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 NELSON

FAM-2015-042-000039
[2016] NZFC 2863

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	EO Applicant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT LI Respondents
AND	PO BORN ON [DATE DELETED] 2016 Child or Young Person the application is about

Hearing:	6 April 2016
Appearances:	A N Gulbransen for the Applicant H A McKinnon for the Chief Executive No appearance by or for the Respondent LI S E Gracia as Lawyer for the Child
Judgment:	6 April 2016

ORAL JUDGMENT OF JUDGE R J RUSSELL
[as to an access order pursuant to s 121 Children, Young Persons, and Their Families Act 1989]

Introduction

[1] These are proceedings under the Children, Young Persons, and Their Families Act 1989 for PO. PO was born on [date deleted] 2015 and is now aged [age details deleted]. This is an application by PO's mother, EO, for an access order pursuant to s 121 of the Act. She seeks to have times defined for her access with her son.

Background

[2] PO has been the subject of Court proceedings since before he was born. A s 78 interim custody order was made at the time of his birth. A declaration was made that PO is a child in need of care and protection under the provisions of s 14(1)(a) and (b) of the Act on 2 April 2015. Since then a s 101 custody order has been in place and PO has been in the care of Ministry caregivers, a Mr and Ms SB. The family group conference was the first plan for the first six month period.

[3] Today is not the first defended hearing which has been needed for PO. Ms EO opposed the Ministry being appointed as an additional guardian of PO. On 5 June, after hearing evidence and submissions, I determined that a general guardianship order under s 110 should be made.

[4] The pattern of Ms EO's contact with PO has gradually decreased in frequency from the time these proceedings commenced. At the time of PO's birth, contact occurred daily. Later this was reduced to three times each week, then to once each week, then to fortnightly contact and currently it occurs on one occasion each month. The contact throughout has been fully supervised by either Ministry social workers or PO's caregivers or Care Solutions.

[5] Ms EO has been dissatisfied with the way the contact has been reduced and so has filed this application seeking to define her access times. The Ministry oppose the application maintaining that access should be determined during the course of the six monthly reviews which are required because of the s 101 custody order which is in place.

[6] It is envisaged PO will ultimately be the subject of Care of Children Act 2004 orders as part of the Ministry's home for life package policy. I need to record no such applications have, as yet, been filed and PO's legal position is governed by the s 101 custody and s 110 additional guardianship orders which are in place.

The evidence

[7] In her application for an access order Ms EO sets out the background which I have summarised. She is living in a rented property in [location deleted] in Nelson. She has a male flatmate living there with her. She said the access arrangements have been varied and have been changed. She accepts there are access visits which have not occurred for various reasons. She records her distress when she was told in August of 2015 that her access was to be reduced to one occasion each month. She said this came as a surprise to her. She deposed that her plan had always been for PO to return to her care.

[8] She outlined some of the work she had done to try and improve her personal and parenting position. She has enrolled with a parenting course through Barnardos. There have been Gateway health assessments and sleep assessment issues which she has engaged with. Parenting assessments have been done. She has moved into the residential property in [location deleted] which I have already referred to which is deemed to be appropriate for herself.

[9] Allegations have been made about her drug use. She said she had been subject to urine tests and is still undergoing alcohol and drug counselling. No hair follicle testing, however, has been done. She considers it to be unfair that her access to PO has been reduced to once a month. In her initial application she sought that to be restored to the three occasions per week as had previously occurred.

[10] Ms EO recorded the assistance she had received from [name of facility deleted], in particular their social worker, Ms ZT. She said this was a relationship which she found supportive and wanted to continue. She deposed that as PO's mother she had not harmed him and wanted to be able to see him grow up and develop as any mother would for her child.

[11] In her most recent affidavit Ms EO restated the concerns which I have summarised. She considered her access with PO had been going well. She recorded concerns that if PO was unwell she would want the contact times to be varied so the little time she had with him could occur at such times when he had recovered and was well. She considers she had a good relationship with Mr and Ms SB who had been keeping her up-to-date with PO's news which she found helpful.

[12] Her primary aim at the hearing was to have access occur on one occasion per week. She did not consider this needed to be supervised but would accept supervision if the Court considered this to be necessary. She considered it important PO and she have good contact and she sought to have a good relationship between herself, PO, and PO's caregivers.

[13] Ms EO was cross-examined by counsel at the hearing and answered a number of questions from me. She did not resile from the evidence which I have summarised. She explained something of her family background and future plans. She is of Ngāi Tahu descent. She has some support from family although they do live in other parts of the South Island. Some familial relationships appear to be fractured while others are not. She was reluctant to accept a home for life placement for PO with his caregivers should occur. She did not accept the permanency of his current placement. She is not in a relationship with any other person at the moment and did not accept she had any current alcohol or any particular drug issues which needed to be dealt with.

[14] The Ministry take a different position. As I have outlined, the outcome they seek is to make no access order and leave it to the regular six monthly plan reviews to determine what the appropriate access arrangements are to be for the period of the plan.

[15] Mr Peter McGowan is the allocated social worker. He filed affidavit evidence and has been cross-examined by counsel during the course of the hearing. Mr McGowan deposed that from the time PO turned six months old, Ms EO had not fully engaged with the family group conference plan and had not shown she was capable of adequately parenting PO in timeframes appropriate to his age. He said

Ms EO was aware of the changes she needed to make during the currency of the family group conference plan. His concern was she had not done so and he cited examples of this not having occurred. In particular, there were parenting sessions that were not attended, her sleep issues remain unresolved, hair follicle testing had not been untaken and, during the access times, Ms EO had not been appropriately focused in caring for PO in an age appropriate way. Care Solutions supervised contact had been problematic because the Care Solutions supervisors were required to intervene to help Ms EO provide direct care rather than supervise contact. It was for these reasons Mr McGowan concluded Ms EO had not shown sufficient understanding of her son's needs. Mr McGowan's view was contact would continue to need to be fully supervised and he has the view that this position was unlikely to ever improve to the point where Ms EO could regain primary care of PO.

[16] Parenting assessments have been completed and I have viewed those. In the assessment it is recorded Ms EO has what is described as a borderline intellectual function with an IQ of 78-79. Psychological assessments have been completed. She is reported to be what is described as a "very concrete thinker" and has limited capacity to be flexible in her parenting. Health and drug issues and sleep issues are also referred to as is Ms EO's ability to provide adequate care of her child.

[17] All of this has meant that in the latest social work plans for PO, which has been approved by the Court, the s 101 custody order has been continued as has the s 110 additional guardianship order. The goal expressed in the latest plan is for PO to remain with his caregivers. In his report accompanying that plan Mr McGowan refers to PO's relationship with Ms EO, saying he has been concerned for some time that PO has a limited relationship with his mother and that he shows little interest in her unless a toy is "dangled in his face". PO has not been responding to his mother when spoken to by her.

[18] I should finally record I have received affidavit evidence from Ms ZT who is a social worker employed by [employer details deleted]. She has been cross-examined at the hearing. She has outlined her support of Ms EO. She has attended several of the scheduled access visits and has painted a different picture of the access visits than Mr McGowan. She speaks positively of Ms EO and the activities which

she has been trying to do, and of her attention to PO during the access visits. She concluded her affidavit evidence by saying it is her opinion access should continue for a longer period of time to allow Ms EO to develop the skills she has. She said an hour was not a particularly long time. Under cross-examination she would not, however, be drawn as to whether the access needed to be supervised or not in the future. She recognised there were issues which Ms EO needed to address and that safety issues for PO were of paramount importance. She was unclear as to whether she could assist in providing some of the supervision. Mr McGowan, likewise, was not prepared to agree to supervision being provided by Ms ZT, saying further discussions about this were required.

[19] It also needs to be recorded Ms ZT has some experience as a social worker, having a tertiary social work qualification, and having previously worked for Child, Youth and Family before moving to work with [name of facility deleted].

[20] Mrs Garcia represented PO at the hearing. She said at the outset she had no particular view about whether an access order should be made or not or about the length or duration of access visits. In her cross-examination of Mr McGowan she closely questioned him as to why access visits could not be increased from the one hour per month suggesting perhaps two hours would be more appropriate. Mr McGowan's response was he was not adverse to this but preferred to wait until PO was walking.

[21] I asked Mr McGowan how he saw the access plan for Ms EO developing into the future. He would not be drawn too much on this, envisaging in the not too distant future the Ministry would cease their involvement in this case and there would be a Care of Children Act order in place governing the contact arrangements, and ultimately future contact would be a decision for Mr and Ms SB and Ms EO and, if necessary, the Court to determine. What Mr McGowan did say was Mr and Ms SB were not agreeable to providing supervision of the contact, notwithstanding they had helped with this at an earlier time.

[22] There are obviously no views which I need to consider in making the decision, given the young age of this child.

The Law

[23] Section 121 of the Act provides:

> **121 Court may make orders for access and exercise of other rights by parents and other persons**
>
> …
>
> (2) Where the court—
>
> (a) makes an order under section 78 relating to the custody of a child or young person pending the determination of any proceedings; or
>
> (b) makes a custody order or an interim custody order under section 101 in relation to a child or young person; or
>
> (c) makes an order under section 110 appointing the chief executive or any other person the sole guardian of a child or young person,—
>
> it may, on making the order, or at any time after making the order, on application made by any parent of the child or young person or any other person, make an order—
>
> (d) granting access to that child or young person to that parent or other person:
>
> (e) conferring on that parent or other person such rights in relation to the child or young person as it thinks fit.
>
> (3) Any order made under subsection (1) or subsection (2) may be made on such terms and conditions as the court thinks fit.

[24] Section 5 of the Act sets out the relevant principles to be applied in the exercise of the powers conferred by the care and protection provisions of the Act.

[25] Section 6 of the Act provides that the welfare and interests of the child or young person is to be the first and paramount consideration, having regard to the principles referred to in s 5.

[26] There are, of course, situations which occur where a parent or guardian or their extended family cannot satisfy these principles and purposes, and placements outside the family need to be considered. The Ministry have developed what they call a "Home for life policy" for such cases. The question can then arise as to what

role a child's parent or parents should then play in a child's life. This issue was considered by the High Court in the decision of *A v Ministry of Social Development* [2009] NZFLR 625, Asher J. His Honour set out the relevant principles in this way:

> [57] I proceed with my analysis, applying the principles set out in *K v G*. The biological tie does not give a natural parent a right to custody or access. The relevant right is the right of the child to have his or her welfare and interests treated as paramount. However, the blood tie is important and will often be decisive if the welfare of the child requires that he or she be with a natural parent as opposed to a distant relative or stranger. When a child has a permanent placement with another family it is important that that child have contact with his or her biological parents so that the child can properly understand his or her background and identity. This is a reason why access will be directed.
>
> [58] Access when there has been such a permanent placement is not given for the purposes of allowing a biological parent to develop a relationship in a way which will ultimately lead to a young child being returned to that biological parent. Indeed, such an approach would be contrary to the interests of the child. This is because the child will end up with confused loyalties and family ties. It is in a young child's interest that it has a predominant connection with the permanent placement family with which the child lives. The "psychological attachment" referred to in the definition of family group in s 2 should not be damaged. In terms of s 13(f)(iii) the child must be able to develop and maintain a "sense of belonging". To allow or indeed foster developments which will lead to disruption of that new family setting can damage that sense of belonging.
>
> [59] There should be no set formula as to the desired frequency of access of a biological parent to a young child who is permanently placed with another family. The issue must be considered on a case-by-case basis.

Discussion

[27] As I observed at the hearing, this application follows the most recent plan which has as its goal a home for life placement for PO with his caregivers. The goal of the plan was not challenged. On the information I have seen it is appropriate that PO's care proceed down this path. I am told by Mr McGowan that Mr and Ms SB will, in due course, apply for Care of Children Act orders. Ms EO has not filed any applications pursuant to s 125 seeking to disturb the custody orders in place. She is, of course, entitled to take steps to defend the Care of Children Act applications at such time as they may be filed. This is not uncommon for persons in her position.

[28] During the course of the hearing I have been interested in cultural matters for PO. Ms EO is part Māori with her connections with Ngāi Tahu. She has engaged,

quite appropriately, with [details deleted]. Ms SB is, as I understand it, also part Māori although not of Ngāi Tahu descent. She too will be able to teach PO something about his Māori cultural heritage.

[29] PO's father is of Vanuatuan descent. He has been removed from New Zealand and is now back in Vanuatu and has taken no part in these proceedings. The ethnicity of PO's parents means he is part Māori and part Vanuatuan and as he grows older this will mean he will need to learn something about his culture, his background, and his heritage. It is important as he grows older he has a reasonably good understanding of these issues.

[30] My review of the evidence would indicate to me that while Ms EO has done some work to try and improve herself since PO has been born, there is certainly work she could have done and has not. All the information before me at this stage supports the Ministry's case that ongoing contact does continue to need to be fully supervised. Just who provides that supervision, however, can be open to discussion and agreement and I will address this in the orders I am going to make. I agree with the line of questioning by Mrs Gracia of Mr McGowan to the effect that this is a case where it is probably not necessary for Mr McGowan to continue to provide all of the supervision given the need for the parenting assessments of Ms EO has probably passed. It is a matter of simply ensuring that the access visits remain child-focused and appropriate for a child of this age. This may mean Mr McGowan could, for example, supervise the first part of a visit, leaving others to provide supervision, and perhaps returning at the end to get a report from that supervisor to ensure that all has gone well. In this way others can be involved with supervision of access and perhaps the access visits can be less stressful for Ms EO than they have been. Her concern about the Ministry continually providing the direct supervision is understandable given that they were the organisation who uplifted PO from her care at the outset.

[31] Ms EO has talked about developing a bond with PO. I have set out in this judgment and read out orally the comments of Asher J which have particular relevance to this issue. It is important for PO that any bond or attachment that he has with Ms EO is not developed to such an extent that it undermines his placement and

the primary attachments that he has to his caregivers, Mr and Ms SB. I carefully clarified with Mr McGowan that is it not envisaged that there be any change of placement. This is important to know. The purpose for PO having ongoing contact with his mother is for him to develop a sense of his identity, some understanding of his culture and background, and some knowledge of who his parent or parents are but not to the extent where this undermines the primary placement and attachments that he will have with Mr and Ms SB. I make these comments in the knowledge that no Care of Children Act applications have yet been filed but on the basis that I am told that they will be.

[32] I propose to make an access order. This will give Ms EO some certainty about the times and terms of her access with PO and that this will not be left to the whim of the allocated social worker or social workers nor be dependent on any other commitments the social workers have or on any resourcing issues. My view is that the frequency of the contact should continue to be once a month. I do envisage the access time once each month, evolving and expanding as PO grows older. He can grow into a routine where he knows he has his biological mother and that he will see her on one occasion each month and the times he has with her can be positive and beneficial experiences for him and something which he can look forward to. This should be the aim. I agree with the submission made by Ms Gulbransen and Mrs Gracia that one hour for a child aged fourteen months, once a month, does seem rather limited at the moment. I am going to increase this in the order.

[33] I am going to build in too the ability for other supervisors to assist with the supervision of contact. I am going to give to the supervisors the ability to terminate any access visits earlier than the scheduled times if, for any reasons, Ms EO is unable to effectively participate in those visits. I will provide in the order for additional times that Ms EO and the Ministry may be able to agree upon, no doubt in consultation with the caregivers.

[34] In this way the order will provide some certainty for Ms EO in that she will know what the access arrangements are to be and will address the flexibility concerns that have been raised by the Ministry if there are difficulties and if there are one-off special occasions which need to be addressed. I did consider whether to

make access orders for special days for PO for example, Christmas Day and birthdays, but I am conscious that supervision on those days might be difficult to arrange and also Mr and Ms SB may have other plans for those particular days. These occasions will need to be addressed on a case by case basis and will only occur if an agreement is reached.

Outcome and orders

[35] Against all of that background I make the following orders and directions:

(a) There will be an access order made under s 121 of the Act as follows:

(i) Ms EO is to have access with PO on one occasion each calendar month at a date and time is to be determined by the allocated social worker.

(ii) The length of the visit will increase to two hours on each occasion.

(iii) The supervision is to be provided by the allocated social worker or such other person or persons as the social worker may determine as being appropriate for the supervised contact from time to time. The person approved as supervisor will be at the sole discretion of the social worker.

(iv) There shall be such further or other additional access times as the social worker and Ms EO may from time to time agree upon.

(v) It shall be a condition of the order that the social worker or the supervisor of contact may, in their sole discretion, terminate any scheduled access visit if, in the social worker's or supervisor's opinion, Ms EO is affected by alcohol or drugs or is otherwise unable to effectively participate appropriately in the scheduled access visit.

(b) Mrs Gracia's appointment as counsel for PO is now discontinued with the thanks of the Court.

R J Russell
Family Court Judge