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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2020-070-000619
[2020] NZFC 10374

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Applicant
AND	[AS] First Respondent
AND	[DP] Second Respondent
AND	[DW] Third Respondent
AND	[LP] born on [date deleted] 2011 Child or Young Person the application is about

Hearing:	19 November 2020
Appearances:	A Gray for the Chief Executive First Respondent appears in Person No appearance by or for the Second Respondent No appearance by or for the Third Respondent R Adams as Lawyer for the Child
Judgment:	19 November 2020

ORAL JUDGMENT OF JUDGE S J COYLE

[1] This hearing today is in relation to [LP], who was born on [date deleted] 2011. [LP] at birth was given the name [full birth name deleted], but for most of her life has made it clear that she identifies as a female and not male and has adopted the name of [LP]. Her identity is that of a young woman and in recognition of the choices that she has made I will refer to her by the female pronoun throughout this judgment.

[2] Last week on a without notice basis Oranga Tamariki sought a s 78 custody order and a s 110AA interim guardianship order under the Oranga Tamariki Act 1989. The matter came before me on the e-Duty platform and I was not prepared to make the order at that time, but instead I directed that the matter proceed today by way of a *Pickwick* hearing.[1]

[3] Prior to today's hearing [LP]'s nan, [AS], has filed an affidavit. She is here today supported by [two other family members]. I have heard submissions from Ms Gray on behalf of Oranga Tamariki, [AS] on behalf of [LP] and Ms Adams on behalf of [LP], she being the Court appointed counsel for her.

[4] I want to say at the outset that this hearing is not about the approval or disapproval of the proposed plan by Oranga Tamariki in relation to the future care arrangements for [LP]. It is not about determining whether [LP] is in need of care and protection. It is not about determining the probable outcomes of the proposed care arrangements that are proposed by Oranga Tamariki. What it is about is determining whether the Court should make a custody order pursuant to s 78 of the Oranga Tamariki Act placing [LP] in the custody of the Chief Executive and an order appointing the Chief Executive as an additional guardian.

[5] Whilst the hearing has proceeded on a *Pickwick* basis, it still technically is a without notice application and thus the Court needs to be satisfied pursuant to r 220(2)(a)(i) of the Family Court Rules 2002 that the Court, in directing the

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1 *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213; [1972] 3 All ER 384.

application should proceed on notice, would or might entail serious injury or undue hardship or risk to the personal safety of [LP].

Background

[6] [LP], as I said, was born on [date deleted] 2011. Her parents are [DW] and [DP]. [LP] has in fact been in the day-to-day care of [AS], her grandmother, since she was [under 12] months old.

[7] It is fair to say that [LP], throughout her life, has presented challenges to [AS] and in June of this year Oranga Tamariki engaged Dr Colin Watt, a child and adolescent psychiatrist, to undertake an assessment of [LP]. In addition to gender identity disorder, [LP] has been identified by Dr Watt as having Conduct Disorder, probable Attention Deficit Hyperactive Activity Disorder and probable Foetal Alcohol Spectrum Disorder. For some time [LP]'s behaviours have become more challenging. [AS] has sought assistance, but earlier this year in desperation she approached Oranga Tamariki in the hope that they would engage and provide support and assistance to her and [LP].

[8] An initial family group conference on 16 April records an agreement that [LP] had care and protection issues, but there was no agreement around where [LP] was to live. A subsequent FGC on 5 June recorded an agreement that [LP] was to live with her mother in Australia and based upon that agreement Oranga Tamariki worked to facilitate [LP]'s move to [Australia] to live with her mother. They did so aware of the travel restrictions that have been forced upon the world as a consequence of COVID-19, but particularly between Australia and New Zealand. There were three attempts to transition [LP] to Australia, but for reasons entirely beyond Oranga Tamariki's control its efforts were thwarted due to the cross border COVID restrictions.

[9] [AS] by this stage was accepting reluctantly but realistically that [LP] could not live in her home without significant intervention, support and therapeutic assistance. There remained no agreement within the whānau as to where [LP] was to live and with whom she could live and eventually Oranga Tamariki, with the

assistance of its Kairaranga developed a plan to move [LP] to live in [a proposed location] to be placed with an iwi organisation affiliated to [iwi deleted] (to whom [LP] has whakapapa links).

[10] At the time of the application Oranga Tamariki believed there was agreement, particularly by [DP] and [AS]. They had sought the orders effectively placing [LP] in the Chief Executive's custody and foreshadowing its intention to shift [LP] to [the first location]. It is clear from [AS]'s affidavit that she has filed that she does not consent to [LP] shifting to [the first location] and faced with that prospect during this hearing she has become quite upset. [AS] is an additional guardian of [LP] appointed under the Care of Children Act 2004.

[11] As I said, the issue I need to determine is whether I make a s 78 custody order without notice to the parties, but on a *Pickwick* basis in accordance with the decision referred to above.

[12] Oranga Tamariki are in a very difficult position at present. They have explored a number of placement options for [LP] in this rohe and Ms Gray estimates that there have been in the first three months around eight different placements. They have all broken down because of [LP]'s extremely challenging behaviours.

[13] Oranga Tamariki therefore has had no option but to place [LP] in a motel where she is supported by three key workers. Ms Gray was quite clear in her submissions that if the Court declines to make the s 78 custody order today then Oranga Tamariki will have no choice but to continue her ongoing placement in a motel and Ms Blackwell, as [LP]'s social worker, believes that would be entirely contrary to her welfare and best interests.

[14] The proposal in [the location] is for [LP] to be placed with the support of the iwi organisation into a family who have a child who has gender identity disorder themselves and therefore have some experience in dealing with children working through their gender identity. [LP] has no idea who they are. Her only connection to the [proposed location] in terms of relationships is with [her other grandmother], who

she has seen once a year. To Ms Adams she said she does not know [her other grandmother] very well, but in any event she will effectively be placed with strangers.

[15] [AS] submitted, and I agree with her submission, it is very one-dimensional to see [LP]'s problems as being that of a gender identity disorder only. As I have said the psychiatric opinion obtained by Oranga Tamariki indicates there are a number of issues for [LP]. There are also her extremely challenging behaviours which have meant that all care options in the [current location] have been exhausted and none of those caregivers have been up to dealing with the challenges of [LP] in their household. It is no criticism of them at all. It is simply a reality of the complexities that this young woman presents to any caregiver and the challenges that any caregiver is going to face.

[LP]'s Views

[16] Ms Adams has met with [LP]. She describes her as thoughtful and polite. To Ms Adams she was quite clear that she wanted to be back with [her grandmother] ([AS]) and on a rudimentary scale of zero being the worst thing in the world and 10 being the best [LP] described returning to [AS]'s care as being 10 out of 10. Much to Ms Adams surprise, and I must say mine, [LP] said she likes staying at the motel and saw that as a seven, eight, nine out of 10.

[17] For [LP] school is extremely significant and the information I have, both in terms of what has been provided by Oranga Tamariki, by [AS] and now by Ms Adams, is that [a school] in [the current location] has been extremely supportive of [LP], particularly around her gender identity issues. School for [LP] is significant. It is a place of support and a place in which she describes as having a number of friends. As Ms Adams submitted, it will close [in December] for two months over Christmas but if [LP] remains in this rohe she will be able to return to that school in the New Year.

[18] [LP] was quite emphatic that she does not want to go to [the proposed location]. She acknowledged to Ms Adams that she had previously expressed a view that she did want to go. Her explanation was that she did not know how to say no to those she spoke with. She talked of missing [her grandmother] and [grandfather] and friends too much. She said: "I don't want to go I'd be too sad."

[19] Ms Adams also expressed concerns on behalf of [LP] that the iwi organisation appears to have a policy in accepting children that have no face-to-face contact with whānau for three months. Given that [AS] has been the only parental figure and presumably the only person to whom [LP] is attached for [LP]'s entire life, I share the concerns of Ms Adams in relation to that policy.

[20] [LP]'s views are important and I need to take them into account. I need to recognise however that she is [not far] off turning nine and I need to weigh her views against her age and maturity in terms of the decision of Randerson J in *C v S*.[2] However, her views, notwithstanding her age, are views that I do give significant weight to.

[21] Any decisions I make need to be made taking into account the s 5 principles and must recognise the new principles inserted into the Act by Parliament, particularly around her mana, whanaungatanga and whakapapa considerations.

Discussion

[22] Ms Gray very forcibly set out her submission that a move to [the proposed location] is a move for [LP] within her hapū and iwi and that she will be welcomed and accepted as whanau, notwithstanding that she has no relationship with anyone from [the iwi], apart from [her other grandmother] who she does not know very well. These are issues which will need to be more fully explored if there is eventually a hearing in relation to the long-term care and protection issues and really call into question yet another of intentions between the approach of this Court in considering the legislation under the Care of Children Act and the approach under the Oranga Tamariki Act. For they are issues and tensions, particularly in light of the accepted and the peer reviewed research that this Court receives in relation to COCA proceedings around attachment and the effects on children of severing attachment and being placed with effectively strangers.

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2 *C v S* [2006] 3 NZLR 420; [2006] NZFLR 745.

[23] In deciding this case I come back to basics. I cannot make an order without notice unless I am satisfied that the delay by making an application on notice would or might entail serious injury, undue hardship or risk to the personal safety of [LP].

[24] On the facts before me the only ground that can be relied upon is that of undue hardship for there is no evidence that [LP] is at risk of serious injury or a risk to her personal safety. The undue hardship is her remaining effectively in limbo in a motel versus being placed in the custody of the Chief Executive and being effectively relocated to live in [the proposed location].

[25] The evidential threshold for a without notice application is recognised to be a high one, particularly in relation to care and protection proceedings, and that is because the effect of granting the application is that the ability of parents and guardians to care for children is usurped by the State.

[26] There are clear risks to [LP] in the Court not granting the application. Enquiries made by Ms Adams indicate that the current motel that [LP] is living in, in which she has created a garden, is likely to cease within a week's time due to Christmas bookings. It occurred to me, and Ms Gray agreed, that there are likely to be challenges over Christmas in any event with motel accommodation given that those Aucklanders have decided not to flee north and tend to flee [to the current location] and fill up available accommodation.

[27] But there are also risks in shifting to [the proposed location]:

(a) Is the Iwi agency going to insist on its policy that there is no contact with any whānau for three months?

(b) Are the caregivers who are experienced in parenting a child with a gender identity disorder capable and experienced enough to parent [LP], who in addition to Gender Identity Disorder has Conduct Disorder, ADHD and FASD?

(c) Are they experienced enough and capable enough to parent this young woman, who so far has managed to sabotage every placement that Ms Blackwell has tried?

(d) Is a shift to [the proposed location] viable when [LP] is so opposed to shifting [there]?

[28] Therefore, there are risks either way. My role under the Act is to make a decision in accordance with the law and taking into account what is in the best interests and welfare of [LP]. An option could be to make the s 78 custody order and, as the Court of Appeal has said I am allowed to do, impose conditions. So for example I can make a s 78 custody order in favour of the Chief Executive but direct that [LP] is to remain living in the Tauranga region or I could make a s 78 order requiring [LP] to reside in [the first location]. But to even do that I need to be satisfied in terms of r 220 that there is an evidential foundation for me to be satisfied on the balance of probabilities that the making of an application on notice is going to cause undue hardship.

[29] Having listened to everyone, read the information before me and considered the submissions of counsel, I have come to the view that there is simply too much uncertainty around the possible outcomes if I grant the s 78 order for [LP] and those potential risks outweigh the risks of not making the order. Or to put it in terms of r 220 I am not satisfied that if the application were to proceed on notice that the evidence establishes that there will be undue hardship to [LP]. Potentially, there is going to be huge hardship, risks and adverse consequences for her either way.

[30] Accordingly:

(a) I have declined to grant the s 78 or s 110AA applications without notice.

(b) In effect, what I have done is I have not dismissed the s 78 application. I have simply directed that it proceed on notice so it remains a live

application and it may be that Oranga Tamariki decides to file further evidence and proceed to a hearing in relation to that.

(c) Ms Gray tells me that Oranga Tamariki will now file a s 68 application for care and protection orders and I agree having heard the discussions there will need to be another FGC. I adjourn this matter to come back before me for a conference on 22 February 2021 at 10 am. I direct that wherever practical I will case manage this file for the moment.

(d) Finally, I reserve leave for Oranga Tamariki to come back to the Court on 48 hours' notice. I appreciate the situation for [LP] remains tenuous and I accept that between now and then there may well be a change in circumstances which justify the urgent consideration and/or intervention of the Court and I do not want to shut the door on that being able to occur at short notice.

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Judge SJ Coyle
Family Court Judge

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