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**IN THE FAMILY COURT
AT WHANGAREI**

**I TE KŌTI WHĀNAU
KI WHANGĀREI-TERENGA-PARĀOA**

**FAM-2019-087-000183
[2023] NZFC 8837**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[RACHEL NORTON] Applicant
AND	[JACOB TYLER] Respondent

Hearing: 31 July and 1 August 2023

Appearances: T Manuel-Belz on behalf of R Elliot for the Applicant
F Newton for the Respondent
A Kennedy as Lawyer for the Child

Judgment: 20 October 2023

RESERVED JUDGMENT OF JUDGE L KING

Introduction

[1] When separated parents live in close proximity and agree to share their children's care, as Ms [Norton] and Mr [Tyler] have indicated, that can often be accommodated. Unfortunately, that option is not available here.

[2] Ms [Norton] lives in [location A], Mr [Tyler] in [location B]. It is a six-hour drive between homes. That, along with respective financial circumstances means physical care of any child not in their care will be limited to school holidays and the end of year holidays.

[3] Although there are long weekends and other public holidays during the year, the opportunity to travel with limited funds available is restricted. They therefore ask the Court to determine their parenting dispute.

Background

[4] In November 2019, the parties separated after a 10-year relationship. They have four children. [Piki] is 12 years old, [Ruhi] is 10 years old, and twins [Rana] and [Waiano] are five years old.¹

[5] Prior to separating, the parties lived in [town 1, part of location A] for seven years. Ms [Norton] has strong whakapapa links to Ngati Awa and was raised by her grandparents in [town 1]. She is a fluent speaker of te reo Māori and the parties raised the children in a Māori speaking home.

[6] Although not a fluent speaker himself, Mr [Tyler] committed to speaking Māori and English to their tamariki and for them to learn in a schooling environment immersed in te reo Māori.² Both parents wanted their children grounded in Te Ao Māori.³

[7] Their two oldest children attended at their local kura, whilst the twins attended the kōhanga reo from the age of six months where their mother worked as a kaiako matua or senior teacher.

[8] The parties' relationship ended in conflict. On 7 November 2019, they were at home with tamariki. Ms [Norton] says Mr [Tyler] was yelling and swearing at the children. She intervened, they then started yelling and swearing at each other before

¹ In the pleadings, the children are referred to by both their Māori and English names. However, the evidence I heard was that the parties always used their Māori names: at p 119 of the notes.

² At pages 124 and 129 of the notes.

³ Mr [Tyler]'s evidence at page 140 of the bundle.

Mr [Tyler] became verbally and physically abusive towards her in front of the children. Ms [Norton], worried that Mr [Tyler] would try and leave with the children, contacted her father who lived nearby to go to her home. Mr [Tyler] drove off. Women's Refuge arrived and Ms [Norton] was assisted to get legal advice.

[9] The next day, Ms [Norton] applied for and obtained temporary protection, tenancy, and interim parenting orders in respect of all four tamariki.⁴ By then, Mr [Tyler] had already left [town 1] and travelled to [location B] to be near his family. He has remained in [location B] since then.

[10] Mr [Tyler] opposed the making of a final protection order and requested unsupervised contact with the children. Those concerns were investigated by Oranga Tamariki following the Court making a s 19 referral to a care and protection coordinator.⁵

[11] Additional safety concerns were initially raised by the lawyer for child's agent when she first attended upon the children. The Court has the benefit of multiple reports from Oranga Tamariki which have assessed the children as being safe in each parents' care.

[12] At a safety hearing in June 2021, the condition requiring Mr [Tyler]'s contact to be supervised was removed with Ms [Norton]'s consent.⁶ Additionally, the temporary protection and tenancy orders were discharged and the application for a protection order discontinued with mutual undertakings provided by both parties.

[13] Shortly afterwards, Ms [Norton] placed the twins in Mr [Tyler]'s care on what was intended to be a temporary basis whilst she secured suitable accommodation.⁷ [Piki] moved to his father's home about six weeks later.

⁴ Orders made on a without notice basis and dated 8 November 2019.

⁵ Section 19 referral made 11 December 2019.

⁶ *[Norton] v [Tyler]* [2021] NZFC 5234.

⁷ Mr [Tyler]'s evidence confirming this arrangement at page 125 of the notes.

[14] At a judicial settlement conference in March 2022, the parties agreed that [Piki] will continue to live with his father and [Ruhi] with Mother.⁸ However, they both seek day-to-day care of [Rana] and [Waiano].

[15] Mr [Tyler] remains concerned about the number of times Ms [Norton] has moved and her ability to provide stability for the children. He seeks an order for the twins to remain in his care alongside their brother [Piki].

[16] Mr [Tyler] lives with his partner, [Gemma]. As well as Mr [Tyler]'s three children, [Gemma] has day-to-day care of her 12-year-old daughter. Earlier this year, Mr [Tyler] and his whānau moved out of his father's home and have their own rental property in [a suburb of location B].

[17] [Piki] attends [kura kaupapa 1]. The twins attend [primary school 1] where they are in the bilingual unit.

[18] [Ruhi] continues to live with Mother and attend [kura Kaupapa 2]. Ms [Norton] has had the care of the children during alternate school holidays and for an extended period of the 2022 end of year holidays.

[19] Ms [Norton] rejects Mr [Tyler]'s claim that she is unable to provide stability for their tamariki. She points to her recent stable employment as a qualified kaiako at [kura Kaupapa 2]. After two years there, Ms [Norton] recently secured a permanent teaching position at [kura Kaupapa 3] near [location A]. At the hearing, Ms [Norton] was in the process of moving to a three-bedroom rural rental property in [location A].⁹

[20] Ms [Norton] urges the Court to return the twins to her care, citing their declining use of te reo Māori and inability to attend culturally significant events if they remain in their father's care. Ms [Norton] seeks the Court determine the parties dispute by ordering [Rana] and [Waiano] to live with her in [location A].¹⁰

⁸ Final parenting orders providing for [Piki] and [Ruhi]'s day-to-day care were made by consent at a judicial settlement conference held on 9 March 2022.

⁹ At page 6 of the notes.

¹⁰ Section 46R application dated 12 April 2021.

[21] Finally, the parties are unable to agree on what contact looks like for the parent who does not have day-to-day care. Whilst they agree on regular video calls and liberal contact during school and end of year holidays, they are unable to agree on the specifics.

[22] Accordingly, the issues for me to determine are:

- (a) Which parent should [Rana] and [Waiano] live with?
- (b) Once [Rana] and [Waiano]’s day-to-day care is determined, what contact should all four children have with parent and sibling/s who live at a distance.

[23] I shall first set out the applicable law, the children’s views, and then consider each issue separately.

The Law

[24] The children’s welfare and best interests in their particular circumstances must be the first and paramount consideration.¹¹ In determining welfare and best interests, I must have regard to the principles set out at s 5:

- (a) a child’s safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in, 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child’s family, family group, whānau, hapū, and iwi.
- (b) a child’s care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

¹¹ Care of Children Act 2004, s 4.

- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.
- (g) a child must be given reasonable opportunities to participate in any decision affecting them.

[25] Recent amendments to the Act have strengthened the voice of the child and their participation in care of children proceedings.¹² This is recognised in the additional principle at (g). This principle and the safety principle at (a) are the only mandatory principles.

[26] Additionally, article 12 of the United Nations Convention on the Rights of the Child has been specifically recognised.¹³ Again, this strengthens the existing law by providing a child with the right to be heard in court proceedings and to have their views given due weight in accordance with the child's age and maturity.

[27] The application of the principles is an individualised assessment. I must identify those principles that are relevant, as well as those that are irrelevant, and provide reasons.¹⁴ In doing so, I must determine the weight to be given to each of the principles.

[28] Consideration of tikanga Māori for this whānau is particularly relevant. In a recent High Court decision considering an appeal from a Family Court decision determining a dispute between guardians (relocation), McQueen J held:¹⁵

It is well established that tikanga is part of the common law in Aotearoa New Zealand. It is also the case that the Courts may assume that Parliament intends legislation to be interpreted in keeping with te Tiriti o Waitangi/Treaty of Waitangi unless Parliament expressly indicates otherwise. In the very recent judgment of the Supreme Court in *Ellis v R*, Glazebrook J observed that in "simple cases where tikanga is relevant and uncontroversial, submissions may "suffice", recognising that expert evidence may not always be required.

¹² The Family Court (Supporting Children in Court) Legislation Act 2021 (2021 No 33).

¹³ Section 6(1AAA).

¹⁴ *K v B* [2010] NZSC 112 at [19] to [23].

¹⁵ *Hopkins v Jackson* [2022] NZHC 2649 at [66].

What are the children's views?

[29] Unsurprisingly, both [Piki] and [Ruhi] are settled in the care of their father and mother respectively. They continue to attend their local kura and neither seeks a change in their care.

[30] [Piki] wants to continue living with his father. He is happy there but misses his Mum and sister [Ruhi].

[31] [Ruhi] has been consistent in her wish to live with Mum. [Ruhi] misses spending time with siblings and spoke about the twins being able to live with and her mother.¹⁶

[32] Due to their young age, the twins' views have only recently been made known. In April this year, Ms Kennedy met with them at their school. They had recently returned from spending time with their mother and [Ruhi] and were keen to tell their lawyer about their holiday. During that meeting, counsel reported [Rana] saying he wanted to "stay up here with Dad" and [Waiano], who was just as decisive, reported she wanted to live with her mother and [Ruhi].

[33] Counsel again attended on the twins at their school in mid-July, just ten days prior to the hearing. Again, this visit followed [Rana] and [Waiano] having spent time with Mother and sister [Ruhi] during the end of term 2 holidays.

[34] Both children remembered meeting with Ms Kennedy and were aware of what the other twin wanted. [Rana] and [Waiano] were consistent in the views they expressed to their lawyer three months earlier.

[35] Whilst [Rana] loved spending his holidays with his mother and [Ruhi], he wants to continue to live with Dad. [Waiano] spoke enthusiastically about her recent holiday with her mother, sister and other whānau and told her lawyer she wants to live with her mother and sister saying, "I miss them". They knew this would mean they would be separated but knew they would see each other during the holidays.

¹⁶ As reported by Ms Kennedy at pages 100 and 201 of the bundle.

[36] Although [Rana] and [Waiano] have expressed clear views, I remind myself that they are young children: they were five and a half years old when Ms Kennedy last met with them. Whilst highly relevant, their views are not determinative: their welfare and best interests are.¹⁷

[37] I turn now to determine the issues.

Analysis

Primary responsibility for care, development, and upbringing

[38] During their 10-year relationship and since separation, the parties have maintained responsibility for their children's care, development, and upbringing. As part of their commitment, they chose to raise their children in a home where te reo Māori was the predominant language spoken in their whare.

[39] In respect of Ms [Norton], the social worker reported:¹⁸

Ms [Rachel Norton] identifies as Maori and affiliates to Ngati Awa and Ngati Pikiao, and her hapu are [four hapu deleted].

Ms [Rachel Norton] was raised with parents and three siblings; she and her whanau were immersed in their culture as children growing up and she consequently views life from a Te Ao Maori perspective; she has strong Maori values and beliefs and upholds Maori traditions. She proudly wears a tā moko that depicts her kinship ties, she is fluent in Te Reo and reports the language and traditions are an integral part of her (and the children) everyday routines.

[40] In respect of Mr [Tyler], the cultural report writer states:

Mr [Jacob Tyler] (“[Jacob]”) identifies himself as a “kiwi” New Zealander. He has lineage to England and Scotland Highlands (paternal) and England, Scotland, and Maori (maternal).

...

[Jacob] comes from a blended family and is the eldest child to his parents...[His parents separated within a year of losing their 8 month old daughter,] [Jacob] was 3 years old.

Growing up in [location B] gave [Jacob] a lived experience of the Maori culture, the community spirit was about the children, he remembers all the

¹⁷ *Brown v Argyll* [2006] 25 FRNZ 383

¹⁸ Section 132 social worker's report at paragraphs 3 and 4 of page 194 of the bundle.

kids were treated the same. It was normal for extra tamariki to be sitting at their table sharing a meal. “Maori culture was accepted and normalised.

[41] Ms [Norton]’s evidence is she only speaks Māori to her children. Whilst Mr [Tyler]’s first language is English, he does speak some Māori and I acknowledge Mr [Tyler] for performing karakia at the beginning and conclusion of each day of our hearing.

[42] As well as speaking Māori in the home, the parties committed to their children learning and growing up in a schooling environment immersed in te reo Māori.¹⁹

[43] The significance of their decision to have their children attend Māori immersion education is referred to in the cultural report prepared for the court.²⁰

There is no doubt that Kura kaupapa Māori plays a pivotal role in surrounding tamariki in a supportive cultural context. The tamariki learn through a Māori worldview lens which is very different to Western world mainstream education. Te Aho Matua is the framework used by Kura Kaupapa Māori. The principles relate to six areas: te ira tangata (the human essence), te reo (language), ngā iwi (people), te ao (the world), āhuatanga ako (circumstances of learning) and te tino uaratanga (essential values).

Tino rangātiratanga (self-determination) over whakapapa (genealogy) and mātauranga-a-hapū (tribal knowledge) and tikanga māori (customs, protocols, and etiquette) sit directly with the [Norton] whānau who are well steeped in their culture.

[44] The parties’ commitment to their tamariki being educated in a Te Ao Māori environment is best captured by the following whakatauki:

Whaia te tino rangatiratanga, kia tu te Ao Māori

The children’s safety

[45] In July and September 2022, the Court received positive reports from Oranga Tamariki reporting on each party’s living situation.²¹ Apart from a s 19 referral made by the Court, no reports of concern have been received by Oranga Tamariki.²²

¹⁹ Mr [Tyler]’s evidence at pages 124 and 129 of the notes.

²⁰ At page 188 of the bundle.

²¹ Two s 132 reports at pp 155 and 193 of the bundle.

²² Letter from Oranga Tamariki dated 19 March 2020 reporting on s 19 referral at page 107 of the bundle.

[46] Ms Kennedy submits the children are safe in each parents' care but is concerned about the poor communication between the parties. I agree.

Ongoing consultation and cooperation between the children's parents

[47] The children's views, as reported by their lawyer, indicate the close bond these tamariki have with each other and their parents. Notwithstanding that, their parents lack of trust and poor communication has limited the children's ability to have good, meaningful contact with parent and sibling/s who live at a distance.

[48] For Ms [Norton], she feels aggrieved because she considers she did the right thing when she reached out to Mr [Tyler] to care for the twins on an agreed temporary basis. As well, he continues to monitor her weekly video calls to the children in his care even though there is no requirement for her calls to be monitored. Conversely, Mr [Tyler] does not trust Ms [Norton] because she breached the interim parenting order three times by not returning the children on time and believes she will try and influence the children's views and involve them in adult issues.

[49] Neither parent consulted with the other parent when Ms [Norton] enrolled [Ruhi] at [kura Kaupapa 2] in 2021 and Mr [Tyler] enrolled the twins at [primary school 1] in 2022.

[50] Even more concerning is Mr [Tyler]'s decision to enrol [Rana] and [Waiano] at his local kindergarten in August/September 2021.²³ His evidence was he tried to enrol [Rana] and [Waiano] at two separate kōhanga reo in [location B] but was unsuccessful. Rather than no preschool education, Mr [Tyler] chose kindergarten even though the twins had continued to attend kōhanga reo from the age of six months and post separation – a period of over three years.

[51] A move from a full immersion Early Childhood Education (ECE), such as kōhanga reo, to a mainstream ECE is a significant guardianship decision particularly when these parents previously committed to their children being educated in a reo Māori speaking environment.

²³ Mr [Tyler]'s evidence at pages 127 and 128 of the notes.

[52] Mr [Tyler]'s failure to consult with Ms [Norton], who was a senior teacher at the children's kōhanga reo when the parties were together, is significant. As was Mr [Tyler]'s decision to attempt to enrol them at a kura kaupapa after [Rana] and [Waiano] had attended kindergarten for over a year without consulting with Ms [Norton].

[53] Although he informed Ms [Norton] about the children attending kindergarten and [primary school 1] after the event, that was too little too late. When asked why she had not made contact with the children's school, Ms [Norton] stated:²⁴

Because I really thought that I would be interfering because he looked after them up here. That was his choice, that wasn't my choice, he didn't consult with me and that's why I didn't.

...

I was upset that he didn't consult with me about the interview at [kura kaupapa 1], so I just left it, I left it.

[54] The impact of Mr [Tyler]'s unilateral decisions is that the twins use of and ability to kōrero Māori has declined significantly.

[55] Whilst [Piki] and [Ruhi] speak Māori fluently and communicate in Māori to their mother, the twins' primary language is English. Ms [Norton]'s evidence is the twins speak to her predominantly in English on their video calls notwithstanding Ms [Norton] only speaks Māori.

[56] This is hardly surprising given they have been in their father's care and the primary language spoken in the [Tyler] household is English. Mr [Tyler]'s evidence was the language of communication between him, his partner [Gemma] and her daughter is English with a mix of (some) Māori and English when speaking with his tamariki.²⁵

[57] Whilst both parties have at times failed to consult and cooperate on important aspects about their children's care, development, and upbringing, I find Mr [Tyler]'s

²⁴ At pages 56 and 57 of the notes.

²⁵ At page 141 of the notes.

failure to consult with Ms [Norton] prior to enrolling [Rana] and [Waiano] at kindergarten as significant.²⁶ The impact of this decision is considered further on.

Continuity in care, development, and upbringing

[58] Mr [Tyler] continues to live in [location B] and is well supported by his family. He spoke proudly of being brought up in [a suburb in location B] with a high Māori population, and said his sister attended the local kōhanga reo when they were growing up. He said this is where he first learnt to speak Māori. Whilst Mr [Tyler] has only recently discovered his “teeny tiny little affiliation to Ngāti Kahungunu”,²⁷ Ms [Norton]’s evidence is she did not know Mr [Tyler] had whakapapa Māori whilst they were together as neither he nor his family said they had Māori lineage.²⁸

[59] My sense is that Mr [Tyler]’s own upbringing instilled in him a close affinity to te iwi Māori and the Māori world view. The parties’ 10-year relationship and their commitment to raising their own tamariki in Te Ao Māori is testament to that. Similarly, Mr [Tyler]’s enrolment and completion of a [paper] in [a field emphasising biculturalism] is another example.²⁹

[60] Mr [Tyler] argues strongly in favour of the children remaining in his care, not only because he has proven he can take good care of them, but he remains concerned about Ms [Norton]’s ability to provide a stable home and her failure to comply with the current orders in place. He seeks an order that recognises their current care arrangements.

[61] Mr [Tyler] does not agree to them being separated notwithstanding the children’s views as reported by their lawyer. He urges the Court to consider the impact on [Piki] who has lived full time with his younger siblings for the last two years. Whilst [Waiano] enjoys spending holidays with Mother and sister, Mr [Tyler] does not believe she truly understands the impact of being separated from her twin brother.

²⁶ The principle at s 5(c).

²⁷ Bottom of page 139 of the notes.

²⁸ At paragraph [36] on page 21 of the bundle.

²⁹ Top of page 139 of the notes.

Ms [Norton]'s inability to provide a stable home

[62] Since these proceedings commenced, Ms [Norton] has moved four times and was in the process of moving again immediately after the hearing. A closer examination of Ms [Norton]'s multiple moves is warranted.

[63] Immediately after the parties separated, Ms [Norton] moved from [town 1] to [location C], which is about 120 km north of [location B].

[64] No issue was taken with Ms [Norton]'s explanation, for the move north was twofold: to live with aunty and be supported in her care of all four children whilst she worked and studied full time; and to enable the children to have more frequent contact with Father noting the return travel time between [location C] and [location B] is just over three hours as opposed to a 12 hour return trip to [town 1].³⁰

[65] During 2020, Ms [Norton] and the children had to move out of her aunt's home at the landlord's request due to overcrowding. Ms [Norton] and the children moved into emergency housing nearby. Unable to secure alternative housing and determining the emergency housing as inappropriate for the children, Ms [Norton] elected to move back to her parents' home in [town 1] in December 2020. Ms [Norton]'s move at the end of 2020 enabled the tamariki to complete a full year at either kōhanga reo or kura kaupapa before they moved.

[66] At the beginning of 2021, [Piki] returned to [location C] to stay with Ms [Norton]'s aunt. Ms [Norton]'s evidence is that is what [Piki] wanted, however, by June 2021, [Piki] was in his father's care in [location B] where he has remained.

[67] In June 2021, Ms [Norton] secured a teaching position as a kaiako at [kura Kaupapa 2]. Unable to find her own place, Ms [Norton] elected to place [Rana] and [Waiano] with Father until she found suitable accommodation whilst [Ruhi] remained living with her. Around this period, [Ruhi] went north to spend the school holidays with father and siblings and ended up staying with Mr [Tyler] for around six weeks in total.

³⁰ <https://www.newzealand.com/int/travel-times-and-distances-calculator/>.

[68] Ms [Norton] then moved into a cabin on her sister's property at [location D] and [Ruhi] returned to her care.³¹ Ms [Norton] then enrolled [Ruhi] at [kura Kaupapa 2] where she has remained.

[69] In June 2022, Ms [Norton] and [Ruhi] moved into a schoolhouse attached to [kura Kaupapa 2] kura. The s 132 report commented positively on Ms [Norton]'s living situation in that home.

[70] At the hearing, Ms [Norton] advised she had secured a permanent teaching position at [kura Kaupapa 4], the kura that [Piki] and [Ruhi] attended prior to the parties' separation. Ms [Norton] also advised she was in the process of signing up an agreement for a long-term tenancy of a three-bedroom whare situated on a rural property in [location A] and owned by an iwi trust.

[71] At first blush, Ms [Norton]'s multiple moves since November 2019 are a concern.

[72] However, Ms [Norton]'s reasons for moving north in December 2019 were valid. As well as providing the children with more opportunity to have contact with Father, the additional support Ms [Norton] received enabled her to complete her [qualification deleted] by the end of 2020 and to be recognised as a [qualification deleted] at the beginning of 2021.³²

[73] I also accept Ms [Norton]'s reasons for returning to live in [town 1] in December 2020. The lack of affordable housing in [the region surrounding location B] is a real issue and I accept Ms [Norton]'s evidence about the inappropriateness of the emergency housing situation in [a town near location C].

[74] Similarly, I am not concerned by Ms [Norton]'s move to live with sister following her securing employment in June 2021. I find Ms [Norton]'s decision to place the twins in their father's temporary care at this time to be a very child focused

³¹ At page 52 of the notes.

³² At page 55 of the notes.

decision, commented on positively by both the s 132 report and s 133 cultural report writers.

[75] There can be no criticism levelled at Ms [Norton] for her move in June 2022 to the schoolhouse in [kura Kaupapa 2]. Furthermore, three months prior, final parenting orders were made by consent providing for Ms [Norton] to retain day-to-day care of [Ruhi], and Mr [Tyler] to retain day-to-day care of [Piki].³³ There have also been good periods whereby all four tamariki have spent school holidays with Ms [Norton].

[76] Whilst Ms [Norton] has recently moved to another rental property in [location A], again the reasons given for the move are sound and I am satisfied Ms [Norton] is able to and does, provide stability for these tamariki.

[77] I therefore do not share Mr [Tyler]'s concerns about Ms [Norton]'s ability to provide a stable home for any of their children.

Ms [Norton]'s inability to adhere to the terms of the interim parenting order

[78] Mr [Tyler] says Ms [Norton] breached the interim parenting order three times; twice in April 2022 and once in October 2022.

[79] The first alleged breach that Ms [Norton] returned the children early during the April school holidays. Neither the interim order nor the evidence specifies the exact arrangements made for school holiday contact. However, I am satisfied the children were returned to Mr [Tyler]'s care on Wednesday, 27 April 2022 which is mid-way during the second week of the holidays.

[80] The text exchange between the parties submitted into evidence by Mr [Tyler] shows Ms [Norton] asking Mr [Tyler] if he can collect the children early and him agreeing to the same.³⁴ The language used by both parties is courteous and ends on a

³³ Agreement reached at judicial settlement conference held on 9 March 2022.

³⁴ At page 90 of the bundle.

positive note. Accordingly, I am not satisfied that constitutes a breach of the interim order; rather there was an agreement to vary the terms of contact.

[81] The second breach alleged is that Ms [Norton] then refused to collect [Ruhi] from Mr [Tyler]'s care in April 2022 and that [Ruhi] remained with him for five weeks.³⁵ Ms [Norton] denies asking Mr [Tyler] to take [Ruhi]. She says her housing situation was dire at the time, Mr [Tyler] offered (and insisted) that [Ruhi] stay with him, and she considered it was a good decision for [Ruhi].³⁶

[82] This allegation was not the subject of further examination at the hearing and the evidence on it is thin. In any event, Mr [Tyler] did not pursue his application for a bond, costs and contravention of parenting order.

[83] In such circumstances, I am not satisfied the second breach is made out.

[84] On 18 October 2022, Mr [Tyler] obtained a warrant to enforce the terms of contact following Ms [Norton] not returning the children to his care on the last Friday of the October school holidays. Mr [Tyler] says the arrangement was Ms [Norton] was to deliver the children to the [service station] at 12pm where his father, the children's paternal grandfather, would collect them and drive them back to [location B].³⁷

[85] Whilst Ms [Norton] accepts she breached the interim order, she said she was very disappointed Mr [Tyler] did not agree to her request to have the children for an extra week to allow them to attend a significant event, namely the bi-annual Ngati Awa Te Toki Festival held over Labour weekend, which she says the children have attended every year.

[86] Ms [Norton] did travel to the meeting point on the Friday afternoon but arrived four hours late, at which point the children's grandfather had left. Ms [Norton] ended up having to travel to [location B] and returned the children voluntarily the day after the warrant was issued.

³⁵ At paragraph 19 of page 71 of the bundle.

³⁶ At paragraph 42 of page 22 of the bundle.

³⁷ At page 70 of the bundle.

[87] Notwithstanding Ms [Norton]’s evidence that she had contacted her lawyer’s office to seek an extension for the children to remain in her care, the interim order required her to return the children as requested by Mr [Tyler]. There was no agreement by him to a variation and therefore Ms [Norton] was clearly in breach of the interim order.

Where does that leave us?

[88] Continuity in care rests clearly in favour of [Rana] and [Waiano] remaining in Mr [Tyler]’s care where they have been since around June 2021. This represents a significant period given the twins turn six years old next month.

[89] However, this principle is wider than just physical care; it requires consideration of the twins’ care, development and upbringing, a phrase used in the two preceding principles that I have just considered.

[90] Whilst neither term is defined in the Act or in *New Zealand Legal Words and Phrases*, the term “development” is referred to in the purposive section of the Act which is to:³⁸

- (a) Promote children’s welfare and best interests, and facilitate their **development**, by helping to ensure that appropriate arrangements are in place for their guardianship and care.
- (b) Recognise certain rights of children.

[91] It is also referred to in relation to the duties, powers, rights, and responsibilities of a guardian which includes:³⁹

Contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal **development**.

[92] Both terms are then referred to in the purposive section regarding parents and guardians making arrangements and resolving disputes:⁴⁰

³⁸ Section 3(1).

³⁹ Section 16(1)(b)

⁴⁰ Section 39.

The purpose of sections 40 to 43 is to encourage parents, guardians, and donors to agree to their own arrangements for the child's care, **development** and **upbringing**.

[93] Given neither term is defined in the Act, I take the ordinary meaning of each word. The word development is defined in the *Oxford Dictionary* as:⁴¹

the process of developing or being developed; a specified state of growth or advancement.

[94] The word upbringing is defined as:⁴²

the treatment and instruction received from one's parents throughout childhood.

[95] In *T v Chief Executive of the Department of Child Youth and Family Services*, Gendall J commented:⁴³

[27] The issue must be what is best for the children and their psychological, physical and emotional development and overall welfare as they grow into their teenage and adult years. It is well known that stability and security, and loving and understanding care and guidance in a warm compassionate relationship, are essential for development of a child's character, personality and talent...

[28] The Court, whether a Family Court or an appellate Court must endeavour to project as best as can be done the future welfare of the children. Past events, behaviour and circumstances of the child's life inevitably play a part in assessing the current situation. Endeavours to predict the future are notoriously difficult for the Courts, but it is a task that must be undertaken in determining the advantages and disadvantages of these children, in this situation at this time, living with each of the competing custodians.

[96] A child's development in their cultural identity and language was also recognised by Hinton J in *Cavanagh v Cavanagh*, a case determining a guardianship dispute over which school the child should attend – whether it be a full te reo immersion school, a bilingual school, or a state integrated school.⁴⁴

⁴¹ Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2004) at 382

⁴² *n* 42 at 1589.

⁴³ *T v Chief Executive of the Dept of Child Youth & Family Services* [2007] NZFLR 143 (HC).

⁴⁴ *Cavanagh v Cavanagh* [2017] NZHC 1546, [2017] NZFLR 701 at [81] and [82].

[97] Noting these parents' commitment to raising their tamariki grounded in Te Ao Māori, the Te Whare Tapa Whā model of care is particularly relevant.⁴⁵

Te whare tapa whā is a metaphor for the four pillars of Māori wellbeing; the concept was developed by Sir Mason Durie in 1984. Each "wall" or dimension of the house represents an aspect of wellness. The four "walls" are taha tinana (physical wellbeing), taha hinengaro (mental wellbeing), taha wairua (spiritual well being) and taha whanau (family wellbeing).

[98] It is clear from the case law and from a tikanga perspective, that continuity in a child's care, development, and upbringing is much more than physical care. It encompasses continuity in a child's educational experiences, in their cultural experiences, continuity in their relationships with siblings, their parents and wider whānau.

[99] This requires the Court to look back at the child's past experiences and to take a holistic view and project forward in terms of which parent will provide best for their care, development, and upbringing. The following whakatauki is particularly apt:

Kia whakatōmuri te haere whakamua.

I walk backwards into the future with my eyes fixed on the past.

[100] Prior to June 2021, [Rana] and [Waiano] were in their mother's care. Mr [Tyler] accepted Ms [Norton] placed the twins in his care on a temporary basis only and that once she secured accommodation and set herself up, they would return to her care.⁴⁶

[101] Mr [Tyler]'s change in position represents a significant turning point in the decline in the parents' relationship. Furthermore, Mr [Tyler]'s evidence at the hearing is that he has continued to monitor Ms [Norton]'s weekly video calls to the children in his care. This came as a surprise to me noting the interim order does not contain such a condition but does prohibit either parent from talking discouragingly about the other parent to any of the children.

⁴⁵ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 14. See also Mason Durie *Whaiora* (Oxford University Press, Auckland, 1994) at 70.

⁴⁶ At page 125 of the notes.

[102] Although Mr [Tyler] considered he had every right to monitor the weekly video calls, as it was his phone that was being used and to ensure there was no inappropriate kōrero to the children, I disagree.⁴⁷ Mr [Tyler]'s presence will likely have been an unnecessary barrier for Ms [Norton] to engage meaningfully in kōrero with three tamariki and importantly, for [Ruhi] to kōrero with three siblings.⁴⁸

[103] I find Mr [Tyler]'s decision to retain the care of [Rana] and [Waiano] despite the circumstances in which they moved into his care, his decision to enrol them at kindergarten despite them having attended at kōhanga reo for a full three years, and finally, his decision to monitor Ms [Tyler]'s video calls with the children are all decisions that have negatively impacted on [Rana] and [Waiano]'s development and upbringing.

Continuity in a child's relationship with both parents and preserving and strengthening a child's relationship with whānau, hapū, or iwi

[104] Although less than perfect, both parents have been committed to their tamariki having an ongoing relationship with each other and with their parents. I am confident this will continue.

[105] Similarly, both parents have ongoing relationships with members of their own whānau, and this has a positive flow on effect for their tamariki.

[106] From a tikanga perspective, a child's attendance and participation at whānau, hapū or iwi activities will not only preserve, but strengthen that child's relationship with whānau, hapū or iwi.

[107] Ms [Norton]'s evidence was that the bi-annual Ngati Awa and Ngati Pikiao events are held over alternate Labour weekends. The other significant event celebrated by her iwi is the Matariki celebrations. Neither of these events fall within the school holiday periods.

⁴⁷ At page 144 and 145 of the notes.

⁴⁸ This is commented on in the cultural report at the bottom of page 179 and top of page 180.

[108] If [Rana] and [Waiano] are in Ms [Norton]'s care, then their ability to participate in such events is assured given her past commitment to such events.

[109] On the other hand, if [Rana] and [Waiano] remain in their father's care, they will have less opportunity to participate, notwithstanding Father indicating his support for the children attending these events, simply because of the distance between the two homes, the timing of such events and the limited financial means in the [Tyler] household. Both Mr [Tyler] and his partner are in receipt of Work and Income benefits and have limited financial means.

A child's identity should be preserved and strengthened

[110] A child's identity includes their culture and their language.⁴⁹ These are tamariki Māori who were raised in a Māori speaking home and whose parents committed to a Māori immersion education for their tamariki whilst they were together. Additionally, the children were able to attend important cultural and iwi events when they lived together as a whānau in [town 1].

[111] During cross-examination, Mr [Tyler] said the twins being part of a bilingual class is a similar education to that which [Piki] and [Ruhi] received when they attended [kura Kaupapa 4] immediately prior to the parties' separation. He said the teachers there spoke both English and Māori.

[112] There are a couple of issues with Mr [Tyler]'s evidence on this point. Firstly, this was not put to Ms [Norton] at any point, either in his evidence-in-chief or during her cross examination. Secondly, it goes against Mr [Tyler]'s clear evidence that whilst the parties were together, he was committed to their children learning and growing up in a schooling environment immersed in te reo Māori.

[113] Even if I were to accept Mr [Tyler]'s evidence, the situation here is quite different. [Piki] and [Ruhi] were living in a home where Māori was the first language, both parents wanted their children educated in a Māori speaking environment and the

⁴⁹ Section 5(f).

older children attend kura kaupapa Māori; [Piki] in [location B] and [Ruhi] in [the town near kura Kaupapa 2].

[114] Whilst [Piki] and [Ruhi]’s identity, in terms of their language and culture, has been preserved and strengthened, I am not satisfied [Rana] and [Waiano]’s has been similarly preserved nor strengthened.

[115] They have limited opportunity to converse in Māori within the [Tyler] home given English is the predominant language spoken. Similarly, whilst they speak some Māori in their class, it is a bilingual class in which instruction is in both Māori and English.

[116] Although the school report for the end of term speaks positively about the children’s progress during the term one, [Waiano]’s goal is recorded as:⁵⁰

I want to get better at te reo Maori and speaking in Maori.

[117] As part of [Rana]’s goal, the school report states:

I want to learn more about atua Maori.

[118] Te reo Māori has been an official language of Aotearoa New Zealand since 1987.⁵¹ This followed the release of the Waitangi Tribunal report on the Te Reo Māori Claim. The evidence of (the late) Sir James Henare at that hearing is as relevant today as it was then:⁵²

... The language is the core of our Maori culture and mana. Ko te reo te mauri o te mana Maori (The language is the life force of the mana Maori)....

“Language’ according to Oliver Wendell Holmes, ‘is a solemn thing, it grows out of life, out of its agonies and its ecstasies, its wants and its weariness. Every language is a temple in which the soul of those who speak it is enshrined.’ Therefore the taonga, our Maori language, as far as our people are concerned, is the very soul of the Maori people...

⁵⁰ Attached to Ms Kennedy’s report dated 23 July 2023.

⁵¹ Māori Language Act 1987 which was repealed in 2016 by s 48 of Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016.

⁵² Report on the Waitangi Tribunal on the Te Reo Māori Claim (Wai 11, April 1986 at [6.1.2.1].

[119] The Treaty principle of active protection is particularly important and requires the Court to protect these children's ability to not only speak Māori but to thrive in a Māori speaking environment.

[120] If [Rana] and [Waiano] lived with their mother, they would be in a Māori speaking home with a parent with the requisite skills and commitment required to improve their understanding in both areas. I find this would preserve and strengthen their identity.

[121] In terms of the children's views regarding [Rana] remaining with his father and [Waiano] living with her mother, both parties had personal experience in their own whānau where a set of twins lived apart. Whilst Ms [Norton] spoke positively about the separation, Mr [Tyler]'s experience was completely different.

[122] There is no presumption which suggests siblings cannot be separated in care arrangements.⁵³ Similarly, whilst a child's views on their care are important, they are not determinative: the child's welfare and best interests must be the first and paramount consideration.

[123] Significantly, [Rana] and [Waiano] have never lived apart notwithstanding these proceedings have been on foot for nearly four years. Given their young age, I find their welfare and best interests weigh in favour of them continuing to live together.

Conclusion

[124] Ms [Norton] and Mr [Tyler] are both good parents. However, their poor communication when they lived together has persisted over the nearly four years they have been separated. This has been to the detriment of all their children, particularly [Rana] and [Waiano].

[125] Mr [Tyler]'s decision to enrol them into kindergarten and then at [primary school 1] were decisions he made without consulting Ms [Norton] and represented a significant change in their care, development and upbringing.

⁵³ Clare Barrett (ed) *Family Law – Child Law* (online looseleaf ed, Thomson Reuters) at CC48.19(3).

[126] The impact on [Rana] and [Waiano], as tamariki Māori, is that their identity, in terms of their culture and their language, has not been preserved nor strengthened. Nor will it be if they remain in their father's care.

[127] Mr [Tyler]'s concerns about Ms [Norton]'s instability and multiple breaches of the interim parenting order were not well founded.

[128] Similarly, his insistence on monitoring Ms [Norton]'s video calls with the three tamariki in his care was neither required nor provided for in the interim parenting order made by consent in March 2022.

[129] Conversely, Ms [Norton] has shown she can make child focused decisions, such as placing the twins in their father's care when she assessed her housing situation as unsuitable.

[130] The social worker described Ms [Norton] in the following way:⁵⁴

Ms [Rachel Norton] presents as an intelligent and competent mother who has acquired an advanced knowledge of child development through her teaching studies and she articulated sound parenting tenets and beliefs. It appears Ms [Norton] has a good common-sense approach to parenting built on strong family values and through her training has an acute awareness of child developmental stages, attachment theories and parenting concepts...

[131] Ms [Norton]'s evidence was given in such a way that I am satisfied she will work with Mr [Tyler] to ensure the tamariki in her care have good, regular video contact with their father as well as school and end of year holidays.

[132] For all these reasons, I determine [Rana] and [Waiano]'s welfare and best interests will be promoted by placing them in Ms [Norton]'s care. It is also in their welfare and best interests to have good contact with their father and brother [Piki].

[133] The order I make will ensure they have regular video contact and enjoy good holiday contact with Mr [Tyler] so that they remain connected to their father, brother and wider [Tyler] whānau.

⁵⁴ Paragraph 11 at page 195 of the bundle.

[134] Although Ms [Norton] formally applied to determine a guardianship dispute and for an order for all four children to reside in [location A], I am not convinced such an order is necessary.

[135] Firstly, the parties have since agreed on [Piki] and [Ruhi]'s care and [Ruhi] lives with Ms [Norton]. Furthermore, the Court can direct where the children reside as part of a parenting order. That is the approach I will adopt noting the parties lived in [location A] when they were together.

The parties contact with the child/ren not in their care

[136] Whilst the parties have agreed on [Piki] and [Ruhi]'s care, they have not agreed on the terms of contact. They have however agreed to alternate school holidays to enable all four tamariki to be together each school term holiday.

[137] I support such an approach as it is important for all four tamariki that they spend good, quality time together.

[138] Mr [Tyler] shall have two periods of holiday contact during the year at the end of terms 1 and 3 and the end of year holidays shall be shared. This will mean Ms [Norton] will have the children for the end of term 2 holidays and part of the end of year holidays.

[139] Given the distance between the parties and their respective financial position, it is not realistic to provide for weekend contact during school terms, including long weekends and public holidays.

[140] Furthermore, Mr [Tyler] supports the children being able to attend the Ngati Awa and Ngati Pikiao celebrations that are held each alternate Labour weekend which is not during school holidays.

[141] I am satisfied the children must have more opportunity for video chats with their parent and sibling/s who live at a distance from them.

[142] Both parties agree they must do more to improve their communication. Whilst they attended separate sessions with the communications counsellor, my impression is that was during the covid restrictions and by telephone only. My sense is that little was gained from the sessions as the communication difficulties continues.

[143] I will make provision for further counselling noting leave to request further sessions was provided for when the s 46G direction was made.⁵⁵

Orders and directions

[144] I discharge the separate parenting orders in respect of [Piki] and [Ruhi] and the interim parenting order in respect of all four tamariki

[145] I make a final parenting order on the following terms:

- (a) Ms [Norton] shall have the day-to-day care of [Ruhi].
- (b) Mr [Tyler] shall have the day-to-day care of [Piki].
- (c) Commencing at the conclusion of the first four weeks of the 2023 end of year holidays, Ms [Norton] shall have the day-to-day care of [Rana] and [Waiano]. Until then, Mr [Tyler] shall have day-to-day care of [Rana] and [Waiano].
- (d) Mr [Tyler] shall have contact with [Ruhi], [Rana] and [Waiano] during the following times and in the following ways:
 - (i) April and October school holidays.
 - (ii) Twice weekly video calls on Wednesday at 5pm and Sunday at 9am.
 - (iii) For the first four weeks of the 2023 end of year holidays and all odd years (eg 2025, 2027).

⁵⁵ Minute of judicial settlement conference dated 9 March 2022 at page 230 of the bundle.

- (iv) For the last part of the 2024 end of year holidays and all even years (eg 2026, 2028). To avoid confusion, this period commences after the first four weeks of that holiday period.
 - (v) At other times as agreed between the parties.
- (e) Ms [Norton] shall have contact with [Piki] during the following times and in the following ways:
- (i) July school holidays.
 - (ii) Twice weekly video calls on Wednesday at 5pm and Sunday at 9am.
 - (iii) For the first four weeks of the 2024 end of year holidays and all even years (eg 2026, 2028).
 - (iv) For the last part of the 2023 end of year holidays and all odd years (eg 2025, 2027). To avoid confusion, this period commences after the first four weeks of that holiday period.
 - (v) At other times as agreed between the parties.
- (f) The parenting order is subject to the following conditions:
- (i) [Rana] and [Waiano] shall live with Ms [Norton] in [location A] area.
 - (ii) The school holiday contact shall commence on the first Saturday after the last day of term and conclude on the last Friday of the school holidays.
 - (iii) Changeovers shall occur at the [service centre] at 12:00pm.
 - (iv) The children shall not be exposed to:

1. Family violence, in any of its forms.
2. The consumption/use of illicit drugs or alcohol, in excess of the legal limit for driving.
3. Any negative comments towards the other parent or that parent's wider whanau.

[146] I authorise an additional eight sessions of communications counselling which shall include joint sessions to be conducted via video link.

[147] I grant leave to Ms Kennedy to file a memorandum within 14 days of release of my decision in the event clarification to give effect to the terms of the parenting order is required.

[148] In closing, I acknowledge the aroha shown by both parents towards their tamariki. I encourage them both to move beyond their dispute and to find a way to communicate more effectively for the sake of their tamariki. That is what will allow each of their tamariki to grow and develop into the best version of themselves.

Judge L King
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 20/10/2023