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/

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 WHAKATANE

I TE KŌTI WHĀNAU
KI WHAKATĀNE

FAM-2014-087-000214
[2019] NZFC 9088

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[FG] [XP] Applicants
AND	[OL] [MG] Respondents

FAM-2017-087-000108

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
AND BETWEEN	ORANGA TAMARIKI, MINISTRY FOR VULNERABLE CHILDREN First Applicants
AND	[FG] [XP] Second Applicants
AND	[OL] [MG] Respondents

AND	[DG] born on [date deleted] 2007 [AG] born on [date deleted] 2008 [BG] born on [date deleted] 2009 [CG] born on [date deleted] 2010 Children or Young Persons the application is about

Hearing:	22 October 2019
Appearances:	L Cohen for the Chief Executive K Johnson for [FG] and [XP] No appearance by or for [OL] and [MG] A Kershaw as Lawyer for the Children
Judgment:	15 November 2019

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO ISSUE ESTOPPEL ARGUMENT]

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[1] On 21 November 2017 her Honour Judge Cook made a Declaration that [AG], [BG], [CG] and [DG] are children in need of care and protection pursuant to the then provisions of the Oranga Tamariki Act 1989. The relevant grounds for the purposes of the s 67 declaration were those under s 14(1)(a) and (b) of the Act. At the same time, her Honour accepted the FGC plan as being the s 128 plan and made a s 101 Custody Order in favour of the Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki. In addition to the s 101 Custody Order, her Honour also made an order appointing the Chief Executive as an additional guardian.

[2] The first review of those initial orders came before me on 6 October 2018. For the reasons set out in my Minute of the same date the review was adjourned and as my Minute noted, the children's grandparents, [FG] and [XP] foreshadowed an intention to file a s 121 access application. In fact, when the matter came before Judge Somerville in June of this year [FG] and [XP] had filed not only a s 121 access application but also an application pursuant to s 125 to either vary or discharge the Oranga Tamariki Act orders.[1] Pursuant to her Honour's Minute she considered the review, recorded that the then plan was adequate, and directed a further review in 12 months' time, but recognising that the applications to discharge the orders or in the alternative a s 121 access application were likely to be disposed of prior to the next review. Her Honour directed that consideration of those outstanding applications be determined at a long cause hearing. She also set down a half day, submissions only hearing in relation to the issue of whether [FG] and [XP] could have ongoing unsupervised contact.

[3] Pursuant to a chambers box work Minute by me on 16 October I noted:

> Decision deferred. The minute of Judge Somerville refers to a video interview which seems to relate the concerns about the care of children while in the grandparents' care. She also records that there is an agreement to unsupervised access with the grandparents. There is therefore an obvious tension. I am not adverse to the suggestions of counsel, but want some assurances that the matter is capable of resolution by mediation given the prima facie safety concerns that have been raised. In short, what are the allegations and are they accepted or not. If not, is it accepted that they cannot be proven on the balance of probabilities. If not, then how can the court be party to a mediated agreement which provides for care/contact with the

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1 The ss 101 and 110 Custody and Additional Guardianship Orders.

> grandparents, while there are undetermined allegations of safety before the court? Counsel to advise by return and I will then consider the matter further.

[4] What transpired was that the matter could not proceed by way of a submissions only hearing in relation to contact issues. Instead, there was a submissions only hearing to resolve a legal issue which had arisen regarding the application of the doctrine of issue estoppel in these proceedings.

What is the issue?

[5] Underpinning the application by Oranga Tamariki for a declaration that the children are in need of care and protection are a number of relatively serious allegations of violence towards the children by [FG] in particular, including:

(a) [FG] slapping [DG] on the head and punching her in the eye;

(b) [FG] twisting both of [DG]'s ears resulting in bleeding;

(c) [FG] giving [AG] permission to hit [DG] repeatedly with a back-scratcher around 30 times resulting in bruising on her upper left thigh;

(d) [AG] disclosed [FG] growls, screws his ears and that of his sisters and that [DG] is kicked by [FG];

(e) He further disclosed that [FG] routinely uses physical discipline by hitting [CG], and that [XP] hits [CG] in the head and kicks her in the bottom.

[6] In support of their application for discharge [FG] and [XP] accept that they allowed [AG] to hit [DG], that [FG] kicked [DG] on the bottom, and that the other grandchildren were kicked on the bottom, but infrequently. In short, the grandparents accept that they have been minimally violent towards two of the grandchildren, but in the context of their struggling with the day-to-day care of the children and feeling unsupported.

[7] The issue that has arisen is whether the grandparents can now, in support of their discharge application, challenge the evidence of Oranga Tamariki filed in support of a declaration, with that declaration being made effectively by consent following a family group conference. Oranga Tamariki argue that the evidence provided in support of the application for a declaration was relied upon by Judge Cook in her decision to make the declaration, thus there has been acceptance of each of the allegations. Consequently Ms Cohen submits that the allegations have been proven and are therefore subject to the doctrine of issue estoppel; this would preclude the grandparents from subsequently challenging that evidence.

[8] Ms Johnson submits on behalf of [FG] and [XP] that Oranga Tamariki's position is incorrect. She submits that as [FG] and [XP] did not participate in the declaration hearing, they cannot be deemed to have accepted the allegations against them. Further, she submits that as those allegations are now relied upon by Oranga Tamariki in support of its opposition to the discharge of the OT orders, [FG] and [XP] should be able to have those allegations tested and determined by a Judge following a hearing.

[9] If Oranga Tamariki are required to now prove the allegations contained in its 2017 Declaration proceedings, this will lead to a lengthier hearing, as compared to a narrowly focused hearing in relation to the discharge applications which would follow if the 2017 allegations are found to have been established and accepted through the making of the declaration. This issue has significant practical importance outside of these proceedings. For example, if a respondent in proceedings under the Family Violence Act does not oppose a Temporary Protection Order being made final, is that respondent then precluded from contesting the initial allegations in support of the making of the Protection Order upon an application for discharge, or in subsequent Care of Children Act proceedings where the issue of contact in the necessity or otherwise of supervised contact, is a central issue?

[10] As Ms Cohen said in her submissions on behalf of Oranga Tamariki, it is also a very important issue from a social worker's perspective. For the nature of allegations leading to the making of a declaration has a direct consequence on the proportionality of response by the social worker. Thus, allegations/findings of minor violence in the

context of parental discipline and where the child may present with some challenging behaviours, may be met by the making of a Declaration and a Support Order.[2] Conversely, where there is an acceptance/finding of more serious violence, then that is likely to have significant weight in informing the social work decision to seek by way of disposition a Custody Order in favour of the Chief Executive and a placement away from the abusive caregivers.

[11] Thus, the issue I need to determine is whether, in the context of their discharge and/or access application, [FG] and [XP] are estopped from asking the Court to make findings about their violence in relation to the allegations of Oranga Tamariki filed in support of their application for a declaration that these children were in need of care and protection.

What were the circumstances which led to the making of the declaration?

[12] On 23 June 2017 Oranga Tamariki applied for a declaration that the four children were in need of care and protection. They also applied without notice for a Custody Order pursuant to s 78 of the Oranga Tamariki Act. In support of those applications the then [social worker, named deleted], filed an affirmation of the same date. In that affirmation she deposed that:

> Notwithstanding that the four children are the children of [OL] and [MG], they were living with their paternal grandparents, [FG] and [XP].[3]

[13] At the time of the application Oranga Tamariki had a history with the children and there was an open police investigation, particularly in relation to allegations that the children were exposed to family violence, neglect, sexual abuse and medical neglect while previously in the care of their parents.[4]

[14] It is clear Oranga Tamariki held some concerns for the children, particularly [DG], in [FG] and [XP]'s care. On 7 June 2017 a critical report of concern was received by Oranga Tamariki in which it is alleged [DG] had disclosed she had been

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2 Or indeed, no declaration at all, but rather a referral to an appropriate community agency for support and assistance.
3 Affirmation of [social worker], 23 June 2017 at [5].
4 Note 1 at [9].

slapped in the head and punched in the eye by [FG] in early June 2017, with the notifier reporting visible bruising.[5]

[15] [DG] is alleged to have also disclosed that:

(a) [FG] screwed both her ears resulting in marking and some bleeding.

(b) That [FG] gave permission for [AG] to hit her repeatedly with a back-scratcher approximately 30 times; the notifier reported seeing bruising approximately the size of a tennis ball.[6]

[16] During a child-focused interview with [AG], [AG] disclosed that both he and his siblings routinely had their ears screwed by [FG]. [AG] also commented on [DG] being kicked in the backside by [FG].

[17] Subsequently, the other children were interviewed. It is alleged that:

(a) [CG] disclosed [FG] whacks her on the neck with a hand and that her ears were screwed by [FG] and [XP].

(b) [CG] is alleged to have disclosed that [XP] screws [DG]'s ears, donks her head and kicks her bottom and by implication it appears she disclosed that occurs to [AG] as well.

[18] Attempts to discuss the allegations with [FG] and [XP] were unsuccessful, and [FG] is alleged to have asserted that [DG] was to blame and that no one was safe around her.[7]

[19] Judge Callinicos, in his eDuty Minute and in granting the s 78 Custody Order in favour of the Chief Executive, recorded his findings that:

> These children have been subject to the care and protection concerns for a number of years, concerns which led them to being placed with their grandparents. There is now cogent evidence that the children have been

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5 Note 1 at [12].
6 Note 1 at [13] and [14].
7 Note 1 at [21] and [22].

> subject to direct physical abuse or been exposed to observing physical abuse of siblings. That evidence is derived from disclosures made by the children in both informal situations to professionals and in an AVI [*sic*]. There is observable evidence to corroborate the disclosures, such as bruising.

[20] The first call of the proceedings was before Judge Whitehead on 3 August, but at that time the children's mother, [OL], had not been served. His Honour's Minute records that the applications had been served on [FG] and the grandparents who had taken no steps. However, given that [OL] had not been served and no FGC had been held, the s 78 order continued, and the matter was adjourned to 10 October for the filing of the FGC plan, social worker reports and disposition.

[21] On 10 October Judge Cook adjourned the matter to 21 November noting that "FGC has been delayed due to police enquiries" and noting that the mother still had not been served although Oranga Tamariki now had an address in which to serve her given that she was on bail.

[22] There is a letter on the Court file dated 17 November 2017 advising that the subsequent social work report was to be served on [FG], [OL] and the paternal grandparents, [XP] and [FG] as well as Mrs Kershaw, lawyer for the children.

[23] On 13 November 2017 a certificate as to holding of the FGC was filed. That record shows that [FG] and [XP] attended the FGC as did [MG]; [OL] tendered her apologies. The record of attendees included the children's therapist, a representative from the Child Protection Team of the New Zealand Police, the then social worker], and a representative from the school.

[24] The FGC record records an agreement that the children were in need of care and protection pursuant to s 14(1)(a) and (b) with those grounds being:

(a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually) ill-treated, abused, or seriously deprived; and

(b) The child or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected,

and that impairment or neglect is, or is likely to be, serious and avoidable.

[25] The record at the FGC goes on to record the concerns of Oranga Tamariki from the social worker that:

> I am worried that [DG], [AG], [CG] and [BG] are being hit by their grandparents [FG] and [XP] on a regular basis which could lead to a serious physical injury or death. I am worried that the children will think it is normal for adults to hit children and repeat the cycle of violence as they grow up. I am worried that the children have already been traumatised from past physical, emotional and sexual abuse [not by [FG] or [XP]] and that being hit by [FG] and [XP] is adding extra trauma into the mokopuna lives. I am worried that the children will not feel loved and cared for if they remain with their grandparents. I am worried that CYRAS' history shows we have received three notifications of physical abuse by the grandparents this year with the most recent concern being about [FG] punching [DG] to the face. I am worried that the grandparents are not showing that they understand their methods of discipline adding further harm to the mokopuna…the mokopuna need emotional care alongside their physical care and this has not been happening.

[26] The plan went on to provide an agreement that [AG] would be in the care of his father [MG], that none of the four children were to have contact with their maternal whānau, and that [XP] and [FG] were to liaise with the social worker to discuss their contact with the four children.

[27] Therefore, at the time the matter came before Judge Cook and the making of the Declaration, [FG] and [XP] were well aware of the allegations against them, had had discussions with Oranga Tamariki social workers about the specifics of the allegations, had attended the FGC, and would have received the record of the FGC and the subsequent social worker plan. While what is discussed at the FGC is confidential, it seems inconceivable to me given the matters addressed in the record of the FGC that with the children's social worker there and a representative from the police[8], and a senior lawyer for the child such as Mrs Kershaw, that the specifics of the allegations would not have been raised in the context of the FGC discussions.

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[8] The court has subsequently received a report from the police dated 12 September 2017 which reinforces the conclusion that the exact specifics of the allegations, and disclosures, were known to the Police.

[28] Additionally, as recorded by Judge Cook in her 21 November 2017 decision, Mrs Kershaw in her report as lawyer for the children set out the sexual abuse that occurred while in the care of the maternal family. Judge Cook goes on to record Mrs Kershaw's narration that the children:

> …then suffered some psychological and physical abuse with the paternal grandfather and step-grandmother when their needs got too high and the caregivers were struggling to cope.

[29] Her Honour goes on to record at [5]:

> I have read the information in regard to the challenges that [the children's] behaviour has presented.

[30] Her Honour then went on in the next paragraph to discharge the s 78 order, to make a declaration under s 14(1)(a) and (b) of the Act that the children were in need of care and protection, and to make the s 101 and s 110 Custody and Additional Guardianship Orders.

What has changed?

[31] [FG] and [XP]'s explanation for not challenging the evidence at the time was that the plan of the FGC was for [AG] to be transitioned into the care of his father, [MG], followed later by the other children. Therefore, the issue for [FG] and [XP]'s at that time was one of access.

[32] Subsequently, [AG]'s placement with his father was revoked. Currently, the children's placement is of concern. They not being placed together, and no decisions are being made as to any permanent placement. Oranga Tamariki now appear to be considering entering into a discussion whereby [AG] is returned to [FG] and [XP]'s care, but Ms Cohen was adamant in her submissions that there is no intention by Oranga Tamariki to return the other three children to [FG] and [XP]'s care. In late February 2019 [FG] and [XP] had applied for a Parenting Order under the Care of Children Act stating:

> We are seeking leave to make this application as the children are our mokopuna who we previously had orders for. They were in our day-to-day care and we are seeking to re-establish that status quo.

[33] In support of that application they attached an additional page in which they stated at [4]:

> Oranga Tamariki became involved after [DG] made disclosures of abuse in our home. We deny the severity of what [DG] disclosed but do accept that the children were diagnosed with their various issues, we did struggle with the children. We also reached out to OT many times for help after they dumped the children in our care, but no support was forthcoming.

[34] Thus, some 15 months after the declaration was made, [FG] and [XP], for the first time in the Court proceedings, denied the more serious allegations against them and particularly dispute the disclosures allegedly made by [DG].

What is the legal position in relation to issue estoppel, particularly in relation to proceedings concerning the children?

[35] In this case, as so often happens, given that the agreement was made following the FGC, there have been no findings of fact made. Given that there was no appearance by [OL], technically it could only have been made with the consent of those parties who were present at the FGC. [FG] and [XP] were persons required to be served (and as set out above they were), and persons entitled to appear at the hearing before Judge Cook. I note that neither of them did.

[36] To avoid arguments over issue estoppel, and over what facts were or were not proven, occurring in the future, it may be best practice for Judges to record that they formally find each and every or, if relevant, some of, the allegations by OT proven on the balance of probabilities. That at least provides a 'line in the sand' in that a determination has been made. I freely acknowledge that in the past I have not done this, more often than not simply recording either, "I am satisfied that these children are in need of care and protection…" or "By consent I make a declaration that these children are in need of care and protection…"

[37] But such a "best practice" approach may not necessarily resolve the issue as it is arguably still open for a party in those circumstances who did not appear or take any steps in the proceedings, to argue that they now wish to revisit that determination. Ms Johnson, in her written submissions relies upon the decision of his Honour

Judge Smith in *Chief Executive of the Ministry of Social Development v LA*.[9] In that case Judge Smith identified the Court's approach when considering a declaration as being:

> (a) To identify the grounds alleged by the Ministry in its application.
>
> (b) Check whether a family conference has been held.
>
> (c) Identify whether any practical or appropriate means outside of the Act.

[38] Ms Johnson submits that:

> …although the Court has to identify the grounds alleged in the Ministry's application at the time of making the application, the use of the word "alleged" shows that the Court is not required to look further into the allegations and determine whether the allegations are proven on the balance of probabilities when making a declaration.

[39] That submission cannot be correct because s 197 of the Oranga Tamariki Act 1989 states that the standard of proof in relation to declaration proceedings is the standard of proof applying in civil proceedings, namely the balance of probabilities. Additionally, the reference of his Honour to "identify the grounds" must be a reference to the statutory grounds in s 14, and not the evidential basis. A Judge is required to be satisfied that there is a sufficient evidential foundation to conclude that some or all of the grounds have been established and that the allegations are proven on the balance of probabilities, in order to make a declaration that the children are in need of care and protection. The above interpretation is consistent with the High Court decision in *C v Chief Executive of Department of Child, Youth and Family Services* where at [29] the Court held:[10]

> I am satisfied then, that s 14(1)(a) is to be read disjunctively, as referring to optional grounds for relief, each with its own threshold tests. For the first, actual abuse must be proven on the balance of probabilities. In the second, the likelihood of abuse is to be considered in the sense of there being a real possibility, but again where there is a real possibility must be proven to the same standard for the balance of probabilities.

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9 *Chief Executive of the Ministry of Social Development v LA* [2016] NZFC 1640.

10 *C v Chief Executive of Department of Child, Youth and Family Services* [2003] NZFLR 643.

[40] By implication, on the facts of this case Judge Cook must have satisfied herself that there was evidence established to prove on the balance of probabilities that the grounds in s 14(1)(a) and (b) were established.

[41] Ms Johnson goes on to submit that:

> The Court cannot be satisfied from the fact that the parties consented to the declaration [through the FGC process] that they accept any or all of the facts/ allegations as alleged in the affidavit of [the social worker].

[42] I disagree; the Court must be entitled in the absence of any specific evidence or assertion disputing all or some of the facts, that in agreeing to the declaration the children are in need of care and protection, that parties are also agreeing that the allegations have been established by Oranga Tamariki. It is not for the Court to second-guess the parties' intention and what they do or do not accept.

Does the doctrine of issue estoppel apply to allegations relied on by OT in support of their application for a declaration?

[43] For the reasons set out by Mrs Kershaw in her submissions, issue estoppel is an issue in this case. The factual issue in question is whether or not the grandparents perpetrated the violence that was alleged by Oranga Tamariki at the time it obtained the Declaration.[11] In her submissions, Mrs Kershaw refers to the decision of Somers J in *Housing Corporation of New Zealand v Maori Trustee (No 2)*.[12] In that case Somers J stated, with reference to the English decision *Henderson v Henderson*:

> The general rule, as stated by Wigram V.C in Henderson v Henderson (1843) 3 Hare 100 at p.119 is that –
>
> 'where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward in context …'

[44] In consideration of this issue Mrs Kershaw has referred me to the English decision in *Re B (Minors) (Care Proceedings: Issue Estoppel)*.[13] In that decision

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11 Memorandum of Lawyer for Child, 21 October 2019 at [39] to [42].
12 *Housing Corporation of New Zealand v Maori Trustee (No 2)* [1988] 2 NZLR 708.
13 *Re B (Minors) (Care Proceedings: Issue Estoppel* [1997] All ER 117 (High Court) Fam D, Hale J.

Hale J held that findings made in relation to a care order [declaration a child is in need of care and protection] are relevant to subsequent proceedings to discharge a care order.[14] Justice Hale also referred to the basic requirements of issue estoppel:

> (a) The first requirement is the judgment relied upon leading to an allegation of issue estoppel must be:
>
> (i) Of a Court of competent jurisdiction.
>
> (ii) Final and conclusive.
>
> (iii) On the merits.
>
> (b) The second requirement is that the parties in the earlier proceedings and those in the subsequent proceedings must be identical.
>
> (c) That the issue to be determined in the subsequent proceedings, in relation to which estoppel is raised, must be the same issue that was decided by judgment in the earlier action.[15]

[45] The conclusion of Hale J was that in considering issues affecting children, the requirement to consider the welfare and best interests of children weighs against the strict application of the common law rule of issue estoppel. However, that relaxation is not automatically an invitation to relitigate the same issues. The Court concluded:

> Hence, if the applicant in one set of proceedings wishes to rely on findings made in previous proceedings in order to prove a case, the Court will have to consider how this should be done. There are no doubt many factors that need to be borne in mind, among them the following:
>
> (1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation–the resources of the courts and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the

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14 Note 9 at p 120.
15 Ibid.

> court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stiftuńg v. Raymer & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 947, "must be applied so as to work justice and not injustice."
>
> (2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significance.
>
> (3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reach different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be relitigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings.

[46] Thus, the conclusion of the High Court of England (Family Division) is that if an argument as to issue estoppel is raised, the Court will resolve that issue based upon consideration of the particular facts and circumstances of each case, and the welfare and best interest issues for the relevant child(ren), rather than a strict application of a rigid rule.

[47] Given that Judges are required to consider, in the context of proceedings under the Oranga Tamariki Act, the welfare and best interests of children,[16] I can see no basis for there being a different approach in the New Zealand Family Court jurisdiction to that taken by the English High Court. Accordingly, I rely upon the *Re B (minors)* decision in resolving the issue estoppel argument for these children. I conclude that the doctrine of issue estoppel may apply to proceedings affecting children, particularly those proceedings where there is a statutory requirement to consider welfare and best interests, in some cases, but not in other cases; each case will turn on its particular facts.

[48] Therefore, the issue is not as clear-cut as asserted by Ms Cohen on behalf of Oranga Tamariki. It appeared to be the thrust of her submissions that the factual issues

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16 Section 6 of the previous OT Act; now s 4A.

had been effectively determined by the making of the Declaration by Judge Cook, and could not now be revisited by the Court in considering the s 125 discharge application.

[49] In this particular case, I have determined that the paternal grandparents cannot relitigate the allegations that they were physically abusive towards the children by denying the more serious allegations. I have reached that view for the following reasons:

(a) As recognised by Hale J, there is a public interest to an end to litigation, and the resources of the Courts and everyone involved in proceedings should not be employed in deciding the same matter twice unless there is good reason to do so.[17]

(b) Secondly, as submitted by Ms Cohen, the proportionality of response by the social worker has already been dictated by an acceptance that the more serious allegations are correct, and thus the proceedings and the care arrangements for the children proceeded with that underlying paradigm.

(c) The applicants were well aware of the allegations at the time and elected to take no steps. For the reasons I have set out above they cannot have been under any misapprehension as to the basis upon which Oranga Tamariki/the social worker at the time, was seeking the declaration. Their decision to not oppose the allegations at that time is one that, on the facts of this case, they should be bound by.

(d) Re-opening the allegations would be contrary to the welfare and best interests of the children. [DG] and [AG] in particular are of an age where they potentially could be required to give evidence and cross-examined and given the passage of time that would be contrary to their welfare and best interests.

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17 Ibid, p 128.

(e) Additionally, given that OT have operated from a paradigm that the more serious abuse has occurred, any supports for the children would have been to assist them in dealing with the consequences of the physical abuse, which would therefore have reinforced in the children's minds the reliability of the event as having occurred.

(f) As Hale J set out, I need to consider whether a rehearing of the issue will result in any different finding from that in earlier trials. I determine that it is unlikely to do so. [DG] and [AG] in particular made disclosures to a number of people at different times and they were remarkably consistent. There were, on the face of it, clear disclosures made when the children were interviewed by social workers, and the totality of those factors may well result in the Court, if it reheard the matter now, coming to the same conclusion.

(g) Additionally, there are some practical considerations. The social worker at the time as I understand Ms Cohen's submissions, is no longer employed by Oranga Tamariki, and would be required to be summonsed. Additionally, if the original allegations are to now be relitigated, that will increase the length of any hearing substantially and will result in significant delays in the matter being heard, which will be directly contrary to the welfare and best interests of these children.

[50] If the argument of the grandparents had been, for example, that whilst being aware of the allegations made, they were precluded due to significant medical issues or mental health issues in progressing their opposition, a different outcome may have resulted. But in the circumstances of this case, where the grandparents were clearly aware of the allegations and made a conscious decision not to defend them, where Judge Cook clearly turned her mind to the nature of the allegations against the grandparents,[18] and considering the welfare and best interests of these particular children, I determine that the doctrine of issue estoppel should apply. Thus, the

[18] As set out at [28] above.

grandparents are precluded from relitigating the basis upon which Oranga Tamariki sought the declaration.

[51] Consequently, the application for discharge and any consideration of some or all of the children being in their day-to-day care will proceed on the basis that the children have been the subject of the more serious allegations[19] asserted by Oranga Tamariki in support of their applications.

[52] Counsel are to file a memorandum within seven days advising of the directions sought to progress the discharge application to hearing. I respectfully suggest that the earlier directions of Judge Somerville are rendered redundant by this determination, and new directions will need to be made accordingly.

[53] Preferably, there should be a joint memorandum filed and signed. If that cannot be agreed, then separate memoranda can be filed. The matter should then be referred to a Judge in chambers for the making of directions, given that there is no judicial conference time available until early into the New Year. The next consideration of the matter in chambers does not need to come before me.

S J Coyle
Family Court Judge

[19] As set out at [5] above.