EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, 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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT MANUKAU

FAM-2010-092-002474
[2017] NZFC 4721

IN THE MATTER OF	Children, Young Persons and their Families Act 1989 and Care of Children Act 2004
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY FOR VULNERABLE CHILDREN ORANGA TAMARIKI Applicant
	[CE] Applicant
AND	[KW] Respondent
	[HM] Respondent
	[IT] DOB [date deleted] February 2010 Child the application is about

Hearing: 8 June 2017

Appearances: Christa Mutavdzic for the Ministry

Hana Ellis for [CE]
Dr Allan Cooke for the Child
No appearances by or on behalf of either respondent

Judgment: 4 September 2017

RESERVED JUDGMENT OF JUDGE M L ROGERS

Background

[1] Oranga Tamariki (or as it was known at the time Child, Youth and Family) became involved with [IT] and [sibling] [AW] in 2010, due to serious concerns about the mental health of their mother, [KW]. There were also issues related to serious family violence between [KW] and [IT]'s father [HM] and between other members of the family. Child, Youth and Family had a significant history of involvement with the family and with [IT and AW's] other siblings.

[2] On 29 October 2010 s 78 interim custody orders were made placing the children in the custody of the Chief Executive. On 19 January 2011 declarations were made that the children were in need of care and protection. Subsequently on 31 March 2011 s 101 custody orders and s 110(2)(b) additional guardianship orders were made in favour of the Chief Executive in respect of [IT and AW]. [AW] is now 18 and has transitioned to independence. [IT] has been living in the care of [a close family member], [CE] since [date deleted] September 2014.

[3] [CE]'s care for [IT] has attracted high praise from [IT]'s social worker and lawyer for child. [IT]'s placement with [CE] is regarded as a very positive arrangement for [IT] and is intended to be a permanent placement.

[4] There is however, some debate and indeed dispute, as to how care by [CE] should be legally recognised. In May 2015 [CE] filed applications to discharge the custody and additional guardianship orders in favour of the Chief Executive and for parenting and additional guardianship orders in her favour pursuant to the Care of Children Act 2004.

[5] Alongside the Care of Children Act orders, [CE] sought a new Children, Young Persons and their Families Act order appointing the Chief Executive an additional guardian for specific purposes. [CE] wanted the Chief Executive to assist with access between [IT] and her parents, fund any reasonable legal costs relating to legal proceedings arising from her care of [IT], and to provide financial assistance to provide [IT] with counselling and therapy.

[6] I note that as at 14 July 2017, the Children, Young Persons and their Families Act 1989 has been renamed the Oranga Tamariki Act 1989. For the sake of clarity and having regard to the fact that this matter was heard before the name change, I will refer to the legislation as the Children, Young Persons and their Families Act in this decision.

[7] [IT]'s father, [HM] was served with [CE]'s applications on 7 August 2015. Service on her mother, [KW], was dispensed with. Neither parent has taken any part in proceedings for some years.

[8] On 16 July 2015 the Ministry filed a notice of intention to appear confirming their consent to the discharge of the custody and guardianship orders in favour of the Chief Executive but opposing the making of the guardianship order for specific purposes.

[9] Matters progressed through the Court and on 3 May 2016 a consent memorandum was filed seeking the following directions:

1) A direction to adjourn the applications filed by [CE] on the basis that applications will be filed after 1 July 2016 for

    (i) Variation of the s 110 order in order for [CE] to be appointed an additional guardian under s 110(1)(e) and,

2) [CE] to then be appointed a special guardian under s 113A noting s 113A will not come into force until 1 July 2016.

3) A direction that the Ministry file and serve a s 128 plan and s 135 report seeking the above by 2 July 2016 or alternatively an application under s 125 to vary the s 110.

4) For the matter to be set down for a one hour hearing to consider:

    a) Discharge of the s 101 order pursuant to the application of [CE] dated 15 May 2015;

    b) Variation of the s 110 order so as to appoint [CE] an additional guardian under s 110(1)(e);

c) The appointment of [CE] as special guardian under s 113A;

d) Withdrawal of [CE]'s applications under the Care of Children Act 2004.

(e) For the sake of clarity it is expected that the s 135 report will detail:

(i) The access and other rights that will apply under s 113B(1)(b);

(ii) Which guardianship rights are to be held exclusively by [CE] as special guardian and which are to be shared with the existing guardians (the parents) under s 113B(4)(a).

(f) [CE] advises that the rights she is seeking to hold exclusively relate to the child's

(i) Education,

(ii) Overseas travel,

(iii) Residence,

(iv) Health.

[10] On 27 September 2016 the Ministry filed

(a) An application to discharge the s 101 and s 110(2)(b) orders in favour of the Chief Executive;

(b) An application to appoint [CE] an additional guardian;

(c) An application to appoint [CE] as special guardian;

(d) An affidavit in support;

(e) A s 128 plan and s 135 report;

(f) Consent from [CE] to appointment of herself as additional and special guardian.

[11] As a consequence of those applications, [CE] seeks leave to withdraw her applications for orders under the Care of Children Act if she can be appointed a special guardian pursuant to the Children, Young Persons and their Families Act. As noted in the submissions of her counsel:

> "The primary reason for this is the view of counsel that the statutory requirements to be met for appointment as special guardian via COCA orders under s 110A are arguably so onerous as to make this route unwieldy and difficult."[1]

[12] I note that the pathway to special guardianship under the Children, Young Persons and their Families Act could not be described as straightforward either and it was this issue which was the subject of a one hour hearing before me on 8 June 2017.

Submissions on behalf of [CE]

[13] For [CE], Ms Ellis submitted that of the three paths to special guardianship (making of an initial disposition orders post declaration, or on review of the initial orders by s 128 plan or by way of s 125 application) only the latter two options were relevant given that the declaration and disposition orders were made some seven years ago.

Special guardianship via the review process

[14] After considering the implications of ss 120-130, 132, 135 and 137 Ms Ellis highlighted two particular issues. The first issue is that s 83(1) which details the orders the Court may make on making a declaration, there is no reference to a s 113A special guardianship order. The only reference to guardianship is at s 83(1)(h) which refers to the making of "an order under s 110 of the Act appointing a guardian of the child or young person".

[15] Ms Ellis has also highlighted the provision in s 137(3) that the Court "shall not" make an order under s 137(1)(a)(i) or s 137(b) unless satisfied that every person

[1] Paragraph 13 submissions H Ellis 14 November 2016.

who is required to be served agrees with the recommendation or a family group conference recommends that the order be made.

[16] Having regard to those issues Ms Ellis summarises the situation as regards special guardianship via the review process as follows [2]:

(a) A s 128 plan has been furnished to the Court for the review.

(b) The parents are entitled to appear.

(c) The parents have been served with the s 128 plan.

(d) The Court is not able to make the sole guardianship and special guardianship orders as the parents do not agree with the recommendation for that order.

(e) No family group conference has been held that might otherwise allow the Court to make the order.

(f) Even if the parents agreed to the orders or an FGC was held that recommends the making of the orders, s 83(1) is a barrier as it does not include the special guardianship order.

[17] Addressing the s 83(1) issue, Ms Ellis submits that it would be inappropriate to read that section in "a narrow and literal way as to frustrate the object and principals of the Act" [3]. In support of a "broad" reading of s 83(1) Ms Ellis notes that although special guardianship was not included in the list of orders that can be made pursuant to s 83(1), guardianship under s 110 is and s 110(4) provides that where a person appointed as a sole or additional guardian is a "natural person" and the Court may make an order under s 113A appointing that person as a special guardian.

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[2] Paragraph 22 submissions H Ellis 14 November 2016.

[3] Paragraph 29 submissions H Ellis 14 November 2016.

[18] With reference to s 5(g) of the Interpretation Act 1999 (the meaning of an enactment must be ascertained from its text and in light of its purpose) and having regard to the s 4 objects of the Act, the s 6 paramount consideration and the holistic approach mandated by s 5(g) Ms Ellis submits the correct approach would be to read s 83(1) broadly enough so as to encompass special guardianship.

Special guardianship via s 125 variation application

[19] Ms Ellis then goes on to address a possible alternative route for [CE], which is to first vary the additional guardianship order currently in favour of the Chief Executive so as to make [CE] the sole or additional guardian for [IT]. The next step would be to appoint [CE] as a special guardian.

[20] I should note that [CE]'s preference is to have sole guardianship of [IT] as she says neither parent takes any interest in guardianship issues and only one guardian, [CE]'s brother [HM], is taking any active steps to remain involved with [IT]. If the Court is not minded to make [CE] [IT]'s sole guardian then she would like to at least replace the Chief Executive as additional guardian. This is on the basis that it is she who has the long term responsibility for [IT], it is a whanau placement of some duration, and neither parent has taken any steps to challenge the placement.

[21] The difficulty with special guardianship via a variation application is that while pursuant to s 126 the Chief Executive could apply for a variation in reliance on s 125, s 127 stipulates that the Court may vary the order in such manner as it thinks fit or discharge the order or discharge the order and substitute any other order referred to in s 83(1) (or s 84(1) which is not relevant to the current matter). As Ms Ellis notes that takes us neatly round in a circle as to how s 83(1) should be interpreted having regard to the fact that the orders specified in s 83(1) do not include a special guardianship order.

[22] Ms Ellis concludes by again urging the Court to take a broad approach to the interpretation of s 83(1), discharge the current custody and guardianship orders in favour of the Chief Executive, appoint [CE] as a guardian (whether sole or additional) and then appoint her as special guardian.

Submissions on behalf of Oranga Tamariki

[23] Oranga Tamariki have filed two sets of submissions in these proceedings dated 8 May 2017 and 25 April 2017. In their first set of submissions the Ministry identify two issues as requiring determination:

(a) Where the Court has made a final custody and additional guardianship order, can the Court discharge those orders and make substitute orders appointing [CE] additional guardian pursuant to s 110(1)(e) and 2(b) and then make an order appointing [CE] as a special guardian pursuant to s 113A.

(b) Does the s 128 plan filed by the social worker seeking the making of the orders appointing [CE] an additional guardian and special guardian, comply with s 130 noting that it was prepared on the basis that there is no realistic possibility of return of [IT] to her parents.

[24] Dealing with the second point first, while it is not clearly enunciated, it seems implicit in that submission that Oranga Tamariki were inviting the Court to make a 18B determination on the basis that the plan records that there is no realistic possibility of return. Counsel for the Ministry is aware that I have expressed the view that an application is necessary before such a determination can be made[4]. During the course of this hearing counsel for Oranga Tamariki confirmed that they would not be seeking a s 18B determination on the basis of the plan. I am satisfied that the plan dated 27 September 2016 is otherwise compliant with the requirements of s 130. That should not be seen as a determination pursuant to s 18B.

[25] I turn then to the first of the issues identified by counsel and that is the legal framework for their preferred course of action, that [CE] is made an additional guardian pursuant to s 110(1)(e) and 2(b) and then appointed as a special guardian pursuant to s 113A.

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[4] *Ministry for Vulnerable Children, Oranga Tamariki v [S & K]* [2017] NZFC 3215 2 May 2017, FC Papakura.

[26] Counsel for the Ministry submits that pursuant to s 126(g) the Chief Executive can make an application under s 125. There seems to be no dispute about this. It is acknowledged that pursuant to s 127 once an application has been filed under s 125(1) for the variation or discharge of an order, the Court may vary the order in such manner as it thinks fit, or discharge the order, or discharge the order and substitute any other order referred to in s 83(1). It is further acknowledged that s 83(1)(h) permits the Court to make an order under s 110 appointing a guardian for the child or young person.

[27] Like Ms Ellis, Counsel for the Ministry identifies s 83(1) as something of a stumbling block given that s 83(1)(h) limits the guardianship order that can be made to one under s 110 but counsel submits that I should read the word "guardian" in that section as including a special guardian. My immediate difficulty with that submission is that it is not just a question of the use of the word "guardian"; s 83(1)(h) expressly constrains the guardianship order to one which can be made under s 110.

[28] With regard to s 113(A). The counsel for the Ministry then goes on to submit that "the appointment of [CE] as a special guardian is made for the purpose of providing [IT] with a long term, safe and secure environment that enhances her interests, and that [CE]'s appointment is additional to the children's existing guardians, [KW] and [HM]".[5] Counsel argues that provided the Court reads s 83(1)(h) as encompassing a special guardianship order there should then be no difficulty in the Court making an additional guardianship order in favour of [CE] followed by the making of a special guardianship in favour of [CE].

[29] Further submissions were filed by Counsel for the Chief Executive subsequent to the filing of Dr Cooke's submissions dated 21 October 2016. Those are the submissions which Dr Cooke relied on at hearing and it makes sense to address them before turning to the submissions filed in response by counsel for the Chief Executive.

[5] Paragraph 29, Counsel for the Chief Executive submissions 8 May 2017

Submissions of lawyer for child

[30] While Dr Cooke is broadly supportive of an order for special guardianship being made in favour of [CE], he does question whether the legislation provides a proper process for that to occur and, even if the procedural hurdles can be overcome, further questions whether the statutory requirements for a special guardianship order have been satisfied.

[31] Dr Cooke notes that where a child has been subject to an application for declaration and that declaration has been made together with a s 101 order, any application to vary will need to follow one of two pathways. The first, and in his submission preferable pathway, is to utilise s 125 which provides for the variation or discharge of specified orders made under part 2 of the Act. The alternative course would be via the s 128 plan and s 135 report so that on review of the current orders and consideration of the plan, the existing orders are discharged and in their stead a special guardianship order is made pursuant to s 128 (2)(e) and s 135(3)(c).

[32] Dr Cooke identifies that either pathway will present challenges having regard to the provisions of s 137, and s 137(3) in particular. Section 137(1)(a)(i) permits the Court at review of any plan to make any order under s 127 as if an application had been made under s 125. Alternatively the Court could utilise s 137(1)(b) which allows the Court to make any order referred to in s 83(1). However, both s 137(1)(a)(i) and (b) are subject to s 137(3) so that the Court cannot make any order unless the s 135 report recommends the order be made and the Court is satisfied that every person to whom a copy of that report is required to be given agrees with that recommendation or a Family Group Conference (FGC) recommends that the order be made. In the present case there is neither consent nor has an FGC recommended the proposed orders.

[33] In addition to the obstacles presented by s 137(3) there is the previously noted issue that s 83(1) does not reference special guardianship. The section was not amended when special guardianship was introduced so the only guardianship order specifically referenced is pursuant to s 110. As Dr Cooke puts it "the issue is whether s 83 constitutes the substantive empowering provision or whether is it

merely declaratory of what orders may be made and with it not mattering in the end whether or not a specific order is specified in the section?".[6]

[34] Dr Cooke acknowledges the argument advanced on behalf of the Chief Executive that the Court utilise s 110(4) which provides as follows:

> (4) If a person who is appointed as a sole or additional guardian of a child or young person under the section is a natural person, the Court may also make an order under s 113(A) appointing the person as a special guardian of the child or young person (including when the order under the section is made at a hearing under s 127).

[35] Dr Cooke submits there are a number of problems with this approach;

(a) S 83(1) clearly delineates the various orders that the Court can make following the making of a declaration. It is accordingly "problematic" and to say that a guardianship order encapsulates an order for special guardianship.

(b) The reference to the appointment of a special guardian in s110(4) is not an actual power of appointment arising under that section. It is descriptive, saying what may occur if an order for guardianship is made. It is comparable to s 112, which provides that an order under s 110 appointing the Chief Executive as a guardian may specify that the appointment is for a specific purpose.

(c) The actual power of appointment arises under s 113A and not s 110. Section 113A is quite clear:

> The Court may make an order under this section appointing a person referred to in s 110(4) as a special guardian only if … [7]

[36] In considering ways in which to circumvent the issues arising, Dr Cooke notes s 5(1) of the Interpretation Act 1999. He observed that the Court cannot rely on the Family Court Rules to fill the legislative lacuna as the Rules are directed to

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[6] Dr Cooke's submissions 21 October 2016 Paragraph 26
[7] Paragraph 31 of Dr Cooke's submissions

matters of procedure and to use the Rules to "fill a gap" would only be viable if the power to make a special guardianship order was seen as simply a matter of procedure.

[37] Dr Cooke goes on to cite the well known decision of *McMenamin v Attorney General*[8]

> An inferior Court has the right to do what is necessary to enable it to exercise the functions powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its processes are used fairly. It is bound to prevent an abuse of that process.

[38] However, as Gendall J noted in *F v W*[9] as an inferior Court the Family Court's "inherent powers" are limited to those arising from its statutory jurisdiction. Thus, as Dr Cooke observes, the jurisdiction to make a special guardianship order will still need to be found in the Act.

[39] Dr Cooke concludes that the only way to make a special guardianship order and to avoid "absurdity unworkability or frustration of primary purpose"[10] is to read s 83(1) broadly so as to confer the jurisdiction to make a special guardianship order. In support of this proposition Dr Cooke refers the Court to the decision of Harrison J in *Sheehan v Watson*[11] affirmed on appeal by the Court of Appeal in *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314. Harrison J, reasoned:

> [24] Alternatively, … I would reach the same result by concluding that the legislature's omission of "the lessee's employee" from statutory exoneration from liability was inadvertent. This case would fall within the extreme category where it is necessary to read qualifying words into the statute in order to avoid absurdity or unworkability or frustration of Parliament's purpose. In my judgment the three criteria identified by Lord Diplock in *Jones v Wrotham Park Settled Estates Limited* [1980] AC 74 at 105 are satisfied namely that:
>
> First, [that it is] possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy;

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[8] [1985] 2 NZLR 274 (CA) at [276]
[9] (HC Wellington CIV-2009-485-531, 3 August 2009)
[10] Paragraph 45 of Dr Cooke's submission
[11] [2010] 2 NZLR 419 (HC) at [24]-[26].

> Secondly, [that it is] apparent that the draftsmen and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and
>
> Thirdly, it [is] possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. [25] A similar approach has been adopted in New Zealand: see *R v Wall* [1983] NZLR 238 (CA) at 240; *R v Salmond* [1992] 3 NZLR 8 (CA) per *Cooke P* at [13] as follows:
>
> > "In many cases this Court has emphasised the importance of a practical and realistic interpretation of Acts of Parliament. In case of ambiguity of hiatus there should be interpreted so as to be made to work. Gaps may be filled to cover problems not foreseen when the legislation was enacted, provided that the policy making function is not usurped by the Court. This approach was adopted for example in *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530 and cases there mentioned. …"
>
> [26] There may be shades of differences between these approaches. *Wrotham* may be seen as authority for reading words into a statute, whereas *Salmond* and *Northland Milk Vendors* may be viewed as gap-filling, and giving a word of phrase a wider or more propulsive meaning than might appear immediately obvious: See *Burrows v Carter*: Statutory Law in New Zealand, 4th edition at 308-311.

[40] Dr Cooke then addresses issues relating to s 113B and whether the statutory requirements set out therein have been complied with. I will address that point later in this decision.

[41] In response to Dr Cooke's submissions, counsel for the Chief Executive submits

> While the Chief Executive agrees that the word guardian in s 83(1)(h) does not specifically state special guardianship, it submits that it does not specify additional or sole guardianship either. It refers simply to guardians. One cannot simply be appointed as a guardian. Therefore reference to s 110 is crucial to determine this. Accordingly the Chief Executive submits that s 83 is a substantive empowering provision rather than a declaration of guardianship orders that can be made. However s 83(1)(h) must be read alongside s 110, as referenced in this section. Section 110 is the section that clarifies the guardian orders.[12]

[42] Counsel for the Chief Executive goes on to acknowledge Dr Cooke's submission that s 110(4) is not an actual power of appointment arising under that section. Counsel also accepts that the power to make a special guardianship order

[12] Paragraph 14 submissions for Chief Executive filed 25 April 2017

would sit more appropriately under s 113A. However in the absence of a provision in s 113A counsel for the Chief Executive submits that s 110 provides the Court with capacity to make such an order. If the Court does not accept that argument then counsel for the Chief Executive urges the Court to adopt Dr Cooke's submission that s 83(1)(h) should be given a broad interpretation to include special guardianship.

Pathway to s 113A

[43] As is readily apparent from the submissions of counsel, the process by which a special guardianship order can be made under the Children, Young Persons and their Families Act is not clearly set out in the legislation.

[44] I agree with Ms Ellis' submission that seven years after the making of the declaration and initial disposition orders, it would be artificial to approach special guardianship in the context of initial disposition orders post declaration. That leaves only two available options; on review of initial orders by s 128 plan or by way of s 125 application. There are also clear issues arising from s 83(1) of the Act which deals with the orders the Court may make on making of a declaration. I will address s 83 in more detail later in this decision.

[45] As for granting the application as part of the s 135 review process, I also accept the submission that the Court is stymied by the provisions of s 137(3) which prohibits the Court from making an order under paragraph (a)(i) or paragraph (b) of s 137(1) unless every person served with a copy of the social worker's report agrees with the recommendation or a family group conference recommends that the order be made. Neither of those provisions can be complied with in the present case. That means the only viable option is special guardianship by way of a s 125 variation. That means that in effect the only viable route to special guardianship in the present case is by way of a s 125 variation application. I note Dr Cooke also submits that this is the preferable pathway. However, s 83(1) is the key issue.

[46] At the outset I note that I do not accept the submission on behalf of Oranga Tamariki that the reference at s 83(1)(h) to "guardianship" empowers the Court to make a special guardianship order. Section 83(1)(h) is specifically linked to s 110. The only orders that can be made pursuant to s 110 are sole or additional

guardianship orders. I agree with Dr Cooke's submission that the reference in s 110(4) to orders pursuant to s 113A does not amount to a power to appoint a special guardian under s 110. It simply directs the Court's attention to the empowering provision which is s 113A.

[47] Further, the concepts of 'guardianship' and 'special guardianship' are not interchangeable as highlighted by s 2 of the Act which defines guardianship as having the meaning given to it by s 15 of Care of Children Act 2004;

> **15 Guardianship defined**
>
> For the purposes of this Act, guardianship of a child means having (and therefore a guardian of the child has), in relation to the child,—
>
> (a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child:
>
> (b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment:
>
> (c) every duty, power, right, and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.

[48] Special guardian has an entirely separate definition and means a guardian of a child or young person appointed under s 110 who is [in turn] appointed as a special guardian under s 113A. In other words, special guardianship is an entirely novel and new concept which arises in addition to 'ordinary' guardianship rather than as an extension of guardianship.

[49] Having regard to the clear distinctions between guardianship and special guardianship I consider the interpretive exercise would be unduly strained if one were to extend s 83(1)(h) so as to read guardianship pursuant to s 110 as including a s 113A special guardianship. They are two are quite distinct beasts.

[50] Notwithstanding that, Dr Cooke urges me to read s 83(1) broadly so as to confer the jurisdiction to make a special guardianship order. The reference to "absurdity or unworkability or frustration of Parliament's purpose" is drawn from the decision of Harrison J in *Sheehan v Watson*. Justice Harrison noted at [24] of his

decision that cases where it is necessary to read qualifying words into statute in order to avoid such a situation "fall within the extreme category". As noted at [39] of his decision, Justice Harrison adopted the three interlinked criteria identified by Lord Diplock in *Jones v Wrotham Park Settled Estates Limited* as guiding when it is appropriate to read qualifying words into a statute;

(a) If it is possible to determine from the Act the precise mischief that the Act was to remedy;

(b) If it was an accident that the mischief had not been resolved by the Act's literal meaning; and

(c) If it is possible to say with certainty what additional words would have been inserted by draftsmen and approved by Parliament.

[51] It bears noting that the legislation under consideration in *Sheehan v Watson,* the Property Law Act 2007, was a single comprehensive and new Act passed with the purpose "to restate, reform and codify (in part) certain aspects of the law relating to real and personal property". That is by way of stark contrast with the Children, Young Persons and Their Families Act 1989 which has undergone numerous amendments and modifications since its passage almost 30 years ago. As a consequence the intent of the legislators is not so readily determined.

[52] The Act does not include a specific purposive provision but it does set out at s 4 its objects which are:

> **4 Objects**
>
> The object of this Act is to promote the well-being of children, young persons, and their families and family groups by—
>
> (a) establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the well-being of children, young persons, and their families and family groups and that are—
>
> (i) appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups; and
>
> (ii) accessible to and understood by children and young persons and their families and family groups; and

(iii) provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community:

(b) assisting parents, families, whanau, hapu, iwi, and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, ill-treatment, abuse, neglect, or deprivation:

(c) assisting children and young persons and their parents, family, whanau, hapu, iwi, and family group where the relationship between a child or young person and his or her parents, family, whanau, hapu, iwi, or family group is disrupted:

(d) assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:

(e) providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation:

(f) ensuring that where children or young persons commit offences,—

(i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and

(ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

(g) encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

The objects of this Act are rather more amorphous than the clear cut purposes of the Property Law Act and complicate the application of the *Wrotham* principal as to the 'mischief' to be remedied.

[53] Further, it cannot be said or inferred that the drafters of s 83 ever contemplated inclusion of s 113A guardianship orders because at the time of their work, such a concept simply did not exist. Therefore, if there is to be a pathway to special guardianship via s 83, the Court will actually be required to read words into a section when those words could not have been intended and/or accidentally omitted by the drafters because the relevant concept was at the time unknown.

[54] My concern is that to read s 83 as broadly as proposed by Dr Cooke would in effect be asking the Court to create a s 83(1)(i) encompassing special guardianship.

That of course offends against Lord Diplock's explicit caution that the court should not shift from its proper role of legislative interpreter to that of legislative drafter.

[55] In the final analysis, I am not persuaded there is any way to interpret s 83 so as to include the power to make a special guardianship order. But that leads me to consider whether such inclusion is even necessary for an order to be made?

[56] There is nothing in s 83 that limits the orders the court 'may' make to only those orders listed in s 83(1). Indeed such a restriction would be inconsistent with the ability of the court to make Part 2 orders which are not listed in s 83(1), for example s 49 (order for medical examination) or s 115 (order to resolve disputes between guardians). Therefore, I have come to the conclusion that while it would have been 'neater' if s 83 had been amended so as to include s 113A special guardianship orders, the fact that it has not been is not in itself an insurmountable obstacle to the making of a s 113A order.

[57] But just when the pathway to a special guardianship order seems to have been clear for this application by the Chief Executive seeking the appointment of the caregiver firstly as an additional guardian pursuant to s 110 and then as a special guardian pursuant to s 110(4), the spectre of s 110A rears its head. This is the section which allows, with the leave of the court, a combined application for a guardianship order under s 110 and a special guardianship order under s 113A. That is the combination proposed in the present case.

[58] As noted by Judge David Smith in *CE MVCOT v [C]*[13];

> The Ministry's position is that due to the inclusion of s 110A in the Act, the Ministry can apply with the leave of the Court to have [The Hs] appointed as additional guardians and special guardians at the same time. In my view the Ministry's approach is misplaced. On my reading of s 110A, the applicant under that section for the orders is the permanent caregiver. Here that would be [the Hs].

[13] *CE MVCOT v [C]* (Family Court, Palmerston North, FAM-2013-054-886, 29 May 2017, D G Smith FCJ) [31]-[33]

[59] And as Judge Smith went on to note, even if the application had been correctly filed in the caregivers' names, they would then need to satisfy the grounds for leave as provided in s 110A(2). In *CE MVCOT v [C]* the caregivers could not satisfy the court as to those grounds, not least because there had never been a guardianship order made under s 27 of the Care of Children Act 2004 or s 48 orders under that Act. We have the same situation here. [CE] does not currently have necessary Care of Children Act orders in her favour nor has she applied for a special guardianship order pursuant to s 110A.

[60] The lack of the prerequisite Care of Children Act orders also means that the s 110A(4)(i) grounds cannot be satisfied and consequently even if the application had been bought by the caregiver and leave granted, it would still fail at the first of the interdependent s 110A(4) hurdles.

[61] The significance of a special guardianship order is emphasised by the restrictions set out in s 110A(4)(a) so that the court may make the order only if satisfied that—

> (i) the person has been unable to effectively exercise their guardianship responsibilities or responsibilities to provide day-to-day care to the child or young person under the orders made under the Care of Children Act 2004; and
>
> (ii) that inability is due to the conduct of the parents or other guardians of the child or young person, and that conduct forms a pattern of behaviour; and
>
> (iii) the child's or young person's welfare is being threatened or seriously disturbed as a result.

[62] The respondent parents have not participated in the proceedings and have shown little ongoing interest in their [child]'s life but here is no evidence of any dispute between guardians or that [IT]'s welfare has been threatened or seriously disrupted as a result. The Chief Executive has submitted that;

> [While] there is no evidence that would indicate there have been disputes between the guardians relating to [IT]…It is the Chief Executive's view that the making of special guardianship orders cannot only have been envisioned to occur as the result of disputes between guardians.[14]

[63] With respect, the s 110A(4)(ii) threshold is in fact set at a level where evidence of disputes between the caregiver and each of the guardians would seem the most obvious basis for a special guardianship order. Certainly, even in the absence of dispute there will need to be evidence of some substantive guardianship issue as between the guardians, which affects the child.

[64] The Chief Executive submits that there is no need to have regard to the provisions of s 110A when making an order under s 113A;

> …the Chief Executive submits that if the legislation had intended that caregivers seeking special guardianship were to fulfil the requirements as set out at s 110A(4) then reference to these requirements would have been set out at s 113A.
>
> It is the Chief Executive submission that when the Court is considering whether an order for special guardianship should be made, it is to evaluate whether the evidence meets the threshold of the criteria under s 113A(1)(a). This section sets out that an order for special guardianship should only be made if the appointment is made for the purposes of providing the child or young person with a long term safe, nurturing, stable and secure environment that enhances his or her interests.[15]

[65] Of course, a child's interests are the paramount consideration as acknowledged by s 6 of the Act but assessment of a child's interests are informed by reference to the principles set out in s 5 which emphasises the importance of the child's whanau, hapu and iwi having an ongoing decision making role wherever possible. Judge Smith addressed this point in *CE MVCOT v [C]*;

> Altering guardianship arrangements clearly has an effect on the relationship a child or young person has with his or her family, whanau, hapu, iwi and family group and in making such an order there will be inevitably a deterioration in the strength of

[14] [22] Supplementary submissions for Chief Executive dated 25 May 2017
[15] [27]-[28] Supplementary submissions for Chief Executive dated 25 May 2017

> that relationship if guardianship is held by someone other than the parent or person to whom the child or young person looks to in a parental role[16].
>
> Quite why the legislation has spelt out how such a matter is to be approached in s 110A, as opposed to s 110 or s 113A may possibly never be known, but the care to be taken by the Court in each and every case irrespective of the basis of the application should be to the same high standard. In deciding whether [the Hs] should have a special guardianship order in the terms sought the requirements of s 113A(1) must be met in respect of both Mr [B] and Ms [C].

[66] I agree with Judge Smith. I also agree with Dr Cooke's comparison with the requirements of s 29 of the Care of Children Act in its approach to deprivation of guardianship. What the Chief Executive seems to be saying is that once the Ministry is not involved, guardianship disputes might arise[17] so it would be prudent to have a special guardianship order in place in advance of any such disputes. I do not accept that submission. A pre-emptive removal of guardianship rights in advance of any actual dispute is inconsistent with any existing statutory or case law approach to guardianship.

Conclusion

[67] In the present case, I can find no pathway by which a special guardianship order can currently be made. Even if the 'procedural' issues such as making the caregiver applicant under s 110A were remedied, on the current evidence I believe [CE] would struggle to satisfy the court that <u>each</u> of the parents has consistently impeded her exercise of her guardianship responsibilities or day-to-day care so that [IT]'s welfare is being threatened or seriously disturbed as a result.

[68] The application for a special guardianship order is for the above reasons declined.

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[16] *CE MVCOT v [C]* (Family Court, Palmerston North, FAM-2013-054-886, 29 May 2017, D G Smith FCJ) [40]-[41]

[17] [26] Supplementary submissions for Chief Executive dated 25 May 2017

[69] Otherwise, the applications on behalf of the Chief Executive are uncontroversial. They seek discharge of the current s 101 custody and s 110 guardianship orders in favour of the Chief Executive in conjunction with the making of Care of Children Act orders in favour of [CE]. The custody and guardianship orders in favour of the Chief Executive are discharged.

[70] [CE]'s application to withdraw her Care of Children Act applications, which was dependent on the granting of a special guardianship order, is now withdrawn by leave.

[71] [CE] will be granted leave to apply for Care of Children Act orders and will be granted day to day care of [IT]. [IT] may have contact with her parents on terms and conditions to be arranged and agreed with [CE], subject to the condition that all contact must be supervised by [CE] or a responsible adult approved by [CE]. These are final parenting orders.

[72] [CE] will also be appointed as an additional guardian for [IT]. There had been a submission that [CE] should be made a sole guardian but in this respect my comments regarding the lack of any evidence of current guardianship difficulties is relevant. There are simply insufficient grounds to deprive either parent of guardianship.

[73] Leave is reserved to all counsel to file memoranda within the next 14 days seeking any further directions necessary to give effect or better effect to this decision.

M L Rogers
Family Court Judge