty about whether he will be placed with whānau. To be clear, no whānau have yet been identified as permanent caregivers for [LS].

[26] There is a risk that when Oranga Tamariki take a slavish adherence to the principle of placement with whānau without fully appreciating the nuances of the changes to the legislation – which is in fact about connection, whakapapa and whanaungatanga this can in fact place a child in a more precarious situation. That is the undermining of a stable placement and the double blow of no connection to whānau. The fundamentals and basics need to be done correctly. That is keeping and maintain connection from the beginning or in [LS]'s case (given they were severed at birth) reconnecting him and having this built up and maintained. This connection

should occur regardless of what the permanency outcome is to be and not a situation of only seeking out whānau for the purpose of permanency.

[27] On the face of it the Chief Executive could be commended for placing emphasis on finding permanent caregivers for [LS] who are whānau this is just words on paper if in fact it is not underpinned by the understanding connection needs to occur regardless of whether there are permanent options with whānau. If it is just words on paper then the changes envisioned in the Act will bear no meaning in terms of keeping [LS] connected to his whānau, knowing where he is from and where he belongs and recognising the concepts of whanaungatanga and mana tamaiti.

[28] A review of all of [LS]'s plans show that there has been a consistent theme in terms of what is written in the plan about recognising his connection to whānau, but the action appears to be missing and a cut and paste type of plan and reporting has developed for [LS]. This is insufficient to comply with the requirements of the Act. It is not just about the words but encapsulating the spirit backed up with action.

[29] A review of the previous plans shows this quite starkly. I outline them as follows:

(a) **Plan dated 15 March 2018**. At this time [LS] had been with his current caregivers for 6 months. It was noted in the objectives of the plan that [LS] is to have a sense of identity and whānau connection. In the social workers report it said caregiver assessments and safety checks on whānau who have applied need to be done and then once done [LS] can begin to have contact with whānau. [TH] was identified as a prospective whānau caregiver.

(b) My assessment of this plan is that the emphasis was on a long term whānau caregiver and not also on the wider development of whānau relationships. At that time whānau members were identifiable as set out in the FGC record of 17 November 2017. These names and relationships would in and of themselves provide a starting point for Oranga Tamariki to build a picture of people [LS] could have contact

with or who Oranga Tamariki could build relationships with to establish on going whānau connections.

(c) **Plan dated 19 October 2018**. In this plan the social worker said they were exploring sibling whereabouts so there could be contact. It was also stated that they had begun the process of assessing Aunty [TH] as a caregiver but had since been advised she is not in a position to be a caregiver. [AL] (maternal aunt) was also identified but caregiver assessments for her did not proceed.

(d) What is missing in the narrative to the Court is what steps were taken to look at these identified whānau members as persons [LS] could still have a relationship with – even if they weren't to be options as caregivers. Even if whānau are not able to take on a child permanently (or aren't going to meet the caregiving criteria of Oranga Tamariki) there is still an obligation on Oranga Tamariki to encourage, facilitate and assist with an ongoing relationship.

(e) **Plan dated 4 June 2019**. The plan again reiterates that sibling contact needs to be addressed. It also said in the social workers report that Oranga Tamariki continue to explore whānau placement but have found that they (whānau) are not yet in a position to take [LS] at this stage. It is noted [LS] has cultural support at preschool. It was also noted that a contact plan to foster his relationship with family is to be developed with Oranga Tamariki (what has been developed has not been provided to the Court). It was then recorded that none of [JS]'s whānau have been identified to become carers for [LS] as they do not have the capacity to take him on. It recorded that there were talks with Aunty [AL] and reference to [TH] and her son [AS] but that their caregiver applications were withdrawn **but they wish for photos and for contact to be arranged soon** (emphasis added). It was noted this is to be followed up by OT.

(f) I have purposefully added emphasis to the italicised words. This is because this should have been a clear signal to Oranga Tamariki that whānau still wanted to be connected and involved in [LS]'s life. Just because being a long-term caregiver was not an option did not mean the whānau were then walking away from [LS]. This was the opening for Oranga Tamariki to keep [LS]'s sense of belonging and connection with his whānau through these key persons who were wanting to exercise whanaungatanga.

(g) **Plan dated 13 February 2020.** This is the plan that has come before me to be reviewed. Alas it falls short. There is no update as to what current steps have been taken to maintain a connection between [LS] and whānau – in particular [TH] and her son [AS]. In fact, it mistakenly recorded [TH] still had an application to be a caregiver to be processed when that was withdrawn in 2018.

(h) There is no follow up on whether [LS]'s Aunty [AL] has been contacted to see if relationships can be fostered – or in fact any of the whānau named in the FGC record. While they may not have attended the FGC for whatever reasons existed at that time to enable [LS] to know where he is from and his connections to whānau these persons should be followed up.

(i) The plan notes [LS] had one visit with maternal whānau in April 2018 which was reported to be positive. The whānau at that visit advised they were not able to be long term caregivers – that should not have meant the end of their involvement in his life. [AL] was invited to visit but was not able to attend. [LS]'s second birthday was on [date deleted] 2018 and whānau did not attend as there was a tangi. This is what is recorded in the social workers report for the February 2020 plan – these events having occurred over 12 months earlier. What has happened to following up contact in the last 12 months? From one of the already identified whānau members may come forth more information about [LS]'s siblings and wider whānau and connections that will enable [LS]

to develop a sense of identity even if it transpires he will not be placed permanently with whānau.

[30] Much emphasis in the social worker reports has been put on finding a permanent placement for [LS] with whānau. It appears to be at the detriment of exploring connections for any other purpose. The basics need to be established for him. The plan needs to focus on fostering and developing relationships for more than just the purpose of permanency. For any permanency arrangement for [LS] to be successful a connection to his whakapapa and whānau needs to be established for the knowledge of who he is, where he comes from and his connections as a Māori child to his whānau, hapu and iwi. To date there have been many opportunities that have been lost due to the lack of follow through from Oranga Tamariki with those who have said they 'wanted contact to be arranged soon'.

[31] For these reasons the current plan is not approved. I ask the social worker to relook at the issue of how [LS] is to be connected to his whānau and whakapapa and who with, and to file a new plan that addresses this issue.

[32] The plan needs to be more prescriptive in its steps to re-establish relationships with whānau from a connection basis with practical and detailed action. The changes that came into force on 1 July 2019 will have nil effect if what is instituted in plans is words that are not backed up with meaningful action. A simple cut and paste of previous plans is insufficient. The changes in the Act should not be implemented in a way to create a wedge between non-kin caregivers and whānau. They are there to ensure that whānau are not excluded at the beginning when a child first comes to the attention of Oranga Tamariki. Where a child does come to their attention the state must recognise and work to assist parents and whānau to safely care for their children. But where the state must step in they need to do so in a way that still does not exclude whānau and that gives practical application to their ongoing involvement. This also applies in the event permanent whānau caregivers are not available. There is still an obligation that the mana of a Māori child needs to be enhanced and promoted and maintained and this can only be done through the recognition and practical promotion of whanaungatanga and whakapapa. E kore au e ngaro, te kākano i ruiruia mai i Rangiatea – I will never be lost, the seed was sown in Rangiatea.

[33] I now make the following directions:

(a) A revised plan and social workers report are to be filed 10 days prior to the next call of this matter.

(b) The review is adjourned to a 30-minute judicial conference on 2 December 2020 at 10am.

KMSH Tan
Family Court Judge