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IN THE FAMILY COURT
AT PALMERSTON NORTH

FAM-2014-054-000208
[2017] NZFC 3648

IN THE MATTER OF	CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	[BK] [MR] Respondents
AND	[PR] Child the application is about

Appearances:	Ms McKenna for the Applicant Ms Neill for the mother Ms Lohrey for the child
Judgment:	6 June 2017

JUDGMENT OF JUDGE J F MOSS[Reasons for finding the Plan for permanent placement of [PR]]

Introduction

[1] Before [PR] was born her four siblings were removed from her mother's care. [Details of the whereabouts of siblings removed]. The Ministry of Vulnerable

Children, Oranga Tamariki (MVCOT) intervened because of a severe history of family violence and a severe and chronic history of drug use. The MVCOT asked the Court to declare [PR] was in need of care and protection because of the previous history of the removal of the other children, on the basis that [PR] was a "subsequent child" because the Court had determined that there was no realistic prospect of return of the other children to their mother's care.

[2] Declarations were made for the other children in April 2014 and a custody order granting custody to the Chief Executive of the Ministry (as it then was) was made on 20 August 2014. Prior to this period the children had been placed with their [relationship to caregiver 1 deleted] for a period but returned to their mother, until removal in April 2014. The issues in relation to the mother's parenting have remained similar. By early 2016 the mother's contact with the older children had reduced, because the supervisor for her contact considered her behaviour adverse. When lawyer for the older children reported to the Court on 9 September 2016 in relation to the new plan for them, Ms Lohrey recorded:

> There was a long period where Child Youth and Family were willing to work with [BK] and [MR] to try and help them address issues of family violence and alcohol and drug use. However the point was reached where it was decided that the children needed permanency.

This reporting followed a period of unstable contact and difficulties for [caregiver 1], which the social worker reported were leading to undermining of the children's placement with [caregiver 1].

[3] In October 2016 the Ministry applied for a declaration under s 14(1)(ba), but notwithstanding no obligation to convene a family group conference one was held. By minute dated 13 October 2016 I had indicated that I was not persuaded that a s 14(1)(ba) declaration could be made unless there had been an adjudicated process by which the Court determined there was no realistic prospect of return for an earlier child. That question was set down for full argument on 13 December. After the family group conference on 1 December, but before the birth of [PR], the Ministry made an application for declaration and s 78 order, relying on the grounds arising in s 14(1)(a) and (b).

[4] The FGC on 1 December ended in non agreement, and the Ministry sought a s 78 order without notice, and a declaration on the grounds in s 14(1)(a) and (b). The evidence at that point relied on the history of a lack of sustained progress for the mother and father, transience, the parents avoiding Child Youth and Family, unsustained engagement with drugs treatment, despite a three year history of involvement with the Ministry, because of risks to their children.

[5] [PR] was then born on [date deleted] December. On [date deleted] December I heard extended argument in relation to s 14(1)(ba) and s 18A, B and C Children, Young Persons and Their Families Act. The mother was present when I made the s 78 order. On [date deleted] December the mother removed the baby from the neonate ward at the hospital. She was then recovered, and placed with a Ministry caregiver. The mother was charged. Bail conditions prevented her having contact with the child. She has seen her only once since the child was recovered.

[6] [PR] has remained with MVCOT caregivers. The Ministry seek to place her permanently away from her parents, and have prepared a plan on the basis that they seek a s 101 order, and that there is no realistic prospect of return home.

Principles under Children, Young Persons, and Their Families Act

[7] Sections 5, 6 and 13 define the principles and focus of the Court's exercise of power under this legislation. The welfare and interests of a child are paramount. The Court must consider them first, and consider them to be more important than any other. The principles in s 5 repay re-reading. They are as follows:

> **5 Principles to be applied in exercise of powers conferred by this Act**
>
> Subject to section 6, any court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:
>
> (a) the principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:

(b) the principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:

(c) the principle that consideration must always be given to how a decision affecting a child or young person will affect—

(i) the welfare of that child or young person; and

(ii) the stability of that child's or young person's family, whanau, hapu, iwi, and family group:

(d) the principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:

(e) the principle that endeavours should be made to obtain the support of—

(i) the parents or guardians or other persons having the care of a child or young person; and

(ii) the child or young person himself or herself—

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(f) the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time:

(g) the principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child's or young person's age, identity, cultural connections, education, and health.

[8] In giving consent to the declaration, the parents have accepted that there are care and protection concerns which relate to likelihood of being harmed, ill treated, abused or seriously deprived (s 14(1)(a)) and that her development or physical or mental or emotional wellbeing is likely to be impaired or neglected in a serious and avoidable way (s 14(1)(b)).

[9] Having reached that conclusion the Court must traverse again the s 5 principles and also the s 13 principles. Again, these repay re-reading. Section 13 places first and paramount importance on a child's welfare and interests. In determining these, the Court must be guided by the protection from harm principle and the upholding of rights principles. Of the further principles set out in the Act (s 13(2)) emphasise that a child's wellbeing is generally enhanced within his or her family group. Where the family group is not able to demonstrate capacity to commit, in a sustained way to the paramountcy of welfare and best interests, and the protection of harm and upholding of rights, a child's welfare is enhanced by living within a family group where the child is or will become psychologically attached. (s 13(2)(h)).

[10] The s 13 principles impose a higher burden on the Court than the findings under s 14. In particular, the Court must not enable removal from family, or retention away from family, unless the Court is satisfied that there is a "serious risk" of harm to the child (s 13(2)(e)). This is a higher standard than the standard of a likelihood of risk which is serious and avoidable (s 14(1)(b)).

[11] In the exercise of powers by the Court, the principle contained in s 5(f), relating to the timeframes of decision making must be imported in to s 13. Other principles in s 5 direct agencies who support and assist. Section 5(f) requires a particular standard of a decision maker. In this matter, the Court is the decision maker.

[12] Once the declaration for [PR] was made, the Court directed the completion of a plan (pursuant to s 128) because the Ministry signalled their proposal that both there should be a s 101 custody order, and that the plan would be prepared on the basis that there was no realistic possibility of the child returning to the care of her mother. Section 130 governs the content of the plan, and the new s 130(2) limits the content of a plan where it is prepared on the basis that there is no realistic prospect of the child returning to her parents. The Ministry prepared the plan on that basis, which, in light of the previous application under s 14(1)(ba) was understandable.

[13] In resolution of the application for a custody order, it appears that counsel for the Ministry, for the child, and for the mother conflated the Court's task of deciding whether a s 101 custody order should be made and whether there is no realistic prospect of return home. These are separate steps. For [PR], because she is an infant, it is necessary that both are decided, urgently, but they are two different decisions. It is possible to anticipate for an older child, where time-frames are not so short, that the Court would see advantage in resolving a question of custody, but delaying the question of no realistic possibility of return home. To decide the latter matter requires a consideration of future needs which necessarily impact on the principles in s 13 in a more sustained way for each child, than an individual order under s 101.

[14] Because of [PR]'s infancy, both the s 101 question and the realistic possibility of return home were heard together. This should not, however, be assumed.

Process

[15] Court resources mean that a full contested evidence process is not possible within [PR]'s time-frame. The risk that imposes on [PR] is that a failure to hear contested evidence may impact adversely on her rights, and potentially on the full expression of the paramountcy principle.

[16] In order for the Court to do its best to avoid this risk, I asked MVCOT to provide wide ranging theoretical advice about the risks to [PR] inherent in the two proposed solutions – long term placement with non kin care givers and placement with a transitional care giver while the mother's treatment was pursued further, and while the Court and the Ministry waited to see if the mother could reach a point of health sufficient to care for [PR]. I also directed the provision of a s 133 report, on a theoretical basis, because the psychological consequences of either outcome for [PR] are grave, and I considered that she is entitled to reasoned and specific evidence addressing the balancing of the risks for her future.

Evidence of Child Youth and Family

[17] Ms Harper filed a lengthy report, on a theoretical basis, dealing with the need for timely decision making for [PR].

[18] She provided relevant background, and inevitably because of the kind of report, included only events which were adverse to [PR] or her siblings. In particular, the report documents a long history of drugs and alcohol issues, family violence and mental health issues for the mother. It also documents the mother's unilateral action to collect children from [caregiver 1] (March 2014). This is relevant, in context of the unilateral action taken on 14 December.

[19] Ms Harper emphasised that [PR]'s wellbeing requires stable placement. She referred to research which demonstrated that early placement and early intervention in general is more likely to be successful than intervention after a period of delay and transitional placements. She referred to research which examined quality of attachment when children are with transitional caregivers as opposed to long term caregivers who do not have certainty of placement. She noted that an uncertainty about length of placement predisposes a degree of anxiety in a caregiver, leading to less deep attachment. Transitional caregivers have been found to be more able to assist a baby to commence the tasks of secure attachment.

[20] Ms Harper also addressed issues which arise out of the statutory scheme of the Children Young Persons and Their Families Act and out of UNCROC related to an entitlement to live with family. Ms Harper quoted research which tends to show there are no discernible disadvantages for children in long-term non-kin care as opposed to the comparator group of children in kin care, on a long-term basis. But she emphasised the need to maintain contact and a relationship with her family group. The issues around [PR]'s sibling group are given significant prominence in Ms Harper's report. It appears that the Ministry is prioritising that, and seeks to place all of the children in such a way that the sibling group can be maintained.

[21] Ms Harper considered placement with the mother. Considered from the mother's perspective, inevitably there would be a delay in placing [PR] with her, because she is not yet fit to receive [PR]. The mother has previously had the return

of children end with further removal from her. The mother has acted unilaterally in a way which has been adverse to [PR] and in a way which was adverse to her other children. With a delay in placement of [PR] with her mother, [PR] will inevitably present developmentally ordinary behavioural difficulties, because of a disruption to her attachment. It is a significant risk to [PR] that her mother would not be in a strong enough position to manage that distressing behaviour, because her own recovery would still be fragile.

Psychological evidence

[22] Mrs Kathy Orr provided theoretical advice, based on the known recorded history of the mother's care of children, and the events proximate to [PR]'s birth. She was asked to advise the Court on the impact on [PR] of delaying her placement for up to six months while the Court determined her mother's parenting capacity. She was then asked to advise the impact on [PR] of being denied the option of her mother's parenting capacity being tested, and of her being placed in a Home for Life now. In defining the brief in this way, the Court recognised that resourcing does not currently enable the Court to determine a matter such as this on fully contested evidence without significant delay.

[23] In addressing [PR]'s attachment needs, Ms Orr relied primarily on the research of *McIntosh, Kline-Pruett and Kelly.*[1] Ms Orr addressed main factors contributing to secure primary attachment. These are:[2]

- [PR]'s physical safety.
- The child's trust and security with their parent.
- Parental mental health and substance abuse.
- Child health and development, and behavioural adjustment.

[24] Ms Orr included descriptions from past and current evidence, which tends to prove that [PR]'s physical safety cannot be assured with her mother, that she has no trust or security with her mother, because of an absence of contact, and that her

[1] *McIntosh, J.E., Pruett, M.K., & Kelly, J.B.* (2014) Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice. *Family Court Review, 52(2),* 256-262.
[2] Report of Kathy Orr, 10 April 2017, para 12-16.

mother's mental health and substance abuse are of major concern. The evidence establishes, to my satisfaction, that the mother has chronic substance abuse issues, and that she has been profoundly and adversely affected by anxiety. Ms Orr noted that although there is no data to suggest that [PR] is not developing normally, she has had an adverse pregnancy. She tested positive to methamphetamine at four days old. The mother gave evidence that this arose because she fed [PR] after she had used, after taking her from the hospital. It is not possible to determine with any confidence whether [PR] was exposed to methamphetamine in utero. Ms Orr's report importantly summarises research about children who have been exposed in utero.[3] Ms Orr summarised their findings as follows:

> They found that the infant/child suffered increased stress responses in the neonatal period and developed poor inhibitory (self regulation) responses, suggesting a lack of executive functioning development. A key factor that protected (partially at least) the child from the effects of the methamphetamine exposure in utero was the positive quality of the home environment, ie, being high quality and stimulating. Thus there is a significant risk that [PR] will suffer from the effects of her pre-birth and post-birth exposure to methamphetamine.

[25] I emphasise again that the evidence about whether [PR] suffered exposure to methamphetamine in utero is unclear. The mother denies it. The mother has also a history of avoiding drug testing. In September and December 2016 the Ministry worked hard to obtain the mother's co-operation to providing a hair follicle test. Despite the fact that she was, at that time, being assessed under s 18A and 18B Child, Persons and Their Families Act, those samples were not provided. She has recently been re-admitted to a programme at MASH Trust. The letter from her programme facilitator there has recorded a number of concerning observations. In particular, in relation to [PR]'s exposure in utero, their mother had four urine tests between 31 January and 2 March. All of the tests were positive for methamphetamine. The level of cannabinoids were decreasing, indicating nil cannabis use. The positive tests for methamphetamine through this period, however, indicate a high risk of frequent use. Although this period post dates the time when the mother lost the care of [PR], on an interim basis, it is within the time that she has

[3] *Smith LM et al* (2015) Development and behavioural consequences of prenatal methamphetamine exposure: A review of the Infant Development, Environment, and Lifestyle (IDEAL) study *Neurotoxicology and Tetrology, 51*, 35-44.

been strongly seeking the return of [PR]. The mother's explanation for the continuing positive methamphetamine testing is:[4]

> I had expected the test on 20 February to also be negative. However Mr Cameron explained to me that as I was a 'chronic user' of methamphetamine it would take time for the drug to be out of my system

[26] This evidence was not tested. It was not included in the report of Mr Cameron. Advice commonly received by the Court is that methamphetamine ceases to show in urine within 48-72 hours. I approach this statement by the mother with great caution.

[27] On balance, it appears more likely than not that [PR] was exposed to methamphetamine in utero. The mother's behaviour in avoiding drug testing calls for a strong inference in favour of use. Thus, adopting Ms Orr's analysis, [PR] needs the protective influence of a stable, high quality and stimulating placement.

[28] In her conclusion, Ms Orr divides her formulation in two ways. First, she looks at history and the degree to which the mother's history impacts on her likelihood of being able to care for [PR]. She records that significant family violence history, and inability to care for older children and a history of substance abuse and mental health issues all reduce the likelihood that she can provide [PR] with a safe environment.

[29] The present, current risk to [PR] is exposure to substance abuse. Ms Orr records that [BK] has commenced reduction of substance abuse and seeks to sustain a rehabilitation programme. Ms Orr records that the research suggests that a minimum of one year and preferably two years of change is needed before one can be confident of the success of the rehabilitation and lifestyle change. Because of how early in the reform process [BK] is, Ms Orr says that she is not in a psychological state to care for a young child.

[30] Mrs Orr's second formulation considers the impact of time on [PR]'s development. She is entering her 7th month of life. She now has the capacity to commence the tasks of forming secure attachments. [PR] does not have the capacity

[4] Affidavit of [BK] 22 March 2017 at [24].

to wait to start this task. In terms of infant development, the need is now. If the chance is missed now, PR] has a high risk of developing an adverse style of attachment.[5]

[31] In conclusion, Ms Orr said this:[6]

> [PR] does not have nine months or 21 months to wait for her mother to heal. She needs to move to a placement now, where she has a warm, sensitive, attuned caregiver and a high quality, nurturing environment which can attempt to mitigate against her early vulnerabilities, and allow her the opportunity to form a secure attachment that will not be at risk of being disrupted.

Does the evidence match the theory?

[32] I have carefully examined the evidence to check and consider whether the material relied on by Ms Orr is established to the accepted standard, being on the balance of probabilities.

[33] In terms of a risk of family violence, the proceedings since 2014 record on many occasions the history of police involvement, and some of the interactive dynamics between the mother and the father. The proceedings also record a lessening in family violence and some determination by the parents to prevent further family violence for themselves. The father now resides in [location deleted], and both parents are said to be determined not to reunite.

[34] As to the mother's mental health, the previous proceedings document some engagement with Community Mental Health Services, and in particular counselling engagement designed to assist the mother to regulate her own behaviour. It appears that the unpredictable dysregulated behaviour, which was previously a matter of concern to the Ministry, has not occurred recently.

[35] In relation to drug use, there has been a difficulty with continuing treatment. The mother was discharged from the [programme name deleted] in November 2014. Early in 2015 she was asked to leave a [programme name deleted] because she was dealing drugs to other clients. In February 2014 the mother agreed to undertake

[5] This process is described in the Orr report 10 April 2017 at [5]-[10].
[6] Report of Kathy Orr, 10 April 2017, at [21].

random drug testing, but ultimately resisted and avoided that. There were reports of concern in January and October 2013 related to escalating drug use. In October 2013 the mother was pregnant with [TR]. The [programme name deleted] clinician has summarised the history of treatment in this way.[7]

> I believe [the mother] to be quite naïve about consequences of her behaviour. As [the mother] has stated to me several times, she is very used to getting her own way. The outcome of this belief system may have been that programme attendance was enough to get what she wanted. I believe that [the mother's] history of attending programmes was not at a level of functioning that is required to gain insight and understanding about her behaviour.

[36] I am satisfied that the basis for concluding that the mother's continuing addiction and the risk that she will not attain and maintain abstinence are well made out in the evidence. I hope that the mother's better insight now, and motivation to address addiction sustain. But [PR]'s needs are now.

The mother's evidence

[37] The mother earnestly wishes to care for [PR]. She accepts that the history of mental health, family violence and drug use all have led to the removal of the other children. She accepts that until she can prove that she can remain drug free, she will not be in a position to look after [PR]. She does, however, consent only to a s 102 interim custody order, and seeks that the plan is amended to aim for [PR]'s return to her.

[38] The mother has also commented in her evidence about the positive drug test for methamphetamine. She believes that positive testing for methamphetamine continues, because she has been a chronic user. There is no evidence to support that opinion. That proposition is not one which can be read from the letter from [the programme facilitator].

[39] However, no matter the outcome of these proceedings, I commend [BK]'s strong attempts to remain drug free. One of her children, [RR], is almost grown up.

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[7] Letter [programme name deleted], [The programmefacilitator] 6 March 2017.

[NR] is now [age deleted]. These young men will be becoming more and more aware of, and in need of, their mother's positive changes.

[40] However, having considered the evidence of the social worker, Ms Harper and of Ms Orr, and having considered the Court's obligation to [PR], as the primary obligation, I am satisfied that she is not in a position to wait until her mother has achieved abstinence. Although the mother and her counsel were highly critical of MVCOT's previous attempts at return of children to her (2013), which she regarded as doomed to failure because of no support, the mother's evidence, and the Ministry's reporting of her engagement with the s 18A assessment while pregnant with [PR] tends to establish that the mother's expectation that she can take only some responsibility for her action is a worrying theme.

[41] Although [PR]'s connection with her sibling group is not a matter which has been able to be fully protected by this decision, and that is adverse to her, the Court has the necessary task of determining the matter on a least bad option.

Cultural considerations

[42] This child is Maori. She whakapapas back to Ngati Ruanui and Ngati Porou. Neither of her parents are engaged with their people. Both may exhibit the distressing and limiting consequences of being without the personal and spiritual anchor which would be available if they were positively engaged with their own people.

[43] This risk is now transferred to [PR]. To grow up without a familiar and cultural anchor has been often cited as a continuing reason for under achievement, under education, and poor health status for Maori.

[44] I have directed a cultural report to be obtained. The Ministry has gone to significant lengths to contact relevant iwi groups, but has not been able to establish a positive link with the people from whom [PR] derives. It is understandable that it is difficult for the Ministry to have sufficient creative and strong networks with iwi. The Court has similar difficulties. However, given the clear mandate within the Children, Young Persons and their Families Acts to honour iwi and hapu

connections, it is, in my view, necessary to make a further attempt to explore those. The cultural report is not for the purpose of identifying a caregiver for [PR]. Tragically, because of her age, it is necessary now that the Ministry place her in the best way they can. However, this child does need information about her forebears. She needs information to enable her, either direct or through her caregivers, to connect with pro-social members of her family. It is not possible to rely on her parents to enable this. The report is also necessary to assist the Ministry to identify members of [PR]'s whanau who may be able to support her and her caregivers, and who may be able to forge or strengthen links for [PR] and her sibling group with their spiritual and genealogical anchors.

[45] As soon as the cultural report is provided, it is to be forwarded to the Ministry, to lawyer for [PR], and to the parents.

[46] Since the hearing of this matter it has been brought to my attention that the Ministry's evidence contained in a report dated 28 April 2017, with relation to enquiries of [PR]'s iwi, was not served on the mother. Likewise, the Ministry's affidavit of 7 April was not served. The former document relates to future focussed efforts. Its contents have not formed part of my determination. The absence of possible whanau placement has been constant for two years. Tragically, this illustrates the degree to which the families of the parents have been struggling, and the poverty of resources available to them. The affidavit of Ms Harper is more gravely concerning. I have omitted mention of it, and consideration of it from my judgment. Without the affidavit I consider that the Court has sufficient evidence to determine the matter of [PR]'s placement. The only matter which is not possible to determine, given the failure of service on the mother is the question of Additional Guardianship in favour of the Ministry.

[47] The mother is directed to file any response she wishes to, in respect of that aspect of proceedings. Counsel for the mother is asked to file submissions in relation to that matter. Whether further hearing will be required will depend on the mother's evidence. The matter is to be referred to me as soon as the mother's evidence is filed. However, discussion in Court related to how the guardianship role may be formulated and exercised may also assist to dispose of the matter. The Court

expects the amendment to the Plan to be filed before the question of Additional Guardianship can be finalised.

Conclusion

[48] For the forgoing reasons, I consider that the current plan in relation to the placement of [PR] is adequate. The Ministry will amend the plan to enhance the obligation to consult with and co-operate with the mother on guardianship decisions. The review has been timetabled.

[49] There will be an order granting the Chief Executive of the Ministry the custody of [PR] pursuant to s 101 CYPFA.

J F Moss
Family Court Judge