NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT AUCKLAND

FAM-2011-092-000521
FAM-2007-092-000257
[2016] NZFC 1640

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1989 THE CARE OF CHILDREN ACT 2004
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	LA EP Respondents
AND	JA born on [date deleted] 2002 HP born on [date deleted] 2005 RP born on [date deleted] 2008 NA born on [date deleted] 2011 MA born on [date deleted] 2013 Children on Young Persons the application is about.

Hearing:	15, 16 and 17 February 2016
Appearances:	C Mutavdzic for the Chief Executive S Bailey for the Respondent P J Attfield for the Respondent A S R Mitchell as Lawyer for the Children
Judgment:	2 March 2016

RESERVED JUDGMENT AS TO REASONS OF JUDGE E. SMITH [SECTIONS 67, 101, 110 AND 121 OF THE CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1989]

The Applications

[1] EP ("Father") and LA ("Mother") are the separated parents of five children: **J** born [date deleted] 2002 [age details deleted], **H** born [date deleted] 2005 [age details deleted], **R** born [date deleted] 2008 [age details deleted], **N** born [date deleted] 2011 [age details deleted] and **M** born [date deleted] 2013 [age details deleted].

[2] These are contested Children Young Persons and their Families Act 1989 ("the Act") (declaration and disposition) and Care of Children Act 2004 ("COCA") proceedings in respect of each child.

[3] On the day the fixture began the parties agreed to declarations (s 67 of the Act) for R, N and M (there already being declarations in force with respect to J and H)[1]; and disposition orders for J, H and R by way of a s 101 custody order in favour of the Ministry of Social Development ("MOSD").

[4] MOSD seek a 101 custody order of all five children and intend to transition and place all five in the care of Father and his immediate whanau. Father consents to that course. Mother opposes that course and seeks a 101 custody order of the younger two children in her favour. Father opposes that course.

[5] Both Mother and Father were opposed to the Court making the Chief Executive of MOSD an additional guardian.

[6] Both parents would seek an s 121 access order between them and the children if they are not to be secured any of the children's custody.[2]

[7] If Mother is not successful in obtaining a custody order in respect to the younger two children in her favour, she consents to MOSD having a custody order in respect of all five children.

---

[1] S 67 declaration made in respect of J and H on 25 March 2011.

[2] For the balance of this decision any reference I make to a custody order will mean pursuant to s 101 of the Act, and a "guardianship order" shall mean pursuant to s 110(2)(b) and to "an access order" it shall be pursuant to s 121 of the Act – unless otherwise particularised.

[8] Therefore, given the agreement between the parties to the making of a s 67 declaration in respect of all children and now the making of s 101 custody orders (be that either in favour of MOSD or Mother as she wishes), all agree no COCA orders can be made and accordingly I intend to therefore dismiss all outstanding and extant COCA proceedings between the parties.

The Law

[9] While agreement has been reached in large measure as to the applicable law, my brief summary of the applicable law and the statutory scheme that governs the outstanding applications is as follows.

[1] The Court's protective role in families derives from the United Nations Convention on the Rights of the Child and is codified in the Children Young Persons and Their Families Act 1989. The over-arching effect of this legislation was summarised by Moran FCJ as follows[3]:

> "The wellbeing of the child is intertwined with that of his family; the child's wellbeing is to be promoted by and through the family to the fullest extent possible; and the child is to be severed from the family to the lest extent necessary and only as a last resort."

[2] All of the Court's protective powers under the Act are subject to the general principles of s 5. The exercise of those powers is governed by the specific principles set out in s 13. Unlike proceedings bought under the Care of Children Act 2004 where all of the factors are to be weighed and where no one principle outlined in s 5 of that Act is to have any more intrinsic value than any other, under the Children Young Persons and Their Families Act, the Court's discretion, as directed by the principles in ss 5 and 13 of that Act, is heavily weighted in favour of the child's family.

[3] Under those principles, the default position is that the child is to be cared for, and protected within, its family.

---

[3] *R v M* Family Court Greymouth FAM-2008-018-000095, 3 September 2010 at [23]

[4] The essence of the principles in s 13 is that a child must be "protected from harm"[4], only removed from its family if there is a "serious risk of harm"[5], "protected from harm" whilst outside its family[6], and returned to its family only when it is practicable for the child to be "protected from harm" within that family[7]. In summary, therefore, "protection from harm" is the only justification for removing a child from its family and is the only barrier to a return to the family.

[5] None of the Court's protective powers can be exercised unless a declaration has been made under s 67.[8] But any declaration made must be on the grounds set out in s 14, so that section must define what constitutes a serious risk of harm from which a child should be protected.

[6] S 14(1) provides:

> **14 Definition of child or young person in need of care or protection**
> (1) A child or young person is in need of care or protection within the meaning of this Part if—
>
> (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; or
>
> (b) the child's or young person's development or physical or mental or emotional well-being is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or
>
> (c) serious differences exist between the child or young person and the parents or guardians or other persons having the care of the child or young person to such an extent that the physical or mental or emotional well-being of the child or young person is being seriously impaired; or
>
> (d) the child or young person has behaved, or is behaving, in a manner that—
>
> (i) is, or is likely to be, harmful to the physical or mental or emotional well-being of the child or young person or to others; and
>
> (ii) the child's or young person's parents or guardians, or the persons having the care of the child or young person, are unable or unwilling to control; or

---

[4] Section 13(a)
[5] Section 13(e)
[6] Section 13(f)(ii)
[7] Section 13(f)(i)
[8] Except on an interim basis, and even then, only if a declaration has been made, the court considers that the child is in need of care or protection, or the child is already in the protective care of the Ministry.

> (e) in the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the well-being of the child; or
>
> (f) the parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person; or
>
> (g) the parents or guardians or other persons having the care of the child or young person have abandoned the child or young person; or
>
> (h) serious differences exist between a parent, guardian, or other person having the care of the child or young person and any other parent, guardian, or other person having the care of the child or young person to such an extent that the physical or mental or emotional well-being of the child or young person is being seriously impaired; or
>
> (i) the ability of the child or young person to form a significant psychological attachment to the person or persons having the care of the child or young person is being, or is likely to be, seriously impaired because of the number of occasions on which the child or young person has been in the care or charge of a person (not being a person specified in subsection (2)) for the purposes of maintaining the child or young person apart from the child's or young person's parents or guardians.

[7] When considering an application for a declaration the Court's approach, therefore, is to:

(a) Identify the grounds alleged by the Ministry in its application; and

(b) Check that a family group conference has been held;[9] and

(c) Identify whether there are any practicable or appropriate means outside of the Act from protecting the child from harm.[10]

[8] A declaration may only be made when those three criteria have been satisfied.

[9] Once the declaration has been made, the Court's approach when considering disposition is to:

(a) Examine each ground established on the making of the declaration.

---

[9] Section 67
[10] Section 73

(b) From those grounds identify the harm from which the child should be protected.

(c) Determine what measures should be taken to ameliorate those risks.

(d) Determine whether those measures would adequately protect the child from those risks if it were to reside with the family.

[10] The child's removal from, or retention outside, the family can only be justified if the court's determination of issue (d) above is in the negative. If it is in the affirmative, then the child must either remain in, or be returned to, the family as soon as practicable. No permanent placement outside the family can be sanctioned unless the Court is satisfied that this determination is unlikely, on the balance of probabilities, to be determined in the affirmative before the child turns 17.

[11] When the Court makes a declaration it may do one or other of the things in s 83 of the Act which provides :

> **83 Orders of Court on making of declaration**
>
> (1) Where the Court makes a declaration under section 67 of this Act relating to a child or young person, it may do one or more of the following things:
>
> (a) Discharge the child or young person, or any parent or guardian or other person having the care of the child or young person, or both, from the proceedings without further order:
>
> (b) Order that the child or young person, or any parent or guardian or other person having the care of the child or young person, or both, come before the Court, if called upon within 2 years of the making of the order, so that the Court may take further action under this section:
>
> (c) Order one or more of the following persons to receive counselling from such person or persons, and subject to such conditions, as are specified by the Court:
>
> (i) The child or young person:
>
> (ii) Any parent or guardian or other person having the care of the child or young person:
>
> (iii) Any person in respect of whose conduct a restraining order or an interim restraining order was sought or made in the proceedings:

(d) Make a services order under section 86 of this Act:

(e) Make a restraining order under section 87 of this Act:

(f) Make a support order under section 91 of this Act:

(g) Make a custody order under section 101 of this Act:

(h) Make an order under section 110 of this Act appointing a guardian of the child or young person.

(2) Where the Court makes an order under subsection (1)(c) of this section, sections 74 to 77 of this Act shall apply, with all necessary modifications, with respect to that order as if it were a direction made under section 74(1) of this Act.

[12] As in this matter, where the Ministry seek by disposition by way of s 101 orders a clear prerequisite is that the Court is prevented from making or considering that (and any s 110 guardianship order) without a report under s 186 and have obtained a plan pursuant to s 128 to s 130 of the Act. This is a matter where the Ministry have filed a s 186 report.

[13] Sections 128 to 130 provide:

128 Court to obtain and consider plan for child or young person before making certain orders

(1) Where the Court proposes to make any one or more of the orders specified in subsection (2) of this section in respect of any child or young person, the Court shall, before making any such order, obtain, in relation to that child or young person, a plan prepared in accordance with sections 129 and 130 of this Act.

(2) The orders referred to in subsection (1) of this section are as follows:

(a) A services order under section 86 of this Act … :

(b) A support order under section 91 of this Act in respect of any child or young person:

(c) An order (other than an interim order) under section 101 of this Act placing any child or young person in the custody of any person:

(d) An order under section 110 of this Act appointing any person as the sole guardian of a child or young person.

(e) Not in force.

(3) Where, pursuant to subsection (1) of this section, the Court is required to obtain a plan in relation to a child or young person, that plan shall be prepared notwithstanding that a plan prepared pursuant to this section is

already in force in relation to that child or young person, and on the preparation of that plan any plan already in force in relation to the child or young person shall cease to be in force.

(4) Notwithstanding anything in subsection (1) of this section, where—

(a) The Court proposes to make an order in respect of a child or young person; and

(b) But for this subsection, the Court would be required, pursuant to subsection (1) of this section, to obtain a plan in respect of the order; and

(c) The making of the order would be in accordance with a decision, recommendation, or plan made or formulated by a family group conference; and

(d) That conference has already formulated, in respect of the child or young person, a plan that complies with the requirements of section 130 of this Act; and

(e) Either—

(i) That plan was prepared in consultation with the chief executive or a Social Worker; or

(ii) The chief executive consents to that plan being treated as a plan obtained by the Court pursuant to subsection (1) of this section,—

the Court may treat that plan as a plan obtained by the Court pursuant to subsection (1) of this section, and that subsection and the other provisions of this Act that relate to plans obtained pursuant to that subsection shall apply accordingly as if the plan had been prepared by the chief executive.

129 Court to direct who is to prepare plan

(1) Where, pursuant to section 128 of this Act, the Court is required to obtain a plan in respect of any order, the plan shall be prepared by such person as the Court directs.

(1A) Where—

(a) A person is directed, pursuant to subsection (1) of this section, to prepare a plan; and

(b) That person is not a Social Worker; and

(c) That plan has any implications for the chief executive ,—

the plan shall be of no effect unless it has been prepared in consultation with the chief executive or his or her representative, and contains an express statement to the effect.]

(1B) For the purposes of subsection (1A) of this section, a plan has implications for the chief executive if it proposes that—

(a) The chief executive be required to provide services or assistance pursuant to a services order under section 86 of this Act; or

(b) The chief executive be required to provide support pursuant to a support order under section 91 of this Act; or

(c) A child or young person be placed in the custody or care of the chief executive; or

(d) The chief executive be appointed as the sole guardian, or as an additional guardian, of a child or young person; or

(e) A child or young person receive counselling or other services under this Act, where that counselling or those services would be provided at the Department's expense; or

(f) Either—

(i) A child or young person be placed in the custody or care of any person or organisation; or

(ii) Any person or organisation be appointed as the sole guardian, or as an additional guardian, of a child or young person,—

and that the chief executive provide financial assistance to that person or organisation; or

(g) Any order (whether a services order under section 86 of this Act or a support order under section 91 of this Act, or any other order) be made in relation to any person or organisation, and that the [[chief executive]] provide financial assistance to that person or organisation for the purpose of assisting that person or organisation to give effect to the order.

(2) Where the Court considers that any plan prepared pursuant to section 128 of this Act is inadequate, it may direct the person who prepared the plan to furnish to the Court a revised plan, and may indicate any specific matter that it requires to be dealt with in that plan.

130 Content of plans

Every plan prepared pursuant to section 128 of this Act in respect of a child or young person shall—

(a) specify the objectives sought to be achieved for that child or young person, and the period within which those objectives should be achieved:

(b) contain details of the services and assistance to be provided for that child or young person and for any parent or guardian or other person having the care of the child or young person:

> (c) specify the persons or organisations who will provide such services and assistance:
>
> (d) state the responsibilities of the child or young person, and of any parent or guardian or other person having the care of the child or young person:
>
> (e) state personal objectives for the child or young person, and for any parent or guardian or other person having the care of the child or young person:
>
> (f) contain such other matters relating to the education, employment, recreation, and welfare of the child or young person as are relevant.

[14] Judge Somerville noted that the provision of a plan for certain orders is to ensure that the proposed intervention is "described in writing and purposive".[11]

[15] Once the plan is prepared, the Court may direct it to be revised if it is inadequate.[12]

[16] Section 130 does not insist that the plan contain specific recommendations about every application before the Court that requires such a plan. Rather, the plan must address objectives, services and assistance for the child or young person.

[17] The various sections of the Act relating to the provisions of plans, reports and revised reports enable the Court to oversee the implementation of its orders, and to ensure that appropriate measures are being taken to ensure the future well-being of the child or young person. The intention of the scheme is to ensure oversight of a child's care and to ensure that they are not lost in the system.

[18] It has been said by Judge MacCormick that the aim of the Court's consideration under s 137 is to:

> … achieve the best possible future care arrangements for the children, having regard to the history, the evidence and reports, and to the principles and objects of the Act.

---

[11] See *Chief Executive of Ministry of Social Development v LFT* [2010] NZFLR 569 at [52].
[12] *MLM v Chief Executive Ministry of Social Development* [2013] NZHC 1064 at [32].

[19] Simply put the Court cannot make a s 101 (or s 110) order unless it is satisfied that there are proper arrangements in place for the child to address the care and protection issues arising as defined in s 14 of the Act.

[20] My approach is to consider the reasons for the declaration and why these children are in need of care and protection, consider the deficits for the children which precipitated the State intervention and thereafter assess what orders or planning for the children might be necessary to address those presenting deficits but more particularly any care and protection concerns that endure and wider welfare issues for the children having regard to the principles of the Act.

[21] The effect of a s 101 order is important and particularly so in this matter. The effect of a s 101 is set out in s 104 of the Act. It is clear that such an order is more extensive and broader than, say, a parenting order under the Care of Children Act 2004, as sections 101 and 104 provide more extensive powers. In particular, where a person who has custody under a s 101 has a role of providing day to day care, the powers set out in s 104(2) are broader. Importantly they include the power to place a child with any person or residence (s 104(2)(a)). Further, s 104(3) authorises a person who has a custody order to use force to enforce that order. S 104 provides:

> **104 Effect of custody order**
>
> (1) Where the Court makes an order under section 101 of this Act placing a child or young person in the custody of any person,—
>
> > (a) that person has the role of providing day-to-day care for the child or young person as if a parenting order had been made under section 48(1) of the Care of Children Act 2004 giving that person the role of providing day-to-day care for the child or young person; and
> >
> > (b)Except to the extent that they are preserved by the Court in any order made under section 121 of this Act, all the rights, powers, and duties of every other person having custody of the child or young person shall be suspended and shall have no effect; and
> >
> > (c) for the purposes of section 92 of the Care of Children Act 2004,—
> >
> > > (i) the order constitutes an order about the role of providing day-to-day care for the child or young person; and

> (ii) the person in whose custody the child or young person is placed is a person who, under the order, has the role of providing day-to-day care for the child or young person.]
>
> (2) Any custody order shall be sufficient authority for any [constable] or any Social Worker or any other person authorised in that behalf by the chief executive to place the child or young person to whom the order relates—
>
> (a) Where the order places the child or young person in the custody of the chief executive, with such person, or in such residence, as the principal manager of the Department for the area in which the Court is situated may direct:
>
> (b) Where the order places the child or young person in the custody of an Iwi Social Service or a Cultural Social Service, with such person as the Convener of the Social Service directs:]
>
> (c) Where the order places the child or young person in the custody of the Director of a Child and Family Support Service, with such person or in such residence as that Director directs:
>
> (d) Where the order places the child or young person in the custody of any other person, with that person.
>
> (3) Any person authorised by subsection (2) of this section to place any child or young person with any person or in any residence—
>
> (a) May use such force as is reasonably necessary for that purpose:
>
> (b) May exercise that authority from time to time in order to return the child or young person to that person or residence:
>
> (c) May, for the purpose of exercising that authority, exercise the powers conferred by section 105(2) of this Act, and the provisions of subsections (2) and (3) of section 105 of this Act shall apply accordingly with all necessary modifications.

[22] Recently the breadth of an s 101 custody order was considered in *Chief Executive of the Ministry of Social Development v DR*[13] at paragraph [37] of the judgment which stated:

> Section 101 does not set out placement powers that arise on the making of the order. However, s 104(2) confirms that the order is sufficient authority to uplift the child or young person in the chief executive's custody and place them where directed by the relevant manager. The authority is not limited to any particular geographical area. This reflects the broad placement powers under s 105 of the Act which are engaged upon the making of an order under s 101. These include the power to place children in any residence, to transfer them from one residence to another residence, to place them temporarily with parents or guardians or with any other person. The chief executive may

[13] [2016] NZHC 24

> at any time cancel any such arrangements and remove the children to a residence to such place the social worker may decide.

[23] It is of course critical to note that if a s 101 custody order is made in favour of a person other than the Chief Executive, the ability to place in the way described above is removed (s 104(2)(d)).

[24] In terms of the access considerations there are two ways of delivering access between the children and their mother and/or father. Commonly access arrangements appear as a obligation of the Ministry in a plan. Secondly, access can be secured by way of a s 121 order defining access as between the custodian (in this case MOSD) and the recipient of the access.

[25] The benefits of a defined s 121 access orders is that the obligations are clearer, they are Court ordered and subject to enforcement, and reduce the uncertainty of access or repose in one party or the other unmeritorious determination of the extent and nature of access or at least can reduce that if less desirable or optimise that if more desirable

Background

[26] Despite the parties being agreeable to declarations being made pursuant to ss 14(1)(a) and (b) with respect to R, N and M (J and H's declarations having long been in place) in my view the reasons for those declarations and State intervention are important. They are critically relevant in order to know the extent and nature of the deficits that the parents and children had that warranted State intervention, as without knowing those matters the disposition orders required sufficient to repair the deficits, or ameliorate them, and how to optimise the welfare interests of the children cannot properly be determined.

[27] Without pretence of precision by me as to all of the procedural background, what appears evident is a multitude of proceedings between the parties in a variety of ways before the Family Court from at least 2007 when Mother obtained a protection order against Father. Notable periods of intense litigation and change of care of the

children ensued which culminated with MOSD applying for declarations for J, H and R (with accompanying applications for s 78 interim custody) by March 2011.

[28] On 25 March 2011, by consent, declarations and s 78 interim custody orders were made with respect to J and H. No agreement was reached whether there should be a declaration and s 78 custody order for R at that time.[14] The Ministry were to file a plan with respect to the two oldest children and a hearing was to be held with respect to R as to declaration and interim custody.

[29] Subsequently on 12 May 2011 the Court[15] made a conditional s 78 order with respect to R in favour of the Chief Executive (condition as to placement with a family member) although a declaration was never agreed. It seems to me at that time the intent was for a full plan and report.

[30] My consideration of the file seems to suggest the s 78 interim custody orders made by May 2011 in respect of J, H and Rea actually have stayed in force for the successive five years since until this hearing (February 2016). R's declaration which was applied for back in March 2011 has never been dealt with until this hearing.

[31] Between then May 2011 up till November 2014 the older three children moved to a variety of caregivers including Mother, Father, family, whanau and Ministry caregivers as no disposition orders have ever been made. There seems to have been a variety of plans prepared by MOSD but never ratified. It is clear along the way there are protestations by the parents of intent to improve their parenting, particularly abstinence from alcohol and drugs, re-calibration of their relationship promising there would be no domestic violence and that they would remain separated. All of those protestations failed. Throughout that period the parties reconciled and then separated, they made attempts to improve their ability to care and achieve sobriety of alcohol and drugs, all of which failed. I am also satisfied that throughout, the proceedings were intensely defended at times, with both parents rounding on the Ministry about its lack of care and proactivity in communication and

[14] See oral judgment M L Rogers 25 March 2011
[15] See judgment of G F Hikaka 12 May 2011

at other times the parents rounding on each other with serious allegations of intoxication, abuse and neglect between them both and towards the children.

[32] When N and M were born in 2011 and 2013 respectively, I am satisfied that Mother largely provided their day to day care. There remains an ancillary (albeit in my view critical matter) that there is a dispute as to whether Father is in fact N's biological father. Father oscillates in his belief about N's paternity as does Mother. It does neither of them credit that they continue to have that unresolved. While Mother largely assumed the day to day care of the two younger children, it is equally clear that from time to time Father cared for them.

[33] There were certainly periods when the Ministry had formed the view there had been advances by both parents, particularly Father, where they had ratified the older children's return to him and at times J to her mother, but none of those care arrangements endured. Discharge of the s 78 orders were contemplated at times and in their stead s 91 orders and placement of the children with their parents in different configurations suggested.

[34] By mid July 2014 the Ministry received reports that J may have been assaulted by her mother and that Mother and maternal grandmother were using drugs (all denied by maternal family). J who had been with her mother returned to Father's care. Father applied and was granted on a without notice basis interim day to day care of M and N who had prior been in Mother's care. Father's supporting affidavit gave, in my view, a cursory summary of the plethora of proceedings prior, omitted significant matters, but persuaded the Court (on a without notice basis) because of the allegations of violence by Mother to J and allegations of substandard care to the younger two children to grant him interim care of the younger two children. Mother immediately defended those proceedings, claimed significant misrepresentation by Father including fabrication and rejection of allegations of impropriety by her to the children.

[35] Whatever the rights and wrongs of the allegations between the parties in the COCA proceedings of August 2014, subsequently in short order it becoming evident to the Ministry that the parents had returned to the use of alcohol and drugs (despite

them claiming sobriety and abstinence). The Ministry itself galvanised so that in 2 November 2014, it made an application (on notice) for declaration with respect to N and M and without notice application for a s 78 interim custody order with respect to both. The latter was successful.

[36] The concerns at that time (given the Ministry had latent but still operative s 78 orders with respect to the three oldest children) was such for all of the children that all five have since that time been placed outside of their parents' care.

[37] Each parent however achieved some defined supervised access by 27 October 2015.[16]

[38] J was placed with a Family Home caregiver Ann Mitchell on 22 April 2014 and has remained there up to the date of hearing. She has been receiving support from Whirinaki in relation to self-harming, hearing voices and inability to sleep.

[39] H and R were placed with a Ministry caregiver Fiona McKinley on 5 December 2014 (prior having lived with Father for a few years), and both remain living with Ms McKinley up to the date of hearing.

[40] N and M were placed with Open Home Foundation caregiver Jacqui Smith on 11 November 2014 (prior having been in Mother's care up until Father's successful without notice application) and they remain living with Ms Smith up to the time of hearing.

[41] While the parties have consented to declarations being made for all of the children, so as a detailed regaling of the evidence in support of that is not required, the grounds that I find substantiated, (irrespective of the parties' consent) for the declaration are obvious and in my view palpable. In particular, the parents have:

(a) Engaged in repeated incidents of serious domestic violence between themselves and to which the children have been exposed to a variety

[16] See oral judgment of Judge M L Rogers as to the making of interim s 121 access orders with respect to the children and their parents.

of degrees. That violence has been both physical and psychological and unabated for long periods;

(b) The inter-parental conflict has been marked and repeated with free flowing allegations between the parties (when not reconciled) about the other's domestic violence, addiction issues, and neglect of the children;

(c) Some whanau have been drawn into the fray with allegations against the other parent being made in accordance with blood alignment;

(d) The parties have separated and reconciled a number of times, often covertly, when the reconciliations were often preceded by protestations that the parties would never reconcile again, such promises usually made to demonstrate that they are safe parents for their children and as accepting when reconciled the use of alcohol and drugs and the incidence of domestic violence increases;

(e) Each has chronic relapsing alcohol and drug dependencies, again there being successive protestations by each party of enduring sobriety proven as inaccurate as relapses have punctured consistently the protestations of sobriety and attending of courses designed to prevent or minimise relapse;

(f) The combination of the above has led to unstable, neglectful parenting particularly marked by exposure of the children to the excesses of their parents' addictions, domestic violence, marked lack of boundaries and inattentive parenting;

(g) The children, particularly the older three, have experienced oscillating and fractured care arrangements, sometimes with their parents, sometimes with others (including to be fair of recent years changes in care during the currency of the s 78 interim custody orders managed

by MOSD) which has resulted in reduced stability and consistency of care;

(h) Whatever the parents' frustrations, they have been unable to sustain (to date) effective engagement with MOSD and a good working relationship. It has become a feature of these proceedings that Father, perhaps in particular, given his dominant personality, rages about MOSD, makes successive complaints regarding their actions to Courts, Judges and politicians and has been particularly forceful in his criticism of MOSD. I pause here to say that this was in direct contrast to Father's presentation throughout the hearing before me. He was contrite, he accepted unreservedly his substandard parenting, his significant addictions and promised repeatedly a willingness and intent to work intricately with MOSD – perhaps this apparent change of character, presentation and circumstance came more from his latent work and his appreciation that of recent days the Ministry are truly contemplating the return of all five children to him. I find that it is likely, however, that when future decisions made by MOSD do not accord with Father's own view of what would happen, there is every risk he will return to his natural disposition and overpowering, critical, demanding behaviours which are difficult for social workers and agencies to engage with in a constructive fashion.

[42] On any view, two overwhelming demonstrable parenting problems pervaded. Firstly, the conflict and domestic violence, and secondly the parties' alcohol and drug dependencies. This is important to appreciate as the parents' chronic addiction is a particular deficit that has been a driver for this Court in considering the best protective disposition outcome for the children.

[43] While I do not intend to dwell in detail on the number and nature of the care changes for the children and the exact reasons why these changes came about, some general observations about the children's fractured care arrangements from time to time are relevant. Firstly, the uncertainty and stability of care over the last four years

or so (particularly the older children) has been far from optimum and has created vulnerabilities and distress for the children from time to time.

[44] That said, a second equally powerful observation needs to be made, that often these changes of care have been commensurate with the shifting sands of: availability of safe caregivers; the parents' changing lifestyles and assessment of their safety as caregivers at any given time depending how much to the fore their addictions and domestic violence were; the children's changing needs and their wishes; and the behaviour of the children. A combination of these factors has meant irrespective of the desirability of stability of care, change has been required to effect the overriding need to ensure the children's safety and wellbeing.

[45] This leads to the third acute observation that drives this decision. That is for these children there is likely to be, on my assessment, ongoing changes and the need to acutely assess their needs at any given time (which I suspect will change) and provide care commensurate with those needs. Bluntly put, the parents in my view have demonstrated consistently an inability and are ill equipped to effect those flexible care changes and the type of parenting that is needed to ensure the children's safety and adapt to their changing needs, let alone self assess the risks that each have posed to the ongoing care of their children.

[46] This leads to the fourth general observation which is that the children all need a high level of functioning caregiver. This is particularly so for J and increasingly so for H, both of whom I assess are going to need excellent caregivers (or oversight or management) who can work collaboratively, quickly and effectively with professionals (particularly mental health professionals).

[47] The last general observation is that there can no longer be room for dissention in the care plan for the children or challenging of the decisions that need to be made for them quickly and in an enduring way. The Court process to date has been marked by criticism and dissention between the parties and the Ministry and procedural inexactitude. That has resulted in an unacceptable a five year delay in disposition for J and H, in the declaration for R and an almost two year delay for the disputed declaration and s 78 orders with respect to N and M. That can never

develop again. If the Court has contributed to that extraordinary state of affairs, it equally has to stop. The fact that under the Act wherever practicable (after the receipt of any opposition) a declaration application has to be resolved within sixty days, brings into sharp focus the abhorrent failure of the Court process and those participants that are charged with the responsibility for disposition of care and protection proceedings of this type to have done so in a timely way. Such delay must not beset these children again.

Question 1: Who ought to have a s 101 Custody Order – MOSD or Mother?

[48] In determining disposition orders that might best meet the children's needs I have found persuasive the data, opinion and recommendations of Dr Watts. He provided reports regarding the children's attachments, functioning and needs at three discrete periods of time; firstly, as at March 2015 (first report), February 2016 (second report) and his opinion at the hearing after considering an updated plan by MOSD that ostensively whilst still seeking custody of the children to the Chief Executive, sought to place (over a staged basis) all five children to Father's care.

[49] While Dr Watts was cross-examined extensively I did not consider any of his opinions or evidence impeached but rather his evidence sound and to be given significant weight.

(a) Dr Watt's first report – March 2015

[50] The prominent foundation protection issues that were evident to Dr Watts were the intertwined history of custody conflict, domestic violence, chronic alcohol and drug use and the children's exposure to all of that.[17] In addition, in his view, the children were suffering secondary social consequences of addiction behaviour including unstable living, exposure to socially deviant and criminal behaviour and suggestions that wider family or whanau were involved in substance abuse, criminal activity or substandard environments.

[17] See Notes of Evidence Page 511 to 513

[51] In terms of sobriety Dr Watts noted that neither Mother or Father had established a clinically significant period of sobriety by that time (March 2015). At the time of the report Mother acknowledged she had continued to use cannabis and consumed a small amount of alcohol over Christmas 2014. Father professed sobriety. This turned out to be completely incorrect when subsequently it was exposed that Father acquired a serious drink/driving conviction (for which he received intensive supervision and disqualification) during the period of Dr Watts' assessment and particularly early 2015. Father in fact has had approximately three drink/driving convictions within the last four years or so and is in peril of incarceration if he accrues another similar conviction.

(i) J

[52] By the time of Dr Watts' March 2015 report, J had been presenting with a history of various emotional and behavioural vulnerabilities including sexualised behaviour, aggression towards sisters, possible hallucinatory experiences including self reports of visions and references to the devil. She had displayed issues with distress intolerance and accompanying self harm behaviour. At times she has a highly negative view of herself. Such emotional issues were accompanied by difficulty in maintaining productive social relationships, difficulty accepting the authority of adults which sometimes results in particularly disruptive and conflictive behaviour. She has chronic problems with peer relationships and also presents an inability to maintain close friendships. At times J pathologises herself, manufactures social conflict and self-sabotaging. Dr Watts' opined this is often evident in children who harbour a pervasive sense of emotional numbness and negative self-esteem and distrust of others. It was his clear opinion that J's presentation was consistent with a child who had come to experience pervasive attachment difficulties and indicates an anxious-ambivalent attachment style. This had lead to J engaging in a variety of degrees and successes with the Child and Adolescents Community Mental Health Services.

[53] At times J expressed both frustration and anger towards her parents regarding their dysfunctional parenting behaviour.

[54] J had an insecure and conflicted caregiving relationship with both of her parents, she had an idolised perception of them as loving and caring as well as her real life experiences of the substance abuse, being neglectful and violent. At that time despite the reports appearing to have few recent experiences of being with her mother, J wished to return to her mother's care. At that time there did not appear to be clear evidence of any third party or her parents had impacted on J's expressed wishes, although Dr Watts expressed concern about how capable J was at differentiating her idolised expectations of each parent, particularly her mother, with the actual experiences of them given her anxious-ambivalent attachment style. At that time Dr Watts considered J's wishes regarding future care was likely to be unstable over time as she drives to engage and then disengage from caregiving relationships and predicted that unless J engaged in long term therapy to address her presenting attachment issues she would likely eventually disrupt any caregiving environment offered to her even if placed with her parents (a matter that his predictive assessment was accurate about – see paragraph [86] hereof).

[55] J's then current care arrangement appeared to be meeting some of her needs and some improvement in her psychological issues particularly sleep and mood.

[56] J was tending to try and influence H and R to return to her mother's care. Dr Watts' opinion was this influencing behaviour was likely driven by her desire to live with all of her siblings in her preferred living environment and she was adopting a parentified sense of responsibility. In the absence of any clear direction from the adults in her life it would be expected that J would begin to take some level of control and perceived responsibility for her siblings' care arrangements.

(ii) H

[57] Despite disrupted life and parental conflict, H did not present with any significant developmental delays or emotional or behavioural problems and had a positivity biased internal representation of herself. While there were no clinically significant issues apparent, she had been exposed to domestic violence between her parents and lack of clear care routine in her father's care. She spoke openly about the fighting and how worried and sad she was when she witnessed it.

[58] H's primary care attachment was to her father and she was not worried or concerned about being in his care, even though she clearly experienced inconsistent care routines with him. Her recall of her care by her mother was impoverished in the sense she could describe it as "good" but no other detail of experience.

[59] H had a clear desire to return to her father's care.

[60] While H's current care arrangements were meeting her need for stable and attentive care, the main concern at that time was the temporary non-kin care placement given it is unlikely to be a Home for Life and subsequent changes in care environment likely to cause psychological distress. In particular, Dr Watts said (and the opinion is equally applicable for all of the children):

> There is now a scientifically robust corpus of research showing that ongoing disruption in a child's care arrangements does tend to have a cumulative and longer term deleterious impact on their emotionality and capacity to bond with caregiving adults.[18]

[61] There is certainly a concern that a continuation of non-kin placement compared to whanau based placement will limit the amount of naturalistic contact the children can have with their father and even their mother and can possibly lead to long-term issues of grief.

[62] H certainly had a generally positive perception of her mother but not a secure caregiving bond, her primary attachment being with her father, in fact describing her uplift from her father's care in 2014 as the saddest time in her life.

[63] There was no clear evidence that H's views of wishing to return to her father had been influenced unduly but rather based on her sense of him as her primary caregiver and general experiences in the past which she overall thought positive.

[64] That said H had formed a bond with her current caregivers and spoke positively about them and seemed happy and settled in that arrangement.

(iii) R

[18] See Page 517 Notes of Evidence

[65] Similar to H, R while experiencing disruptive family life and conflict did not present with any significant developmental delays or psychological problems and had a positively biased internal representation of herself. She too had clearly been exposed to conflict between her parents and the fighting as well as her father and her older half-sibling J. There is clear evidence that R had lacked consistent care boundaries with her father.

[66] R had a sense of her father as her primary caregiver and a positive sense of him generally and was sad not being able to live with her mother and father together and in those circumstances would want to be in her father's primary care.

[67] R had a positive perception of her mother but not a secure attachment.

[68] There was no evidence that there was an inappropriate influence on R's expressed wishes, they came from her real experience and her primary attachment with her father.

(iv) N and M

[69] M and N do not appear to be presenting with any significant developmental delays, emotional or behavioural problems. They seem happy and settled in their then care arrangement. No significant issues of adaptive functioning or behaviour. Suffice to say the care arrangements were meeting their day to day psychological needs for a stable, attentive care environment, similar concerns presented however, as for H and R in that N and M's current care arrangement was not likely to be a Home for Life and subsequent changes in care arrangements is likely to cause significant distress and disruption and the care arrangement was certainly not at that time whanau based.

[70] Given N's age her representation, views and narrative of her parents was limited in express detail but overall positive and appeared excited when she was going to see her parents, particularly her father and used phrases like "*want Daddy*" and "*love Daddy*". N did not display any signs of anxiety towards her parents during the observations and was excited to see both.

[71] M's age prevented any narrative regarding his views, attitude and wishes towards his parents and Dr Watts' observations were reliant on third parties' representations and their observations suggesting M seemed to be happy in his parents' care and did not display anxiety towards either of his parents although reported to be more father focused.

[72] While the older three children identified other whanau who they knew, there was no indication of them having developed significant caregiving bond with anyone else in the whanau apart from their parents. It is perhaps of note that J spoke in a positive fashion about her aunt but the material on the file suggested that J had reported that she had been physically mistreated by her and was removed from her care because of that which suggested to Dr Watts of J's attachment difficulties.

(v) The likely effect on the children of each party's parenting

[73] In assessing the likely effect on the children of each party's parenting them, Dr Watts considered two broad psychological variables. Firstly, the parent's individual functioning and whether they themselves have emotional or behavioural deficits which would negatively impact on the child. Secondly, the parent's internal modelling of the child – this includes such things and the parent's motivation to parent, attitude towards the child, working knowledge of the child as a person and their day to day needs – often reference as the parent's "bond" (or attachment) with the child.

[74] Dr Watts gave an opinion that there was no clear clinical evidence that either parent had achieved any sustained resolution of their substance abuse and use issues (both alcohol and drugs) so he could offer no assurances that the children would be cared for appropriate in either parent's sole care.

[75] Dr Watts particularly referred to research on substance abuse generally showing parental drug addiction as one of the strongest risk factors to mistreatment, particularly insofar as it results in maladaptive and disregulated behaviour by parents, but the secondary impacts on a parent's life such as unstable living

conditions, financial stress and association with deviant peers will impact on the parent's ability to consistently attend to the child's needs.

[76] Research showed that insight into addiction behaviour and motivation to address presenting issues was quite insufficient to overcome addiction unless the parent was able to maintain a long period of sobriety (in excess of a year). Research continues to suggest that less than half of all people who experience addiction issues are able to sustain complete sobriety across their life span.

[77] In terms of the parental conflict, there was certainly no clinical evidence in the work done by Dr Watts to suggest that these parents would be able to work together to parent their children in the future.

(v) Advantages and disadvantages for the children of the options for their care

[78] Care options at that time included Father's wish to have all five children, Mother's wish to have all five children or the Ministry placing with non-whanau (unless a whanau option could be found).

[79] In general terms the research pointed that if possible the children should be placed in the care of their parents but in the circumstances there was no assurance that the parents could appropriately care for them on their own. Dr Watts' opinion was that if any of the children were to be safely cared for by either parent they would have to cohabit long-term with an appropriate caregiving adult(s) and receive ongoing extensive community based support and monitoring. These were unmoveable prerequisites. If achieved the advantages relate to the children's expressed wishes and the clear bonds with each parent. Conversely, placement with third party care would not directly expose the children to the parents' substance and conflict issues and if this could be with whanau based care, this would likely optimise the children's chance of maintaining some kind of regular and naturalistic contact with each of their parents and family of origin.

(b) March 2015 until hearing 2016

(i) Overview

[80] After Dr Watts' first report came to hand, it appears the parents applied themselves trying to establish sobriety and/or improve parenting skills or their lifestyles generally, each wanting to have the children returned to their care.

[81] However, for Mother's part something critical occurred. By mid 2015 her mother had become very ill and Mother began to dedicate much of her time and energy to the substantial home-based care of her mother. This intensified by December 2015 when her mother had an accident which compromised her care and required even more intensive care.

[82] By the middle of 2015 the parents were ostensively advised by the Ministry that they were not looking at the children returning home to either of them and Child Youth and Family were looking for a placement for all five children together and one eventuated with whanau in [location deleted]. Those whanau were unknown to the children.

[83] Also, by October 2015, the parents having agitated long and hard about the extremely restricted contact and the length of time the fixture was taking, an interim hearing was heard before Judge Rogers that resulted in the parents having increased contact.

[84] I am satisfied that throughout 2015 the relationship between the parents and CYFS was more than tense, with the parents particularly critical of CYFS and it was unrealistic to expect a good supportive therapeutic relationship between them all at this stage given their respective intents regarding the children's care were so far apart.

[85] It is also evident that throughout 2015 J's circumstances worsened. She was receiving assistance from Whirinaki and there was significant concern regarding her difficulty sleeping and the need for medication. Latterly (late 2015/early 2016) this has intensified whereby J's medical practitioners are expressing the need for serious administration of drugs to assist her mental health, disposition and sleeping. Father

supports that. Mother does not, she saying that she prefers homeopathic or natural remedies fearing that J will become addicted to drugs to assist her sleep in the way that Mother did in her early life. It is inconceivable that the parents are still having difficulty agreeing about such critical matters for J given how fragile J's mental health and current care condition is. The parties had intended to meet after the conclusion of this hearing to see if resolution could be reached and if not, a dispute between guardians was likely to follow by way of application to the Court.

(ii) Steps Father had taken to achieve sobriety

[86] It transpires that Father was serious about the return of the children to him and appreciated that he may need to make substantial changes in his life and took on board Dr Watts' clear advice in his March 2015 report that continuous maintained observed sobriety was a fundamental part of his ever obtaining the children as was a reduction in the conflict with Mother. Father took significant steps to try and demonstrate this. They have included:

- In 2011 completing the Stage 1 and twelve week Stage 2 Bridge Programme with the Salvation Army – acknowledging his relapses since completing that programme he appreciated the need for further intervention;

- He says he has been sober since 12 February 2015;

- He re-engaged with the Bridge Programme and again completed Stage 1 and the twelve week Stage 2 Bridge Programme graduating 18 August 2015;

- Father is currently completing Stage 3 with ongoing support programme which involves weekly meetings;

- Father attends Recovery Church each week;

- Part of the involvement with the Bridge Programme includes undertaking random drug tests. He completed six during Stage 2 and has requested they continue during Stage 3. He says all his tests have been negative;

- Within the Bridge Programme Father facilitates the Waiata group for Stage 2 and volunteers;

- In 2011 Father joined AA – this assisted him in staying sober for ten months but obviously this did not endure but since completing the Bridge Programme in August 2015 Father has been introduced to the programme NA (which is Narcotics Anonymous) with a sponsor and engaged with the fellowship and support that comes with that programme;

- In October 2015 Father became the Group service representative for the local NA with significant responsibility including regional meetings and a national meeting due in Wellington in April 2016. He has also assumed other steering responsibilities in NA groups;

- Further Father has been attending one on one counselling with David Flewitt of Care NZ – that is a national provider of alcohol and other drug treatment services. Father completed drug assessment with Care NZ September 2015 and individual counselling sessions from September 2015 up until January 2016 and will continue to attend the weekly group therapy at the next step group;

- In December 2015 Father attended the five day workshop of dynamics of Whanaungatanga Mana Tane programme – covered relationships, wellbeing, authority, action principles.

[87] Father's evidence was that he intended to continue with all of those supports in his efforts to maintain sobriety.

[88] For Mother's part while compromised in terms of the exacting intervention she could undertake by virtue of a significant commitment to her mother's care from mid June 2015 (her mother having recently passed away) the interventions Mother had undertaken included:

- On 17 March 2015 completing the toolbox parenting Tweens and Teens;
- On 30 March 2015 completing the Family Resilience programme;
- On 16 June 2015 completing the "Getting a Grip on Addiction";
- Working with a social worker from IOSIS from 6 January 2015;
- During the hearing Mother's evidence also was that she has been involved with the Phoenix Group since 2013 in terms of drug and rehabilitation for the past three years or so. They was little or no confirming documentary evidence of the nature of the course, participation or content.

[89] Mother has provided some negative drug tests of recent times, last administered 22 January 2016. It is uncertain the length of time that that test would have detected any drugs (it will not detect alcohol) but Mother suggested it was close to six months but that cannot be verified. Mother does concede having drunk some alcohol of recent times commensurate with the really testing times of her mother's increasing illness and passing away but that was an aberration and it was a minor intake.

(c) Dr Watts' report of February 2016

[90] It appears that in anticipation of this hearing the Court sought an updated s 178/133 report. Dr Watts was only asked two questions, namely:

(a) Consider how the children have managed the extended contact (from October 2015) and identify concerns or benefits from that contact; and

(b) Examine the efforts of Father to maintain sobriety and assess the likelihood and effectiveness of such efforts.

[91] I gather that there was no concentration on assessment of Mother's sobriety because by that time all perhaps thought that Mother was not seriously intending to pursue return of the care, her having taken something of a practical and effective back seat in the proceedings given her concentration on her mother's wellbeing. By the time of hearing (February 2016) and maternal grandmother's passing, Mother has resurrected as a very clear intent, to have the two younger children in her care – she accepting that the three eldest wished to be in Father's care.

(i) Children's circumstances since last report and response to increased contact.

J

[92] Again Dr Watts noted the pervasive attachment difficulties J was having given her anxious-ambivalent attachment style and the uncertainty regarding her future care arrangements was certainly exacerbating these presenting issues.

[93] At that time Dr Watts was concerned that given the pervasive and self destructive nature of J's presentation, she had not been formally engaged in any psychotherapeutic intervention. There was some recent engagement with Community Mental Health Service (CMHC) but data suggested she may have sabotaged intervention by not engaging and in any event Mother had not consented to J receiving some psychiatric intervention.

[94] With respect to the care and contact arrangements, J was enjoying the contact with her father which she considered "normal" and it let her reconnect with whanau particularly paternal grandparents. There was no negativity or reticence in J's contact or her relations with Father or siblings. In fact J had perhaps been openly talking to her younger siblings about her desire to return to Father and perhaps seeking to influence them.

[95] Since, however the extended access regime some data seems to suggest J's attitude towards her then placement had become dismissive as she had come to believe she would be returning to her father's care.

[96] J certainly seemed far more aware of adult issues than was required. She was aware of the placement being considered at [location deleted] and had expressed views that if she was placed anywhere other than with Father she would run away to her father's care.

[97] A clear opinion (and a matter which I intend to give weight) was that given J's presentation she would need to fully and actively engage with all of the therapeutic interventions offered to her by CMHC before it would be viable for her to live with her younger siblings in her father's care.

H

[98] H reported as happy, no concerns yet her caregiver considered her emotionally fragile and sporadically coming into conflict with R featuring disregulated behaviour and difficulty sharing with other children in the home. The worst example included a recent absconding by R and another occasion they have found a dressing gown belt wrapped around her neck. The caregiver's report was that H's behaviour was more disruptive since contact with Father had been extended. H had not engaged in any formal psychotherapeutic intervention. Regardless of where she lived Dr Watts considered that H should engage in longer term (8 to 12 months) traumagenic play therapy. Dr Watts' opinion was that H's current presentation was as a result of a disrupted attachment issue and traumagenic consequence of chronic disruptions in her life and exposure to family conflict, violence and parental substance abuse.

[99] Insofar as H's perception of contact with her father, she described it as "really cool" and "good". She particularly liked seeing Father with other extended members of the family. She expressed a clear desire for her and her siblings to return to Father's care as this would "feel more normal". H too was aware of the plan that she live with whanau in [location deleted].

R

[100] R is reported as having no significant emotional and behavioural problems at that time in the home and considered an "easy" child. She self-reported her mood as "happy" with no worries and her contact with her father "good". Similarly R expressed a desire to return to the care of her whanau, particularly either Aunt Jane or Father but later in the interview solidified that to be a return to Father's care. She did not however think that that was likely to happen. R was aware of her father's wish for her to return to his care and CYFS plan for her to live in [location deleted].

N

[101] N did not present with any significant developmental concerns or emotional behavioural problems although caregivers explained from time to time a tendency to tantrum and be verbally defiant and there perhaps had been an exacerbation of these issues since contact increased with Father and made settling at night more difficult. N's general mood was happy and a feeling of happiness with respect to contact with her father and her siblings. N identified both her current caregivers and her mother and mother as people who take care of her indicating generally positive but also diffuse attachment behaviour.

M

[102] M was not considered to have any significant developmental delays although from time to time experiences tantrum behaviour with perhaps this increasing post contact with Father and when upset M has a tendency to bite and lash out at others – adults as well as children. Otherwise he is settled in his home environment as well as during contact with Father.

(ii) Conclusion of contact with parents' effects on children

[103] The generalised conclusions of Dr Watts included:

- Except R, all of the children's behaviour seemed more disruptive or dismissive since extended access but nothing sinister in Dr Watts' views is to be taken from this;

- The children had experienced a more naturalistic and extended first-hand experience of Father and whanau which was generally satisfying;

- Conversely this also meant the children were experiencing levels of grief and dissatisfaction associated with living with non-kin care (particularly for the older three children);

- It is reasonably certain that at least the three older children have been exposed to "passive" influence from caregivers, Father and their knowledge of CYFS plans for their care. Even with these influences Dr Watts is of the view that it would be clinically expected that the children would want to return to Father's care given their harboured positive experiences of him and generally return to family.

(iii) Examination of Father's sobriety

[104] In terms of the second fundamental part of the reassessment Dr Watts noted that in his last report he could offer no assurances Father would be able to

appropriately care for the children given his lack of sustained resolution of substance abuse. However, since 2015 Father had, in Dr Watts' view, engaged in a clinically valid constellation of interventions as a means of achieving and maintaining sobriety.[19]

[105] The report writer had considered Father had made very positive steps to addressing addiction issues. That said, it was critical to still be wary of two major matters. First, it must be borne in mind the clear relationship between parental drug addiction and child mistreatment. Secondly, addiction issues are and must be conceptualised as a chronic relapse condition. Of relevance to the second issue has been Father's relapsing despite historically engaging in interventions.

[106] The above said, it was clear progress had been made by Father his addiction issues and while at the same time there are valid concerns which could still be raised about the sustainability of the progress he has made as a means of resolving the clinical conundrum it would be that if the children were to be placed in Father's care, he would need to strictly:

(a) Continue his current regime of sobriety interventions;

(b) Cohabit with whanau members who were prepared to take shared responsibility for the children;

(c) For the whanau to engage with community based social services as a means of monitoring the children's home environment (at least for a 10 to 12 month period).

(d) CYFS Change Care Plan

[107] Perhaps in light of the second report from Dr Watts (February 2016), the Ministry met and reconsidered their care proposal if they obtained a s 101 custody order in respect of all of the children. Rather than place them with family members

[19] See paragraph 4.1 to 4.5 of Dr Watts report

in [location deleted], the Ministry were prepared to place all five children in Father's care subject to some very strict monitoring and oversights.

[108] Accordingly, the Ministry filed an updated plan of 12 February 2016 in the context of having a s 101 custody order that plan (which should be referred to in its entirety)[20] noted:

- A staged return of all five children to Father's care;

- Such return predicated on a highly specified safety plan

[109] The plan is extraordinarily comprehensive. It is detailed in every way. It presupposes a clear safety plan in place, J's placement with her Father first followed by the other four children at staged periods and dependent upon J's engagement with mental health services and wellness. The support for Father was to include the Triple P programme and highly specified therapeutic support for each of the children, ongoing managed contact with Mother and clearly predicated on sobriety by Father, his living with whanau – in fact in the same property at this time.

[110] I remark in passing that the plan offered by the Ministry is extremely well thought out, highly detailed in terms of the obligations of the Ministry, Father and Mother and has adopted as clear prerequisites the recommendations of Dr Watts as referred to at paragraph [106].

[111] On the basis of that plan Father would agree to a s 101 custody order in favour of the Ministry. His otherwise typical opposition to everything that the Ministry proposed had dissipated instantly and he professes he will be highly co-operative in every way with the Ministry and complying with every obligation and intent in the plan.

[20] Some amendments were sought during the course of the hearing to the plan.

(e) Evidence at Hearing

[112] By the time the matter came before me the MOSD proposal to place the children with whanau was clearly before the Court. During the hearing Dr Watts was cross-examined extensively about that proposal. It needs to be critically understood by all that the Court is not ratifying a return of the children to Father. The Court is considering whether or not a s 101 custody order should be made to the Chief Executive with all the powers, obligations and burdens that go with that as indicated at paragraph [21] hereof. That said the Court is also very mindful of the contents of any plan. The critical and overwhelmingly important aspect of a s 101 custody order, however, is that it reposes in the recipient the ability to not only care for the children but place them wherever they wish. Fundamentally that means that if the Court grants the Ministry a s 101 custody order, irrespective of the plan, the Ministry could deviate from that plan and place the children with such persons or organisations as they deem fit that optimise their wellbeing and safety. In this regard Father's agreement to the s 101 custody order in favour of the Ministry puts him in a vulnerable position. If he does not comply with the plan or the Ministry in its own view deems him inappropriate or unfit to continue or if the plan does not take effect as indicated, particularly if J does not make the progress sought or H for that matter, or if Father is indeed unable to cope with all five children or his whanau circumstances change, the Ministry will be able to place the children outside of Father's care. He will not be able to complain or challenge that save an application under s 121 to discharge the s 101 custody order – that process itself would possibly take a long period of time.

[113] The clear and, in my view, critical expert opinion was given by Dr Watts at the hearing in the light of the revised plan was (my summary):

- There were no clinically significant benefits to the siblings being separated in their care;

- Conversely there were benefits for the children remaining in one family unit;

- While the children's wishes should not supplant assessment of their overall safety, the children would be disappointed if not placed together;

- The older children's views are reasoned and it is important they are acknowledged;

- Placement together would be consistent with the constellation of care attachments already demonstrated;

- Clear concerns about Mother's capacity to care for the two younger children (alcohol, drug mistreatment and lack of demonstrated sustained period of engagement in specialist drug and alcohol rehabilitation services – although Mother may well be making a good start towards clinically demonstrable sobriety) at this time Mother is more likely to relapse as she has no sustained long term engagement and target treatment provider to manage her presenting alcohol and drug issues;

- Father has shown an engagement in the valid constellation of drug and alcohol rehabilitation and consequently improvement in all related areas of life;

- The plan offered by MOSD had as critical features the three recommendations Dr Watts made in his report (refer paragraph [106]);

- In particular, staged reintroduction of J first followed by the other children was important;

- Mother's suggestion that the older and younger children be separated, on the basis of Mother's argument that Father might have difficulty coping with all five children, was potentially flawed as putting the youngest children with Mother would be putting the most vulnerable

of the children in the sibling group with the caregiver that has the highest risk profile;

- Out of the care options, the most viable that gives the children the most opportunity to experience a stable, attentive home environment at this time is with Father;

- The need for ongoing engagement between the parents will be a significant risk factor for the children;

- The children being placed in the custody of the Chief Executive, and the incidents that go with that custody would optimise the children's protection[21] and the most effective tool to have a quick effective replacement or implementation of care would be with the Ministry.

(f) Mother's Proposal for a Custody Order of the younger two children

[114] Mother's driving logic to suggest the younger two children go to her care under a s 101 custody order was her belief that Father would not cope with all five children and as an ancillary to that argument she claimed care ability to care for the younger two and demonstrated sobriety.

[115] The making of a s 101 custody order in favour of Mother for the two youngest children would not, in my view, at all repair the current deficits for them or be in the overall welfare and interests of those children or the other siblings. In coming to that decision I have given weight to the following major relevant findings:

- The significant benefits opined by Dr Watts for all five children to remain together;

- Mother simply has not been able to demonstrate clinically the degree of sobriety that would be required to safeguard the children;

[21] See page 60 Notes of Evidence Line 30

- In my view, Mother's offered care plan lacked three critical planks as suggested by Dr Watts – living together with whanau, engaging with whanau with community supports and demonstrated sobriety;

- Mother really had not contemplated the overall logistical burden and difficulty in facilitating contact between the children and even though her plan stated that the children would spend each weekend going between Mother and Father's homes, she does not have a car, Father is currently without a licence, the plan would involve significant communication, planning and contact between them (a matter they say is improving but in which I have no confidence);

- If Mother was unable to care for the children it would not be an easy matter or flexible to move them from Mother's care if she relapsed or provided substandard care;

- I am uncertain as to whether Mother truly intended to remain in Auckland, she prior to the hearing having sent a text to Father that it was her intent to relocate to Rotorua with or without the children (see paragraph [117] below).

[116] As the hearing developed it became clear that the fundamental recommendation of Dr Watts was that if the children were to be returned to either party, it would be on the basis that there would be, in essence, live-in or close thereto family adult whanau providing oversight supervision. Father intends to effect that by living on the same property as his parents. Mother's response was that she had plenty of whanau who would assist and particularly her cousin who is prepared to live with her. There was no evidence of this in Mother's last updating affidavit of February 2016 and it seemed to me very clearly an advent that Mother was developing during the course of the hearing and her giving evidence. It is clear that with her mother's increased unwellness that a cousin came to live with Mother to assist her but that cousin has simply not been assessed in terms of her suitability or even her ability to remain as an appropriate oversight family whanau member. The proposal was substantially underdeveloped and ill-considered and in my view

relatively last minute. In fact while Mother professed significant whanau support, her evidence about that was less than impressive. In my view she was unable to name consistently those family members who would be able to give her significant support. My overall sense was that while the family came together at the time of maternal grandmother's passing, there had been little prior galvanising of this whanau to assist Mother with the degree of support or oversight required and neither can there be much expected post in terms of the type of daily oversight to the degree required and actual practical support that would be required for Mother to have the return of the children to her.

[117] Also it transpired just prior to the hearing Mother had sent a text to Father that she intended to relocate to Rotorua with or without the children. Mother recast this during cross-examination as an expression really of frustration by her rather than any genuine intent behind the text for such relocation. I reject Mother's minimisation of her text. In my view Mother did have a plan of relocation to Rotorua. She may now consider it a fleeting intent and with good counsel and better reflection she now professes she will remain in Auckland. Failure by her to do so will almost essentially result in a cessation of access with the children or very similar thereto. It displays, however, as recently as a few days before this critical hearing, a fragility about Mother's current position.

[118] While I have rejected it is the youngest children's welfare and interests to currently be in the day to day care of their mother, I do not consider this may never happen. Mother has made a start, as Dr Watts suggested, in demonstrating clinically significant sobriety and gaining far better community and whanau support. She seems capable of possibly caring particularly for the two younger children and with those other matters put in place she may well become a good option for their care, particularly if, as she suggests, Father will be unable to either maintain sobriety or cope with the care of all five children. In that regard I had indicated to Mother at the end of the hearing that she remains "in the frame" but that will very much depend on her demonstrating ongoing sobriety and ability to cope and a failure of the care plan with Father and MOSD's assessment of all of that.

[119] Therefore for the above reasons I formed the view that the principles of the Act and the overall welfare and interests of the children are best met and their deficits best readdressed by disposition of a s 101 custody order in favour of the Chief Executive.

Question 2 - Should there be an access order?

[120] Father had not sought a s 121 access order, he believing that his care of the children under the current plan and placement with him would endure. If the children are placed with him as intended, he will certainly not need an access order in his favour. He would need an access order if that care failed. Given Father's confidence of being able to remain sober, conflict free and continue in his current intent to live with whanau, there is no need for an access order and in my view making one on disposition would be superfluous at this time. Father may need to repair this if in fact the Ministry do not continue to place the children with him and in those circumstances this can be repaired by Father making an originating application for a s 121 order.

[121] For Mother's part I think it is critical that there be an access order in her favour. The current access that she has been afforded by Judge Rogers in October 2015 was hard fought and hard won. Further I do not consider Mother's access with the children during the day time has to be supervised. Further, it is wholly appropriate that Mother's contact with the children extend to the next anticipated stage of some six hours. There was intended to be a family hui after the hearing to determine the progress of Mother's access including the prospect of overnight access with the children. That hui must be implemented and real consideration given to increasing Mother's access with the children including overnight. The pace and nature of that, however, will have to be, in my view, commensurate with the children's reactions to the staged return to their father's care and the "bedding in" of that process. Therefore I intend to guarantee to Mother some minimum access with such other access to be agreed between the parties.

Question 3 - Should there be a guardianship order?

[122] Neither Mother nor Father consider disposition requires the Chief Executive to be appointed as an additional guardian. They believe between themselves they would be able to resolve all of the children's guardianship issues. I disagree. There are critical incidences of guardianship not only present for the children now but likely over the next number of years. In particular, whether J receives serious medication with respect to her current psychiatric condition is already a dispute between the parents. Schooling, potentially residence and other important aspects of the children's lives are going to have to be resolved. I do not consider that these children's welfare and interests would be optimised by leaving that solely to their parents who have been unable to demonstrate co-operative, highly communicative parenting to date. It is reasonable for the Ministry to be appointed an additional guardian so that the Chief Executive can raise by way of an application for dispute between guardians if agreement cannot be reached. In fact I find that a critical part of the children's welfare and interests going forward, particularly given the custodial role I have given to MOSD.

Warning

[123] I wish to make something very clear. These children have been let down in my view by the delay in disposition of these proceedings. They have been let down by fractured care arrangements and arguments regarding care. This must stop. My clear intent in making particularly the s 101 custody order to the Chief Executive is to enable cessation of such disruption and lack of consistency in decision making and care in these children's lives. It is foreseeable that Father may in fact not maintain sobriety or live with whanau or continue to cope and in those circumstances I want to make it extremely clear that it is the Ministry who has reposed in it the ability to determine the placement and care of the children so there are no further disagreements and stopping of the children's welfare and progress. Such is the degree of the care and protection issues for these children.

[124] Also because of my extreme concern regarding the time it has taken for disposition and the fact that the children have been subject to a morass of procedural

ineffectiveness, I have acceded to the parties' requests that to some extent I seize the matter. I am going to seize it only for one period. That is, I shall direct that the next review (which will be in approximately four months time) will be before me, after that time I will likely relinquish any specific judicial oversight.

[125] While I have been critical of delay I am very thankful to all counsel for the highly reasonable and professional way in which the eventual hearing was presented and argued.

[126] With my thanks to all I make the following orders and directions:

Orders and Directions

(1) I approve the plan as of 12 February 2016 as filed with the following noted amendments; namely:

(i) As an additional paragraph 41 under the heading "*Details of assistance provided by the Ministry*" there shall be: the Ministry to provide a level of support to Work and Income New Zealand to support the children's return home.

(ii) A further paragraph 42 that "*If melatonian is prescribed, it shall be funded by the Ministry*";

(iii) Paragraph 3 under the heading "Responsibilities and Objectives of the Children at page 8 of the Plan the child's name "*R*" shall be replaced with the child's name "*H*".

(2) There shall be a s 101 custody order in favour of the Chief Executive of the Ministry of Social Development with respect to all five children.

(3) There shall be a s 110(2)(b) additional guardianship order in favour of the Chief Executive of the Ministry of Social Development in respect of each of the five children.

(4) There shall be a s 121 access order in favour of Mother under the following terms:

(a) Mother shall have such access with the children as agreed between her and the Chief Executive of the Ministry of Social Development but that access shall consist of the following minimum unsupervised access on the following conditions:

(i) Six hours unsupervised each fortnight;

(ii) That Mother and Father have no contact during such access.

(5) I discharge the access order of 27 October 2015 in favour of Father.

(6) There shall be a review on 23 June 2016 and the Ministry of Social Development must file and serve a report and plan by 5pm on 10 June 2016.

(7) The review of that report and plan shall take place before Her Honour Judge Emma Smith at 9.15am on 23 June 2016 – attendance by phone. That review shall be facilitated as follows:

(a) The file shall remain a file of the Family Court at Manukau;

(b) Judge Emma Smith shall be seized of the matter until such time as she relinquishes the same;

(c) The Case Officer/Registrar of the Family Court at Manukau shall issue a fixture notice now to all parties of the review for 9.15am on 23 June 2016;

(d) The Ministry, Lawyer for the Child, Mother and Father and their counsel are to be connected to the review by way of telephone with Her Honour Judge Emma Smith at 9.15am on

23 June 2016. The Registrar at Manukau shall liaise with the Registrar at Christchurch (Mr Turner) to facilitate that hearing by phone;

(e) I intend to complete the review on the papers and accordingly Lawyer for the Child and the parties must file any report or submissions respectively regarding the report and plan by 5pm on 16 June 2016 and the Registrar at Manukau must scan or fax the social work report, the plan and any submissions to Judge Emma Smith by 5pm 20 June 2016.

(f) The Registrar at Manukau Family Court shall arrange for all telephone connections but on the basis that the parents shall be at the offices of their counsel unless counsel no longer acts and then the parents, if they wish to be connected to the review by telephone or make an appearance, they must advise the Registrar in writing seven days prior and will have to attend the Manukau Family Court to be joined by phone.

E Smith
Family Court Judge

Signed at Christchurch on 2 March 2016 at am/pm