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 NORTH SHORE

FAM-2015-404-000628
[2016] NZFC 2280

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	HOPE CLAYTON First Respondent
	NIKAU LINWOOD Second Respondent
AND	NOAH CLAYTON-LINWOOD BORN ON [DATE DELETED] 2014 Child or Young Person the application is about

Hearing:	18 March 2016
Appearances:	L Jones for the Chief Executive M Flannagan for the First Respondent D Martin for the Second Respondent C Armstrong as Lawyer for the Child
Judgment:	18 March 2016

ORAL JUDGMENT OF JUDGE D M PARTRIDGE

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[1] These are proceedings concerning Noah Clayton who will turn two years old on [date deleted] 2016. Noah's mother is present in Court with her counsel, Ms Flannagan. Noah's father is present in Court with his counsel Ms Martin. His father, Mr Joseph Linwood Senior, is also present. Mr Golding is also present in support of Ms Clayton. The Ministry is represented by Ms Jones and the social worker Ms Sawyer. Noah is represented by his counsel, Ms Armstrong.

[2] On 27 August 2015, the Ministry obtained a s 78 interim custody order in respect of Noah and he was uplifted from his mother's care where he was residing with her in Merivale. Since then, both parents have had contact with Noah for two hours once every three weeks on a Friday at Child, Youth and Family and supervised by a social worker.

[3] At a roundtable meeting which took place on 24 February 2016, there was agreement that contact would be increased to occur on a Friday for three hours for two weeks in every three. Two of those visits have occurred so far.

[4] A s 178 report was earlier directed. It has only very recently been filed and is dated 16 March 2016. The parties and counsel have only recently had an opportunity to consider it.

[5] The matter comes before the Court today for a one-hour submissions only hearing on an application that had been filed under s 121 of The Children, Young Persons, and their Families Act 1989 for contact. Applications have been filed both by Ms Clayton and also by Mr Linwood. Mr Linwood has also filed an application to discharge the s 78 order in favour of the Ministry.

[6] However, issues arise in respect of Mr Linwood's ability to take part in these proceedings as he is only 17 years old. He turns 18 on [date deleted] 2016. That is an issue because he is unable to file the notice of intention to appear that has been filed, and is also unable to file or prosecute his applications for access orders and to discharge the interim custody order.

[7] Pursuant to r 90 of the Family Courts Rules 2002, a minor must be represented by a next friend or litigation guardian. They cannot take part in proceedings without such.

[8] Pursuant to r 90A:

> A minor who wishes to take part in proceedings in his or her own name may apply to the Court for authorisation to take part in those proceedings without a next friend or litigation guardian." On an application filed, the Court or registrar may make an order allowing the minor to take part in the proceedings if the Court or registrar is satisfied that the minor is capable of making the decisions required or likely to be required in the proceedings; and if no reason exists, that would make it in the interests of the minor to be represented by a next friend or a litigation guardian.

[9] I will make directions in respect of those applications at the conclusion of this decision. For today's purposes however, I have accepted submissions by Ms Martin on behalf of Mr Linwood. I have requested that she confine her submissions to the more generic issues as opposed to providing submissions on behalf of Mr Linwood in the circumstances as they present themselves. I do, however, accept that it is Noah's right that his father has contact with him and note that contact has occurred with both parents together. Therefore the order that I intend to make today will be to provide for both parents to have contact with Noah.

[10] On 16 November 2015, a declaration was made by consent that Noah is a child in need of care or protection. The issue in respect of Mr Linwood's minority was not readily apparent to the Court at that time. In fact, it had not been made known to the Court until Ms Martin's submissions were filed. That also raises a question in relation to how matters should progress following the access order being made today. Again, I will make some directions at the conclusion of this decision in respect of that.

[11] Therefore for the purpose of today's hearing, the application before the Court for determination is that of Ms Clayton who seeks access with Noah. Ms Clayton's position is that she wishes contact to be increased to occur twice a week and be supervised by Tom and Greta Golding, Karen Dobbs or Joseph Linwood who is Mr Linwood's father. Her counsel submits that it is in Noah's interest that her contact is

increased so that she is able to maintain her bond and attachment with Noah pending determination of the substantive proceedings.

[12] Despite his minority, it is important for the Court to be aware of Mr Linwood's position. I note that in submissions, I am invited to make orders in terms of what is occurring at present which is what was agreed at the roundtable meeting for contact to occur on a Friday for three hours, for two weeks in three. I record at this point that in submissions, counsel for Ms Clayton submitted to the Court that if the Court was not minded to make orders in the terms that her client was seeking, that at the very least, contact should occur in terms agreed at that roundtable meeting.

[13] The position advanced on behalf of the Ministry in written submissions was that, in light of the conclusions of the 178 report, contact should at this time reduce to four times per year. However, if contact was to continue on a more frequent basis it should occur on a Friday once every three weeks.

[14] On behalf of Noah, Ms Armstrong submits that contact should remain at the level recommended by the psychologist until Noah's permanent placement is determined by the Court. That is, that contact should occur once every three weeks for a period of two hours.

[15] When considering applications under The Children, Young Persons, and their Families Act, the Court must, pursuant to s 6, make decisions in accordance with that section which provides that the welfare and interest of a child or young person shall be the first and paramount consideration and having regard to the principles set out in s 5 and 13 of The Children, Young Persons, and their Families Act.

[16] The s 178 psychological report has provided some useful information for the Court in making this decision. It does not recommend that Noah is placed with his parents or be parented by them throughout his childhood. That is a very hurtful conclusion for the parents. I accept unreservedly that that report is untested at this time. However, as I have said, it does provide the Court with some guidance.

[17] For the purposes of today's hearing, which is focused on Noah's access with his parents, I have regard to some of the conclusions of that report. In particular, I note that the psychologist does not, on my reading of the report, support contact increasing from once every three weeks. The psychologist raises concerns about the parents' ability to maintain their interest and attention in Noah during an increased period, and whether they may be as motivated to attend contact if a decision is made for Noah not to return to their care. The issue that arises if that occurs is that it may significantly undermine any benefit that Noah potentially receives from the visits. I accept the submissions of counsel that certainly in that portion of the report, the psychologist is not referring to concerns about Noah's behaviours or any detriment caused to him following the access visits.

[18] However, I must bear in mind that it is likely to be some time before a substantive hearing is going to take place and I am reluctant for Noah to be placed in a situation where the expectation is created that he is going to be having contact with his parents on a frequent basis and this is not able to be maintained by them.

[19] In paragraphs 127 and 128 of the report, the psychologist states:

> Whilst contact visits for Noah to date have incurred stress at separation from his caregivers, visits do not appear to have significantly impeded his ability to start building as sense of security with his caregivers or to make considerable improvements in his overall function. Nonetheless, given his age and stage of development, increased contact (from once every three weeks), or contact during the period that he transitioned into permanent care, when this occurs, is likely to involve additional stress and undermine Noah's ability to form a secure bond with his caregivers. At this stage, this is Noah's primary developmental task.

[20] It has been submitted to me that the phrase, "is likely to involve," should not be taken by the Court to mean that it is a certainty that Noah will experience additional stress or that his ability to form a secure bond or attachment with his caregivers will be undermined. The reality, however, for Noah is that having regard to the information that this Court has at his juncture, it is not in Noah's best interests for a situation to arise which may create any additional stress or difficulties for him, or undermine what he needs to achieve.

[21] I interpret the psychologist's phrase, "is likely to be," as something that is more probable than not. It is not phrased in neutral terms and the word, "may," is not used. Therefore, as I have said, it is something that I consider to be a realistic possibility.

[22] It may well be when a substantive hearing is held that the Court determines that Noah should be cared for by one of his parents or transitioned to a whānau placement if that is found by the Court to be in his best interests. That is not something that is evident to the Court on the face of this report.

[23] However, if that is the Court's determination at the substantive hearing, then that would be an appropriate time for access between Noah and his parents to be increased. The Court will be in a much better position at that time to make orders in respect of Noah's contact with his parents and other whānau members.

[24] However, at this time, I am not satisfied that it is in Noah's best interest for contact to be increased. In fact, having regard to all of the evidence, I am satisfied that it is in his welfare and best interests that contact should occur on a Friday once every three weeks for a period of two hours.

[25] I make the following orders:

(a) A s 121 access order in favour of Ms Clayton providing for her to have supervised access with Noah on a Friday once every three weeks from 10.00 am to 12.00 pm or such other day or times agreed between the Ministry and Ms Clayton. Mr Linwood may also be present during those access visits. (I cannot make an order in respect of Mr Linwood at this time given the difficulties referred to above).

(b) Access will occur on [date deleted] 2016 to enable the parents to celebrate Noah's second birthday with him and will then occur three weeks later, on [date deleted] 2016, and three-weekly thereafter.

(c) Access will commence and conclude at the [location deleted] unless otherwise agreed, but may occur out in the community rather than being restricted to occurring at the [location deleted].

(d) Access is to be supervised by the social worker who transports Noah to and from the access visit. It is preferable that the same supervisor and transporter is used for each visit.

[26] In respect of Mr Linwood's minority, there have been some discussions between counsel about whether, given that Mr Linwood is going to turn 18 years old on [date deleted] this year, there is any merit in him filing an application pursuant to r 90A(2). I am minded, with the support of counsel, to take a pragmatic approach. What has been discussed is that a family group conference should be allocated. There is some significant merit in that occurring now with the benefit of that 178 report. If Mr Linwood wishes to file any applications, he will be at liberty to do so, of course, following his eighteenth birthday.

[27] I invite counsel to file submissions, however, in respect of the status of the declaration that had been made by the Court by consent of November 2015. Those submissions are to be filed by 8 April 2016 and are to be referred to me in chambers for consideration. If required, or if any counsel seek it, I will convene a brief hearing at 9.30am one morning in order to determine that issue. If counsel feel they are in a position to file a joint memorandum in respect of that issue, they are free to do so.

[28] Once that memorandum is filed and is referred to me, I will make further directions. If counsel could alert me to the date for the family group conference, that will allow me to timetable whatever directions for the matter, perhaps, to come back before the Court for a judicial conference.

D M Partridge
Family Court Judge