EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT WHAKATANE

FAM-2013-047-000046
FAM-2016-044-000772
FAM-2017-044-000048
[2018] NZFC 1239

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ESTHER NIKAU] Applicant
AND	[NIGEL TATCHELL] [BECKY TATCHELL] First Respondents
AND	[COLIN NIKAU] Second Respondent
AND	[WENDY NIKAU] [WINSTON HOHEPA] Third Respondents

Hearing:	12-16 February 2018
Appearances:	L Ross for the Applicant First Respondents appear in Person Second Respondent appears in Person J Kay for the Third Respondents R Paul as Lawyer for the Child
Judgment:	9 March 2018

RESERVED JUDGMENT OF JUDGE S J COYLE IN RELATION TO DAY-TO-DAY CARE PARENTING ORDERS

"Her absence is like the sky, spread over everything"[1]

Hutia te rito o te harakeke
Uamai koe he aha te mea nui
He tangata he tangata he tangata[2]

[1] Grief. Loss. I have never been in a hearing in which these two emotions have been so raw and powerful, and the parties' tears flowed freely throughout. The [date deleted] June 2010 was a significant day for the [Nikau] family as it was the day in which [Rhonda Nikau] was born. For her parents, [Esther] and [Colin Nikau] , the birth of their third child and only daughter was a bitter-sweet day. For they had agreed that [Colin]'s sister and her partner, [Wendy Nikau] and [Winston Hohepa], would care for and raise [Rhonda] in accordance with matua whāngai. Thus, for [Wendy] and [Winston] the birth of [Rhonda] heralded for them the reality that they would be parents, something they had not dared to envisage, given that they are unable to have children of their own. Following [Rhonda]'s birth [Winston] and [Wendy] took [Rhonda] home and raised her as their daughter. However, in accordance with tikanga Māori and in terms of the principles of matua whāngai[3] while they raised [Rhonda], [Esther] and [Colin], as her birth parents, were deeply involved in [Rhonda]'s life.

[2] What was in fact agreed to between [Esther] and [Colin], and [Wendy] and [Winston], at the time of [Rhonda]'s birth is now in dispute. What is clear is that some months after [Rhonda]'s birth [Esther] changed her mind and decided that she wanted [Rhonda] back in her care to live together as a family with their elder children, [Toby] and [Mitchell]. The relationship between [Esther] and [Colin] and [Wendy] and [Winston] rapidly deteriorated as a consequence, and within the wider [Nikau] whanau deep divisions have formed, and there is now a rift within that whanau.

[3] [Esther] has made several allegations alleging that [Rhonda] has been the victim of violence, sexual assault and intimidation, principally by [Wendy][4].

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1 C S Lewis, *A Grief Observed* (London, Faber and Faber, 1964).
2 A whakatauaki given by Ms Paul at the start of her submissions.
3 See s 4 Te Ture Whenua Māori Act 1993 and *PED v MHB* [2012] NZFLR 35 at [4] – [11] inclusive.
4 There are no allegations against [Winston] at all.

Following several notifications to Oranga Tamariki,[5] a number of social work interviews with [Rhonda] and three evidential interviews, [Esther]'s [parent and stepparent], Mrs and Mr [Tatchell], applied for and were granted without notice an interim parenting order and from [date deleted] December 2016 [Rhonda] has been in their day-to-day care in [location 1 deleted]. [Wendy] and [Winston] then had no contact with [Rhonda] until [date deleted] June 2017 and thereafter supervised contact at [Centre name deleted] in Auckland. [Esther], and then [Colin], move to [location 2 deleted] and see [Rhonda] regularly.

Applications Requiring Determination

Domestic Violence Act proceedings

[4] [Esther] had filed an application for a protection order against [Wendy] and [Winston]. At the start of the hearing Ms Ross indicated that [Esther] wished to discontinue that application and I did so accordingly.

Care of Children Act proceedings

[5] Mr and Mrs [Tatchell] have applied for a parenting order in relation to [Rhonda]. At the outset of the hearing Mr [Tatchell] advised that their position was that they sought an order providing for them to have contact with [Rhonda], but if the Court found that [Rhonda] should not be in the care of [Esther] and/or [Colin], or in the care of [Wendy] and [Winston], that they were willing to have a final parenting order in their favour pursuant to which [Rhonda] would be in their day-to-day care. However, as the evidence progressed, at the end of day four Mr [Tatchell] advised me[6] that he and Mrs [Tatchell] reached the view that they no longer wished to pursue their application for a final parenting order, and that they were confident that they would be able to continue to have a relationship with [Rhonda] while [Rhonda] was in [Esther]'s care without the need for any formal orders. They wished to simply become grandparents again.

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5 At that time the Ministry of Social Development, subsequently Ministry for Vulnerable Children: Oranga Tamariki and now the Ministry for Children: Oranga Tamariki.

6 Mr [Tatchell] confirmed to me that this remained their position during his closing submissions.

[6] The Court therefore was left with the cross-applications of [Esther][7] and [Colin] for a parenting order in their favour, and the applications of [Wendy] and [Winston] for a parenting order in their favour. [Colin] had chosen to have a limited participation in these proceedings prior to the fixture, but appeared at and participated fully in the hearing. He seeks that I make a shared parenting order in favour of he and [Esther] in relation to [Rhonda]. Mr Kay also made an oral application[8] for an order appointing [Wendy] and [Winston] additional guardians of [Rhonda]. Thus, I need to determine:

(a) Whether [Rhonda] is to be in the day-to-day care of [Esther] only and have contact with [Wendy] and [Winston].

(b) Whether [Rhonda] is to be in the day-to-day care of [Esther] and [Colin] and to have contact with [Wendy] and [Winston].

(c) Whether [Rhonda] is to be in the day-to-day care of [Wendy] and [Winston] and to have contact with [Esther] and/or [Colin].

(d) Whether [Rhonda] is to be in the shared care of all four adults.

(e) Whether to make an order appointing [Wendy] and [Winston] additional guardians of [Rhonda].

Legal Principles

[7] While there are many issues in this case which are important to the adults, pursuant to s 4 of the Care of Children Act 2004 I am required to consider as the first and paramount consideration the welfare and best interests of [Rhonda]. Both s 4(1) and the High Court decision of *Brown v Argyll* make it clear that any decision I make must take into account that [Rhonda] is a unique child in a unique family environment, and thus an individualised assessment needs to be undertaken by the Court rather than

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7 Although [Esther] was equivocal as to whether she in fact wanted a parenting order solely in her favour.

8 That it was made orally was not opposed by other counsel/parties.

any formulaic approach.[9] Additionally, pursuant to s 4(2)(b) parental conduct is irrelevant unless it directly impacts upon the welfare and best interests of [Rhonda].

[8] I am required to consider the relevant principles in s 5 of COCA[10] with the Supreme Court in *Kacem v Bashir* identifying that I need to consider not only those s 5 principles that are relevant, but also I need to identify those principles that may be irrelevant and explain why.[11] In this case, all counsel and parties agree that all of the s 5 principles are relevant, and I agree.

[9] There are other factual issues which are directly relevant to the issue of [Rhonda]'s best interests and welfare and I need to consider those factual matters carefully. Ultimately, it is an issue of weighing the relevant principles and that other evidence as I see fit, in evaluating and determining what outcome is in the best interests and welfare of [Rhonda]. [Rhonda]'s views, pursuant to s 6 of COCA, are also relevant and must be considered by me in weighing up what is in her best interests and welfare.

Issues

[10] The legal and factual issues that I must determine in the case are as follows:

(a) Has [Wendy] been violent towards [Rhonda]?

(i) Did [Wendy] hit [Rhonda] in June 2014?

(ii) Did [Wendy] sexually abuse [Rhonda] in 2014?

(iii) Did [Wendy] physically discipline [Rhonda] in mid-2016?

(iv) Did [Wendy] physically discipline [Rhonda] in early November 2016?

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9 *Brown v Argyll* (2006) 25 FRNZ 383 (HC).
10 Section 4(2)(a)(ii).
11 *K v B* [2010] NZSC 112.

(v) What has been the effect of Oranga Tamariki's placement decisions on [Rhonda] and the proceedings?

(vi) Has [Rhonda] disclosed physical abuse in the Evidential Video Interview?

(vii) Is there other violence from which [Rhonda] needs to be protected?

(viii) Are there any risk issues to [Rhonda] that I need to consider?

(b) What weight should be attached to the principle that [Esther] and [Colin] should have the primary responsibility for a child's care (s 5(b))?

(c) Who cared for [Rhonda] in her formative years?

(d) What have been the care arrangements for [Rhonda] more latterly?

(e) Can there be consultation and co-operation between [Rhonda]'s caregivers?

(f) What weight should be afforded to the principle that [Rhonda] should have continuity in her care?

(g) What is the significance for [Rhonda] of her Māori culture and the ongoing involvement with her whānau?

(h) To what extent are the personal circumstances of the four adults relevant?

(i) To what extent is the wider family conflict relevant?

(j) What is the importance of the sibling relationship between [Rhonda] and [Toby] and [Mitchell]?

(k) What are the options for [Rhonda]'s care?

(l) What are [Rhonda]'s views?

Has [Wendy] been violent towards [Rhonda]?

[11] [Rhonda] and [Esther] have made a number of disclosures that [Rhonda] was being physically disciplined by [Wendy] and one disclosure of sexual abuse. Section 5(a) of COCA requires that [Rhonda]'s safety must be protected, and in particular that she must be protected from all forms of violence. Section 5(a) imports the definition of violence from ss 3(2) to (5) of the Domestic Violence Act 1995 and requires that [Rhonda] must be protected from violence from everyone, including members of [Rhonda]'s family group, whānau, hapu and iwi. That section is consistent with Article 19.1 of UNCROC. Of the various s 5 principles consideration of [Rhonda]'s safety and protection from violence is statutorily required through the use of the word "must" in s 5(a).[12]

[12] [Wendy] denies that she has physically or sexually abused [Rhonda] in any way at all. Thus, I need to undertake an analysis of the evidence in relation to each of those allegations. The approach that the Court should adopt is set out in the Court of Appeal decision of *M v Y*.[13] The Court of Appeal set out the correct approach as being as follows:[14]

> Where an allegation of sexual abuse is made – and the same is no doubt true of any allegation of misconduct bearing on the welfare of the child – the Court's task is twofold. First, it must deal with the allegation; and secondly, it must determine the application before it in the light of all of the circumstances that are relevant to the child's welfare, including its finding upon the allegation
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> …
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> In dealing with the allegation the Court should apply the civil standard of proof, consummate with the gravity of the allegation. Applying that standard it may be satisfied that the abuse has occurred…The Court may, on the other hand, be satisfied that the abuse has not occurred…It is then right that the allegation should be expressly rejected.

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12 *K v B*; above n 11; *Brown v Argyll*, above n 9.
13 *M v Y* [1994] 1 NZLR 527 (CA).
14 At 533-534.

> In many cases, perhaps most, the Court will be unable to reach a conclusion with any confidence. It is in that situation that an assessment of risk must be made. That assessment may lead to the conclusion that there should be no contact between parent and child, or to the conclusion that there should only be [contact] that is monitored or supervised or otherwise controlled or limited. At this point the two aspects of the Court's task begin to merge but the distinction between them is important and must not be lost sight of.

[13] If I find all or some of the allegations proven on the balance of probabilities I then need to undertake a safety assessment, and particularly in terms of s 51 and s 59 of the Act. I adopt the view of Duffy J in *Lowe v Way* where her Honour stated that the Court's task was to:[15]

> … assess the violence that has been proven and then to assess the likelihood of it being carried out against the subject child. The more serious the nature of the violence, the greater concern there will be when it comes to assessing risk to a child.

[14] As I have suggested in *Ness v Ness* in undertaking that safety assessment it remains useful to have recourse to the now repealed s 61 of the Act by way of guidance to the Court in undertaking that safety assessment.[16] I now turn to consider each of the various allegations in light of the above legal principles.

Did [Wendy] hit [Rhonda] in June 2014?

[15] The s 132 social worker's report, dated [date deleted] March 2016, records that on [date deleted] June 2014 a report of concern had been received by Oranga Tamariki in relation to [Rhonda] alleging physical abuse. The report records:

> At the time of reported concern being made there were two notifiers. Notifier 1 had received information from another source, notifier 2. Notifier 1 briefly discussed about the home situation and said, "[Rhonda] has been raised by her whāngai parents as well as by her mother." Notifier 2 then further discussed the concerns with the National Call Centre.
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> Notifier 2 saw multiple visible bruises (faded) (unsure of the orientation of the bruise) on the child's back whilst she was giving her a bath. In discussion, child disclosed that, "Mamma [Wendy] whacked…" her back; she said she was crying and she told her whāngai father
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> …

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15 *Lowe v Way* [2015] NZHC 93 at [83].

16 *Ness v* Ness [2016] NZFC 2078. Although that can only be way of guidance and is non-exhaustive of the factors the court could consider.

> Notifier had taken photos of the alleged bruises.
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> …
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> On Sunday morning, they (notifier and the child) were in the shower and the child disclosed that [Wendy] dug her nails in her neck when she was being naughty. When asked to show, child dug her nail into the notifier's collarbone area and said, "But really, really hard." Notifier did not see any bruises at the time.

[16] During [Esther]'s cross-examination, she accepted that she was notifier 2; notifier 1 was a case worker at the [place of employment deleted][in [original location deleted]. The social worker met with [Rhonda], who reported to the social worker that, "mamma [Wendy]…" smacks her when her daddy [Winston] is at work, "she smacked me soft."[17]

[17] I note that the social worker report also refers to an interview with [the Manager], who was the manager of [early childhood centre name deleted], the early childhood centre that [Rhonda] was attending. However, the evidence before the Court is that some of the reporting by [the Manager], particularly around [Esther] having mental health issues, is untrue, and that [the manager] has subsequently had her appointment with [early childhood centre name deleted] terminated. [Winston] and [Wendy] were interviewed and emphatically denied that they smacked or pinched [Rhonda]. Significantly, the s 132 report writer records:[18]

> They talked about their issues with Ms [Esther Nikau], they weren't surprised she has made allegations, because [Esther] uses things against them. They keep a book and take notes of when [Rhonda] gets hurt. The bruises on [Rhonda] were when she fell off the horse.

[18] The conclusion of Oranga Tamariki was "that this is a custody issue."[19] They made a reference to four contact records in the past where [Esther] has made allegations about [Wendy] to the police; a record of those complainants to the police by [Esther] are set out in page 67 of the bundle of documents.

[19] While acknowledging that [Rhonda] has, on the face of it, made a disclosure to the social worker, it is vague and unspecific. Additionally, [Winston] and [Wendy]

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17 Bundle of documents at 228.
18 Bundle of documents at 228.
19 Bundle of documents at 229.

have expressed a concern that [Esther] had been making a number of allegations against them[20] prior to this notification, and to the point where they have had to keep a notebook in order to protect themselves. I find the allegation as unproven on the balance of probabilities for the following reasons:

(a) There is such a lack of specificity around the alleged disclosures that I cannot rely upon them as being reflective of actual events.

(b) I place reliance upon the social worker's evidence in the report that the allegation was centred in the dispute between [Esther] and [Wendy] as to the care arrangements for [Rhonda].

Did [Wendy] sexually abuse [Rhonda] in 2014?

[20] The same social work s 132 report records that on [date deleted] Decemberthere was a notification by [Esther] alleging that [Rhonda] had been sexually abused by [Wendy]. The allegation is that [Rhonda] was putting a stick in her vagina and when [Esther] talked to [Rhonda] later she said, "Aunty [Wendy] does it. She put a stick and two thumbs in my thiddle."[21] [Esther] went on to say that it appeared from what [Rhonda] had said to her that [Wendy] put a pencil in her vagina. [Esther] also made allegations that the paternal grandmother ([Wendy] and [Colin]'s mother) and the grandmother's [female relative] regularly touch the "children's private parts"; who those children are was undefined in the notification. [Esther] further disclosed that [Rhonda] did not want to go to [Wendy]'s place saying, "Mum, I want you to help me,"; "I don't want to go there." [Rhonda] at this time was four years of age. [Esther] further alleged that around this time [Rhonda] had begun wetting and soiling her pants. Given the nature of the allegations of sexual abuse a joint investigation between Oranga Tamariki and the police was undertaken.

[21] On [the next day] December, there was a further social work interview with [Esther], who expanded on her prior allegations and alleged further that [Wendy] was taking photographs of [Rhonda]'s genitalia, that there was ongoing smacking and that

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20 None of which were substantiated.

21 It is likely, in the evidence, that this should have in fact read "tiro" being Maori for vagina.

they, "whack [Rhonda] around her head."[22] She went on to assert that [Wendy]'s family had tried to kill her and that they had burnt down her house. For the reasons set out elsewhere in this judgment the evidence before the Court is that the fire was accidental.

[22] Later that day, a social worker interviewed [Rhonda] at a local park and [Rhonda] made no disclosures to the social worker. [Esther] then wanted [Rhonda] to be re-interviewed as she did not think the social worker had spent enough time with [Rhonda].[23] Social workers, however, were not prepared to interview [Rhonda] in Ms [Nikau]'s presence. Significantly, [Rhonda] reported to the social worker that she wanted to go to [Wendy]'s home and that she did not feel sad.

[23] The next day, [Esther] took [Rhonda] to see [the doctor], a doctor at [name of medical centre deleted]. [Rhonda] refused to be examined by that doctor and became extremely distressed. [The doctor] suggested to [Esther] that she make another appointment on a day in which a female doctor would be at the surgery, but [Esther] did not do so. Of concern to me is the narration that [Esther] contacted Oranga Tamariki and made an allegation that [Rhonda] said to the doctor that she, "[d]id not want to get up on the bed because it will hurt like Aunty [Wendy]… hurts her".[24] However, the s 132 report records that [the doctor] did not hear [Rhonda] say this at all. Subsequent enquiries with [early childhood centre name deleted] indicated that [Rhonda] had had no issues with soiling or wetting at pre-school. The manager of [pre-school name deleted] recorded, "that the main concern is there is one child and two parents who love her and they do not get along...she is so young and they are playing games and causing issues."

[24] In cross-examination [Esther] stated that [Rhonda] had disclosed to her that [Wendy] would part her vagina with her two thumbs and at the same time photograph [Rhonda]'s splayed genitalia. I challenged [Esther] on that, given that it seemed impossible to me for a person to use both hands to hold [Rhonda]'s vagina apart and at the same time take a photograph; as I said to [Esther], [Wendy] only has two hands

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22 Bundle of documents at 229.
23 Bundle of documents at 230.
24 Bundle of documents at 230.

and if her two hands were used splaying apart [Rhonda]'s vagina, then how could she take a photograph at the same time. [Esther] became very flustered and was unable to answer that issue satisfactorily.

[25] In relation to this allegation a decision was made by the social worker and the police to return [Rhonda] to [Wendy]'s home with other family members living there to provide supervision pending the evidential interview. [Esther] made it clear to the social worker that she was opposed to this course of action making allegations that [Wendy]'s [sibling] , uses drugs and that she despises [Wendy]'s mother.

[26] An evidential interview was completed on [date deleted] January 2015 and the forensic interviewer advised that there were no signs of sexual abuse and no disclosures were made by [Rhonda]. Of concern to me is that [Esther] was seen in the corner area of the office; the s 132 report records that she had been advised not to attend [Rhonda]'s appointment, but that she did so.[25] [Esther]'s response in learning that there were no disclosures made was to request that [Rhonda] be re-interviewed.

[27] The social worker talked with [Colin] to inform him of the outcome of the evidential interview. Significantly, the s 132 report records that:

> [Colin] informed social worker that [Wendy] and [Esther], "Need to sort their shit out," he said that he is getting "fucken hoha", he does not treat his children any differently and that [Esther] made a choice a few years ago and that she has now changed her mind…[Colin] was asked if he had any concerns about [Rhonda] being in [Wendy]'s care and he said he did not.

[28] The social work outcome was as follows:[26]

> The social work assessment concluded that both [Esther Nikau] and [Wendy Nikau] have their own personal issues which have come about due to both parents wanting care of [Rhonda]. The Court arrangement at the time was not working for the families and it appeared that neither parent would give up what they had to ensure [Rhonda] is in a more stable environment…There is a concern that [Esther Nikau] continues to make allegations against [Wendy Nikau] and her family, which is putting extra strain on the relationship and impacts on [Rhonda] as she is stuck in the middle of two parents.…
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> There was no finding of sexual abuse. The case was closed.

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25 Bundle of documents at 232.
26 Bundle of documents at 233.

[29] It is my determination that the allegation of sexual abuse is not proven on the balance of probabilities. On the basis of the evidence before me I make a positive finding that [Wendy] has not sexually abused [Rhonda]. The nature of the disclosures made by [Esther] have been evolutionary in nature and her assertion in Court as to the way in which [Wendy] splayed [Rhonda]'s vagina and contemporaneously took a photograph is physically impossible. [Esther] has made no attempts to objectively consider the evidence, or, as she accepted in evidence, made any attempts to contact [Wendy] to see if there was a reasonable explanation as to why [Wendy] was touching [Rhonda]'s vagina.[27] The evidence from the day care, which was not challenged, is that [Rhonda] did not have any wetting or soiling issues at this time. This evidence is contrary to the assertions of [Esther], and I find that she was making up this allegation.

[30] By this stage there is clear evidence, in my view, of [Esther] making false allegations in order to bolster her desire to have [Rhonda] in her primary care. Within a matter of weeks of the decision by Oranga Tamariki that there had been no disclosures, [Esther] and [Colin] applied to the Court for a variation of the parenting order seeking the primary day-to-day care of [Rhonda]. That application was opposed by [Wendy] and [Winston].

[31] The Court directed a further s 133 report from Mr Higgs. The conclusion of Mr Higgs was that [Rhonda] remained securely and firmly attached to the four adults in her life and that all four relationships, "…are important to [Rhonda] and essential to her physical, emotional and social-world."[28] Mr Higgs did comment on the potential for the ongoing conflict between adults to adversely impact upon [Rhonda]; an opinion that has proved to be prophetic The substantive day to day care proceedings were set down for hearing, but in the latter part of 2016 there were then a series of further notifications and allegations alleging physical abuse by [Wendy] on [Rhonda].

Did [Wendy] physically discipline [Rhonda] in mid-2016?

[32] [Rhonda] made a disclosure to her teacher, [teacher's name deleted], her then teacher at [school name deleted], that [Wendy] smacked her. The pastoral notes are

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27 For instance to apply cream.
28 Bundle of documents at 223.

set out on page 337 of the bundle of documents and records that [Rhonda] said to [teacher's name deleted] that her Aunty smacks her and she does not like it, that she is smacked on her left forearm, her back and sometimes her head (indicating a smack to the top of her head). In accordance with the school protocol [teacher's name deleted] suggested to [Rhonda] that she should talk to the acting principal, [principal's name deleted], and [Rhonda] agreed to this.

[33] The pastoral notes of 3 August record that [Rhonda] said to [the principal] that [Wendy] smacks her and that she does not like it, that she punches her when she gets angry, that she hits her spine and that she smacks [Rhonda] a lot and there is a little bit of kicking. She then gave some context by saying:[29]

> I was going out to the tramp. I wasn't looking down and I tripped over the smoke jar and ashes went everywhere. Aunty thought it was on purpose because she saw me look back. I was looking at the tramp, but she thought I was looking at the smoke jar on purpose. So she picked up my yellow [item deleted] and she threw it to the ground. But Uncle [Winston] catched it and it made her angry because I twisted and bended [jewellery]. That's what made her more angry. She keeps thinking about it and that's what makes her mad.

[34] Both [the principal] and [the teacher] gave evidence in the hearing. They described [Rhonda] as being extremely private and that it was unusual for her to disclose anything personal. [The teacher] simply recorded [Rhonda]'s disclosures to her and in accordance with school protocol [the teacher] referred the matter to [the principal], who, having talked with [Rhonda] further, made a notification to Oranga Tamariki. [Wendy] was cross-examined about the disclosure to [the principal]. Her evidence was that [Rhonda] does not own a yellow [item], but she does own a pink one. Of more significance is that her evidence was that whilst there is a jar outside in which cigarette butts and ash are put into, it always has a screw lid on it, and thus it was her evidence that if [Rhonda] had tripped over that jar it would have been impossible for the ashes to go everywhere as [Rhonda] described because of the screw top lid. But, in any event, she denied that she had ever smacked, kicked or punched [Rhonda].

[35] On 9 August 2016, [Rhonda] underwent a second evidential interview and no disclosures were made by [Rhonda]. The s 132 report of 28 September 2017 sets out

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[29] Bundle of documents at 337.

the circumstances around the evidential interview. It records that at that evidential interview:

> [Rhonda] turned her chair away from the interviewer and buried her head in her hands. [Rhonda] said she would not talk about Aunty, and that Aunty had told her not to tell anyone and that she had been told by Aunty not to tell Mum.
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> …
>
> [Rhonda] told the interviewer that she was telling the truth when she spoke to her teacher and principal, but did not want to tell the interviewer and she did not want her aunty to find out. [Rhonda] further told the interviewer that Aunty had told her that she [Aunty] would get into trouble if she told anyone. [Rhonda] said she did not want to get her aunty into trouble and remained unwilling to talk to the interviewer.

[36] Again, [Esther] asked that [Rhonda] be re-interviewed. On the basis that no disclosures had been made by [Rhonda] during the evidential interview, Oranga Tamariki and the police closed their file. Those comments by [Rhonda] that she was told not to tell anyone are of concern. [Wendy], again, denies that she has ever hit [Rhonda] and denies hitting [Rhonda] in the manner in which [Rhonda] alleges in relation to this notification. She emphatically denies that she ever told [Rhonda] that she would get in trouble and that she should not tell the evidential interviewer about what had occurred.

[37] If this was a stand-alone allegation it may well be that I would have determined that [Rhonda] had been assaulted by [Wendy]. But that allegation cannot be seen in isolation from the wider picture of the number of allegations that have been previously made and the very real concerns that those allegations have been motivated and influenced by [Esther]. Further I accept the evidence of [Wendy] that it would have been impossible for [Rhonda] to kick over the jar as [Rhonda] suggested. When I stand back and look at the totality of all of the evidence and those concerns that I have identified, I am unable to conclude that this allegation is proven on the balance of probabilities. The prior unsubstantiated allegations by [Esther] against [Wendy] cannot be ignored by me, and I determine that I cannot place any weight upon these disclosures by [Rhonda].

Was [Rhonda] abused by [Wendy] in October and November 2016?

[38] On [date deleted] October 2016, a report of concern was received by Oranga Tamariki reporting that [Rhonda] had pain passing urine and had a painful right thigh. [Rhonda] had allegedly told [Esther] that [Wendy] makes her wash internally and [Esther] believed that bruising or grazes may be causing [Rhonda] discomfort. Ms [Nikau] wanted an internal examination to be carried out on [Rhonda], but the nurse reported that she would not be performing an internal examination and if that was to occur a doctor would need to undertake that examination. [Rhonda] was examined externally and it was recorded that there were no abnormalities, bruising or grazes to [Rhonda]'s genitalia.[30] The notifier (whom I assumed to have been the nurse) noted that there was a small bruise described as a "resolving bruise" on [Rhonda]'s thigh and when asked about this [Rhonda] stated it was caused by Aunty [Wendy] who smacked her and then Ms [Nikau] is said to have "expanded on the story that [Rhonda] and Aunty were arguing when [Rhonda] threw an orange across the floor and Aunty smacked her in the leg and hit her on the back." No marks or bruising were sighted on [Rhonda]'s back. Given the absence of any corroborating injuries, particularly around [Rhonda]'s genitalia, I do not find that this allegation is proven on the balance of probabilities.

[39] On [date deleted] November 2016, there was a further notification from what is described as a confidential notifier reporting that [Esther] had explained to that notifier that [Wendy] has a history of "thumping/slapping".[31] Oranga Tamariki closed their file in relation to that notification. Given the paucity of information around that notification I do not find that allegation proven on the balance of probabilities. Of concern to me it is evidence of yet another allegation reported by [Esther] of [Wendy] hitting [Rhonda].

Did [Wendy] physically discipline [Rhonda] in early November 2016?

[40] The school's pastoral notes record that [Rhonda] made a further disclosure around [date deleted] November 2016 that:[32]

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30 Bundle of documents at 770.
31 Bundle of documents at 770.
32 Bundle of documents at 337.

> Aunty [Wendy] hit me right up there [indicating left and her elbow] last night. It was sore and it made me sad. I didn't like it. I wanted to sleep in my big girl bed and Aunty said hop into their bed "'cos it's the last day with us". So she grabbed me and pulled me in and hit me. So I then jumped in there (their bed) until they went to sleep and then I climbed back into my bed.
>
> [Rhonda] said, she's telling me so it could stop. She'd wanted to tell [teacher's first name deleted] ([the teacher]), but she wasn't in class.

[41] As a consequence of that notification a child-focused interview with [Rhonda] was completed on 30 November during which [Rhonda] disclosed that [Wendy] had smacked her, hitting her with a fist on her back and smacked her on her head. The social worker arranged for [Rhonda]'s maternal grandmother (Mrs [Tatchell]) to care for [Rhonda] while an evidential video interview was arranged and completed so that she could be in a place of 'neutral' care. The EVI was undertaken on 9 December 2016 and in that interview [Rhonda] made disclosures of physical abuse by [Wendy]. Oranga Tamariki in Whakatane recorded an outcome finding of substantiated physical abuse on [Rhonda] by [Wendy Nikau].

What has been the effect of Oranga Tamariki's placement decisions on [Rhonda] and the proceedings?

[42] Following that disclosure, a decision was initially made that [Rhonda] would return to live with [Esther]; she clearly could not live with [Wendy] and [Winston] in light of the disclosures made. However, the social worker involved, [Social Worker 1], gave evidence that following a subsequent case consult between [Social Worker 1], her supervisors and the police a decision was made that [Rhonda] would not be returned to [Esther]'s care, but instead placed with Mr and Mrs [Tatchell] in [location 1 deleted]. That decision has had cataclysmic implications for [Rhonda] and on these proceedings.

[43] At the time, there was of course a Parenting Order made by consent which provided for [Rhonda] to be in the shared care of [Winston] and [Wendy] and [Colin] and [Esther]. While I can understand, in light of the disclosures made by [Rhonda], Oranga Tamariki's reluctance to have the aspects of that order enforced which would have provided for [Rhonda] to be in the care of [Wendy] and [Winston], there can be no justification for the decision to not allow [Rhonda] to be in [Esther]'s care. I

specifically asked [Social Worker 1] upon what basis Oranga Tamariki thought it could ignore an order of the Court and she was unable to provide any explanation[33]. In making the decision to ignore the parenting order she, her supervisors and the police officers involved were arguably parties under s 66 of the Crimes Act 1961 to an offence under s 78 of the Care of Children Act; indeed, I had considered referring the matter for prosecution but given that the police were part of that decision, I have little confidence that the matter would be pursued.

[44] The situation is even more egregious in that Mrs [Tatchell], in her evidence, said that the social worker contacted her and told her that unless she applied for an Interim Parenting Order that Oranga Tamariki would place [Rhonda] with foster parents. That is a surprising position for Oranga Tamariki to take given that it had no legal status in relation to [Rhonda], and Oranga Tamariki would have had no lawful basis to place her with foster parents in any event. It is inexplicable that the Executive arm of Government believes it has the ability to ignore orders made by Courts, particularly when the Executive has no lawful status in relation to this particular child. If Oranga Tamariki felt that there were safety issues for [Rhonda] in the care of either [Wendy] or [Esther]/[Colin], then it should have sought a place of safety warrant or a custody order under s 78 of the Oranga Tamariki Act 1989.

[45] What became apparent from [Social Worker 1]'s evidence was that Ministry told [Esther] of its requirement that [Rhonda] live with Mr and Mrs [Tatchell] in [location 1 deleted], but did not make any attempt to discuss the matter or inform [Colin]. Given that [Colin] and [Esther] are the only lawful guardians of [Rhonda], that action by the Ministry is inexplicable.

[46] For the effect of what the Ministry forced upon Mr and Mrs [Tatchell] was a relocation of [Rhonda] from [original location deleted], where she had lived for her entire life, to [location 1 deleted]. Relocation is a function of guardianship and given that the Ministry did not hold guardianship of [Rhonda], it had no lawful basis to decide to relocate [Rhonda]. That the Executive chose to make a guardianship decision in relation to a child of whom it had no guardianship status is concerning.

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[33] Notes of Evidence at 90.

The effect on this child is that she has been dislocated from her Māori culture and from the community in which she has lived from birth. Oranga Tamariki's actions failed to give effect to the statutory principles it is required to exercise under s 5(a), (b), (c), (e) and (g) and the statutory principles in s 13(2)(b), (c), (d), (e) and (f).

[47] As a consequence of the threat by Oranga Tamariki to Mr and Mrs [Tatchell] that unless they sought the care of [Rhonda] the Ministry would place [Rhonda] in foster care, Mr and Mrs [Tatchell] made a without notice application to the Court. Their actions cannot in anyway be criticised. They have always acted in what they believed to be the best interests and to promote the welfare of [Rhonda]. They have no legal training and were simply doing what they thought they had to do out of a concern that if they did not [Rhonda] would be placed with strangers in a foster placement. They, accordingly, made their application to the Court; it should have been made to the Whakatane Court, but they were not to know that. They did not make the type of disclosure that should have been made so that the Court would have been appraised of all of the information, including the history of notifications and concerns by the Ministry of the influence of [Esther] in the prior notifications by [Rhonda]; again, Mr and Mrs [Tatchell] were not to know this.

[48] Consequently, the e-Duty Judge was faced with the information that he had, albeit unknowingly to him, incomplete information, and on a without notice basis an Interim Parenting Order was made, which similarly had the effect of relocating [Rhonda] from [original location] to [location 1]. Whilst the e-Duty Minute records that, "the order made will be provisional only,"[34] the actual order that was made was a standard template interim parenting order in favour of the applicants, and contained no end date. The order made provided for no contact between [Rhonda] and [Wendy] and [Winston],[35] who by this time had been two of [Rhonda]'s primary caregivers throughout her life.

[49] Notwithstanding that the order was made on 30 December 2016, because of pressures of volume in the North Shore Family Court, the first directions conference that was held was on 6 March 2017 was well outside the envisaged 21-day period

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34 Bundle of documents at 351.

35 There of course had not been any assertion that [Winston] had been violent or abusive of [Rhonda].

required by r 416U Family Court Rules 2002.[36] The Judge who dealt with the matter in the North Shore Court transferred the proceedings to the Whakatane Family Court without making any substantive directions to progress the proceedings or in relation to [Rhonda]'s contact with [Winston] and [Wendy]. It was not until 22 June 2017 that the court was able to schedule time before her Honour Judge Parsons to make an order providing for [Wendy] and [Winston] to have contact with [Rhonda] on a supervised basis; by that stage [Rhonda] had had eight months with no contact with [Wendy] and [Winston].

[50] Hindsight is a wonderful thing; if Oranga Tamariki had simply indicated that it did not agree to [Rhonda] being in the day-to-day care of [Winston] and [Wendy] in accordance with the final parenting order, and that [Rhonda] should be in the care of [Esther], [Rhonda] would have remained living in [original location], and the options for the Court in determining the care arrangements for [Rhonda] would have been in the context of her continuing to live in the [original location] community. However, as a consequence of decisions made by the Ministry, without any legal status to do so, the factual matrix has changed significantly and potentially has changed forever [Rhonda]'s relationship with two of the four most significant adults in her life. That is, if I determine that [Rhonda] is to be in the care of [Esther] and [Colin] in Auckland, then her relationship with [Winston] and [Wendy] becomes that of weekend contact once a month and half the school holidays. Clearly, the converse applies should I determine that [Rhonda] is to be in the care of [Winston] and [Wendy]. I agree wholeheartedly with the views expressed by Mr Higgs[37] that [Rhonda] is the victim in all of this and that for her whatever the outcome she is likely to lose out.

Has [Rhonda] disclosed physical abuse in the Evidential Video Interview?

[51] The evidential video interview was admitted into evidence by consent under s 9 of the Evidence Act 2006. All counsel and the parties had had the opportunity of viewing the EVI prior to the hearing, as had I. While on the face of it there are clear disclosures by [Rhonda], they need to be seen the context of the overall interview.

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36 Through the use of the word "must".

37 The psychologist appointed by the Court under s 133 COCA.

[52] Mr Higgs in his report of 7 November 2017 discusses the impact of the multiple interviews upon [Rhonda] and whether they have affected her reliability of the current disclosures. He noted that in relation to the second interview that the interviewer concluded, "the primary cause for [Rhonda]'s anxiety and psychological harm [resulted] from the parental conflict between [Rhonda]'s birth parents and her foster parents."[38]

[53] Mr Higgs notes that in relation to the December 2016 evidential interview [Rhonda] was observed to be fidgeting anxiously for much of the interview. Whilst she said she was aware that she was being interviewed, "because my aunty smacks me," when asked to tell the interviewer about her aunty [Rhonda] said, "I forgot." [Rhonda] said that she was smacked by her aunty, "more than one time – 53 or 55 time." Mr Higgs concludes:

> Given [[Rhonda] was only six years of age when the evidential interview took place the frequency of alleged physical punishment in [Rhonda]'s recall of her age when the alleged physical punishment began may not be relied upon.

[54] He describes [Rhonda]'s reluctance to participate through the use of comments, including, "I forgot," "I can't remember," or "I don't know," eventually becoming distressed and informing the interviewer, "I forgot when it was – I forgot everything." Mr Higgs concludes:[39]

> Despite multiple disclosures to various parties [Rhonda]'s lack of specific recall of most of the events and her reluctance to engage in the evidential interview suggest the current disclosures may be unreliable. In addition, when interviewed for this assessment [Rhonda] expressed her desire to resume her full relationship with Ms [Wendy Nikau] and Mr [Hohepa]. Her observed lack of concern and lack of fear during her contact visit with them suggests that these disclosures have had little negative impact on her attachment and positive regard for them.

[55] I accept that evidence of Mr Higgs. He was careful, balanced and measured in his evidence. Counsel and the parties neither challenged that he was a suitably qualified expert witness, nor the admissibility of his evidence under s 25 of the Evidence Act 2006. I found his evidence to be of substantial assistance to me in this case. Mr Higgs referred to research around factors which tend to assist fact finders

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38 Bundle of documents, at 799.
39 Bundle of documents at 800.

impacting upon issues of reliability and credibility of disclosures made by children, and none of those factors were present in [Rhonda]'s case. Indeed, my impression in looking at the evidential interview is whilst there were generic comments about smacking, [Rhonda] was unable to say when or where it was to have occurred, nor was she able to indicate how many times with any great certainty or reliability. There simply was not enough specificity around the allegations for me to conclude that at any time she has been physically assaulted by [Wendy Nikau]. I am unable to find as proven on the balance of probabilities that [WendyNikau] has ever smacked [Rhonda]. For the reasons I have set out, the alleged disclosures that have been made by [Rhonda] are unreliable and as a consequence I make no finding of abuse by [Wendy] of [Rhonda].

[56] Additionally, [Rhonda] in the second evidential interview commented that, "aunty stole me from my mummy". When asked about that comment Mr Higgs stated that in his opinion that it can only have arisen as a direct consequence of adult involvement, by way of an explanation given to [Rhonda] in [Esther] and [Colin]'s household; I accept his evidence in relation to that comment. Given that [Rhonda] has been actively involved and is aware of the conflict between the four adults in her life, that similarly raises concerns for me as to the reliability of any disclosures that she is alleged to have been made.

[57] I also take into account [Wendy] and [Winston]'s emphatic denials. Whilst there is a sense in which that is to be expected, I agree with the proposition put by Ms Paul to [Esther] in cross-examination that it would be extremely unlikely, given that [Esther] has been making allegations for a number of years that [Wendy] has been physically hitting [Rhonda], for [Wendy] to continue to do so knowing that the gaze of [Esther], and indeed the Court, is squarely upon her.

[58] I make a finding on the evidence before me that [Wendy Nikau] has never physically disciplined [Rhonda]. [Rhonda] is therefore not at risk in the care of [Wendy]. There are no allegations that she is at risk in the care of [Winston]. It is my determination that neither [Winston] or [Wendy] have ever physically assaulted [Rhonda].

Is there other violence from which [Rhonda] needs to be protected?

[59] The short answer to that question is yes. For the definition of violence under s 5(a) is that imported by the Domestic Violence Act 1995, which includes psychological abuse. Psychological abuse is defined in the Domestic Violence Act as including intimidation and harassment. The evidence before me is that in the supermarket [Toby] and [Mitchell] have been present when members of the wider [Nikau] whānau have deliberately rammed supermarket trolleys into the back of [Esther]'s legs and made derogatory and threatening comments towards her. That is psychologically abusive of [Toby] and [Mitchell] and is therefore an act of violence and the concern must be that if the decision is made that [Rhonda] is returned to [original location deleted] that she too will be exposed to that level of violence.

[60] Secondly, the Courts have accepted that emotional abuse is psychological abuse and it is quite clear from the evidence and from Mr Higgs's report that [Rhonda] has become involved in the conflict between [Esther] and [Colin] and [Wendy] and [Winston], that she is aware of it and has been adversely impacted by it. [Colin] has no confidence that his family will moderate their behaviour in the future, although it was unclear to me on his evidence as to whether that is a view generally held by him or whether it is a view expressed by him in order to support [Esther]'s assertion that she could never return to [original location deleted]; that is, a view to "keep the peace" between he and [Esther]. The impact of [Rhonda] being exposed to further conflict should she return to live in [original location deleted] is a significant concern of mine. It is clearly a matter that I need to give some weight to in considering what is in the best interests and welfare of [Rhonda].

Are there any risk issues to [Rhonda] that I need to consider?

[61] But if I am wrong in that regard, as Duffy J set out in the *Lowe* decision then I would need to stand back and look at the issue of risk. It appears that within Oranga Tamariki there is tendency to conflate all violence as being equal. Thus, in this case if the allegations of [Rhonda] were found to be proven, [Wendy] would have been found to have assaulted [Rhonda] by smacking her, either by way of a slap with the hand or a light punch, and not with such force to cause any injury to [Rhonda]. To

conflate that, as Oranga Tamariki appears to do, as being equivalent to serious violence resulting in injuries is inexplicable. As a consequence of the Ministry's view that all violence is to be treated of an equivalent nature, the policy is to automatically remove children. I accept that children who are physically disciplined and who are injured, or who are physically disciplined with such force that bruising or marks are left on their body, is serious and requires intervention. But [Rhonda] has described her smacks as being soft and I struggle to see how the Ministry could justify removal of [Rhonda] from [Wendy] and [Winston] in those circumstances, without any attempt to see if protective safeguards could have been put in place to enable to maintain her attachment relationships. I would have determined, if I had found the physical assaults had occurred, that [Rhonda] was safe in the care of [Wendy] and [Winston], provided there was a condition of their ongoing care that they do not physically discipline [Rhonda].

[62] A further issue arises; [one of the s 132 report writers],, noted that there is now a positive finding that [Wendy] is a child abuser in Oranga Tamariki's database. She was asked what would happen if the allegations were found to be not proven by a Court. Her response was that the Ministry's view is that it believes the voices of children and that that narration would remain within the Ministry's database. That is notwithstanding a finding by the Court that the allegations are unproven, the Ministry will continue to assert that [Wendy] is an abuser of children because [Rhonda] has made a disclosure and what [Rhonda] says must be true. That is concerning at a number of levels. Firstly, I would have thought that following a number of enquiries, including the Bristol enquiry, that it is now recognised that children can sometimes make the most appalling and worrying disclosures which are fundamentally untrue and devoid of any basis in reality.

[63] Secondly, it again is an example of the Executive showing indifference to the Courts. If a Court duly constituted by law makes a positive finding that there has been no abuse, then it is inexcusable for the Executive arm of Government to think it knows better than the rule of law and to ignore findings made by the Court. I would have expected that the Ministry's database would be subsequently updated to record that [Rhonda] made disclosures of physical abuse and that the Family Court determined that the abuse allegations were unsubstantiated and made a finding that [Wendy] was

not an abuser of children. There can be no justification for the Ministry to continue to assert in light of this finding that [Wendy] is an abuser of children.

What weight should be attached to the principle that [Esther] and [Colin] should have the primary responsibility for a child's care?

[64] Section 5(b) provides that [Rhonda]'s care development and upbringing should be primarily the responsibility of her parents, both of whom are guardians of [Rhonda]. However, what is meant by the word "the parents"; is it restricted solely to biological parents or can it include whāngai parents and/or psychological parents?

[65] Article 9.1 of the United Nations Convention on the Rights of the Child states as follows:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

[66] Article 9.3 of UNCROC provides:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

[67] Finally, Article 18.1 of UNCROC provides:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

[68] An interpretation restricting the meaning of parents to only biological parents excludes whāngai parents being able to be defined as parents for the purpose of s 5(b). However, as a basic premise of statutory interpretation, s 5(b) cannot be seen in isolation from the surrounding sections of COCA. For example, s 3 of COCA sets out

the purposes of the Act, which includes a parent's powers to appoint guardians.[40] Parents in that context must be the biological and legal parents of a child as opposed to a customary or psychological parent pursuant to s 21 of COCA. Pursuant to s 47 of COCA a parent applying for a parenting order must clearly be a biological parent. A whāngai parent would have to apply for leave to make an application for a parenting order under s 47(1)(d). I determine that the reference to "parent" in s 5(b) must be a biological parent.

[69] However, Tipping J in *B v Department of Social Welfare* in relation to what was then the Children, Young Persons, and Their Families Act 1989[41] stated:[42]

> The Act reflects the way in which the New Zealand Parliament has given effect to UNCROC. We must not be thought to be downplaying the importance which biological ties have in the principles underlying this area of the law. Ordinarily the interests and welfare of children are best served by their being in the custody of their biological parents, or at least one of them; that is to do no more than state the obvious and to recognise the fundamental role of the biological family in our society.

[70] That case is also an authority for the proposition that a child's welfare and best interest may require a child to not be in the care of the child's parents, as is *T v Chief Executive of the Department of Child Youth and Family Services* where Gendall J stated:[43]

> Blood ties are important and may end up being decisive, but there will be cases where, because of particular circumstances, the wishes of a natural parent to have custody of his or her child will be subordinated to others because the child's welfare so requires it.

[71] Whilst those decisions related to proceedings under what is now the Oranga Tamariki Act 1989, the same principles must apply to proceedings under COCA. Thus the s 5(b) principle is but one of the s 5 principles that I need to consider, and as with all the principles in the Act it is not automatically determinative, but rather each case needs to be considered on its own merit. The cases to which I have referred indicate is that ideally children's parents should have the primary responsibility for

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40 Section 3(2)(a)(ii).
41 Now the Oranga Tamariki Act 1989.
42 *B v Department of Social Welfare* (1998) 16 FRNZ 522 (CA) at [525].
43 *T v Chief Executive of the Department of Child Youth and Family Services* [2007] NZFLR 143 (HC) at [27].

their care, but that does not rule out on the facts of a particular case, that principle being over-ridden as to do so would be in the best interests and welfare of a particular child.[44]

Who cared for [Rhonda] in her formative years?

[72] In this case [Rhonda] has her biological parents ([Esther] and [Colin]) and her psychological/ whāngai parents ([Winston] and [Wendy]). The Court has sought a number of reports from Mr Higgs, pursuant to s 133 of the Act, and it is his expert opinion that [Rhonda] is securely attached to those four adults. That she had a secure attachment with her biological parents and her whāngai parents was not disputed by any of the parties in the case before me. What is in issue is the extent to which [Esther] and [Colin] have been involved in [Rhonda]'s life, particularly her early life.

[73] [Winston] and [Wendy]'s evidence is that prior to the birth of [Rhonda] there was a discussion with [Esther] and [Colin] in which an agreement was reached that they would whāngai [Rhonda]. Their evidence was that this was in accordance with traditional mātua whāngai practices and that [Rhonda] would become their child raised in their house by them, but with ongoing and regular contact with her biological parents

[74] [Esther]'s evidence was that there was an agreement that [Winston] and [Wendy] would assist her and [Colin] in parenting [Rhonda] and that this was a whāngai placement, according to the tikanga of the [Nikau] family rather than traditional mātua whāngai tikanga. Thus, it is her evidence that she and [Colin], but she in particular, was heavily involved in the care and upbringing of [Rhonda], in a de facto shared care arrangement. [Colin]'s evidence, to a social worker would tend to support the evidence of [Winston] and [Wendy].[45] In that report he stated that [Esther] had changed her mind, which again is consistent with the evidence of [Winston] and [Wendy]. However, his evidence in Court was supportive of [Esther]'s position and

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44 See *Temple v Barr* HC Wellington CIV-2010-485-561, 24 August 2010; *Tanner v Edghill & Marlow* (2007) 26 FRNZ 906; [2008] NZFLR 262 (HC).

45 See [25] above.

he denied that the parties' intention was to share the care of [Rhonda], with a view to [Rhonda] returning to his and [Esther]'s care.

[75] The change in [Colin]'s evidence is really reflective of the huge tensions he has been under in this case. He has had divided loyalties as between being a father of [Rhonda], his loyalty and obligations to his whānau, and his loyalty and obligations to his wife. It seems that over the last 12 months he has clearly chosen to align himself with [Esther] in order to secure the ongoing commitment he has to his marriage to [Esther], and to their being a family of himself and [Esther], [Toby], [Mitchell] and [Rhonda]. He became very distressed in his evidence describing his sense of failure in not having supported [Esther] earlier, but also reflective of the fact that his distress was to a large part centred in the conflict that he found himself in between his whānau and [Esther]; [Wendy] is, after all, his sister and as I have set out above the issues surrounding this case have split the [Nikau] family.

[76] I accept and prefer the evidence of [Winston] and [Wendy]. It is, as I have said, consistent with the earlier evidence of [Colin], and I find that [Rhonda] was placed with [Winston] and [Wendy] on the basis of mātua whāngai tikanga. That is, they, being childless themselves, expressed a willingness and desire to take over the care of [Rhonda] because they would have liked to have had her in their care. I find the clear understanding between [Winston] and [Wendy] and [Esther] and [Colin] was that [Winston] and [Wendy] would raise [Rhonda] as their own, but that [Rhonda] would grow up having a relationship with [Esther] and [Colin], knowing that they were her biological parents, but to all intents and purposes being the child of [Winston] and [Wendy]. While in their care she called them Mum and Dad.

[77] In accordance with the spirit of that agreement [Winston] and [Wendy] ensured that [Esther] and [Colin] had a lot of contact with and care of [Rhonda]. Indeed, there was a period of three and a half months in which they lived with [Colin] and [Esther] while awaiting their own housing. Thus, for the first four years of [Rhonda]'s life she was primarily in the care of [Winston] and [Wendy], but had an open relationship with [Esther] and [Colin].

What have been the care arrangements for [Rhonda] more latterly?

[78] That this was so was reflective in Mr Higgs' report of 27 July 2014 in which he first reported on the strong attachment between [Rhonda] and the four adults in her life. His recommendation was that [Rhonda] needed to be having more contact with [Esther] and [Colin], and by consent a parenting order was made in September 2014 providing for [Rhonda] to be in the shared care of [Winston] and [Wendy] and [Esther] and [Colin]. By this stage, [Winston] and [Wendy] had filed an application for a parenting order and appointment as additional guardians; as a gesture of goodwill, upon resolution of the parenting issues by way of the shared parenting order, they discontinued their application to be appointed as additional guardians.

[79] However, six months later [Esther] and [Colin] filed an application seeking the primary day-to-day care of [Rhonda]. An updated s 133 report was called for and that application was set down for fixture by way of back-up hearings, but did not proceed. Throughout 2015 and 2016 there were the further notifications raising concerns about [Rhonda]'s safety, principally in the care of [Wendy], as set out above.

[80] Following the evidential interview and prima facie disclosure of [Rhonda] in December 2016, Mr and Mrs [Tatchell] applied without notice for a parenting order and an interim order was made in their favour on a without notice basis. Thus, for two years [Rhonda] was in the shared care of [Winston] and [Wendy] and [Colin] and [Esther], but from December 2016 she has been in the care of Mr and Mrs [Tatchell]. Thus, for [Rhonda], while s 5(b) provides that the primary responsibility rests with [Esther] and [Colin] for her care development and upbringing, throughout [Rhonda]'s early life that role was principally undertaken by [Winston] and [Wendy], pursuant to the mātua whāngai agreement between the four adults. She was then, for a period of two years, in the shared care of the four adults and since December 2016 has been in the primary care of Mr and Mrs [Tatchell]. Thus, on the facts of this case whilst that principle is relevant and needs to be given weight by me, it is not determinative of the ultimate outcome, but rather is simply one of the principles that I need to weigh and balance in deciding what is in the welfare and best interests of [Rhonda].

Can there be consultation and co-operation between [Rhonda]'s caregivers?

[81] Section 5(c) provides that [Rhonda]'s care development and upbringing should be facilitated by ongoing consultation and co-operation between her parents, and any other person having a role in her care under a parenting or guardianship order. The evidence in this case would indicate that in the early years of [Rhonda]'s life the relationship between [Winston] and [Wendy] and [Esther] and [Colin] was good and there was regular consultation and involvement. By virtue of the interim parenting order made in Mr and Mrs [Tatchell]'s favour, [Winston] and [Wendy] have now been excluded from any meaningful input into [Rhonda]'s life. The relationship between [Esther] and [Colin] and [Winston] and [Wendy] has entirely broken down as a consequence of these proceedings and the allegations that have been made against [Wendy], in particular.

[82] What is clear from Mr Higgs in his reports is that [Rhonda] has been involved in the conflict. For example, in her last evidential interview she made a comment, "[a]unty [[Wendy] stole me from my mum." Mr Higgs' opinion, which I accept, was that that is a comment that would have had to have come from an adult as developmentally [Rhonda] would not have been able to form her own independent view that that is what had occurred and, in any event, it was not her experience of her relationship with [Wendy]. The relationship between [Esther] and [Wendy], in particular, is extremely toxic and I agree with the evidence that it is unlikely to be repaired in the foreseeable future. Mr Higgs's opinion is that [Esther] has unresolved grief from her decision to place [Rhonda] with [Wendy] and [Winston], and that [Wendy] has become the target of that grief.

[83] As I have set out above there are a number of allegations made against [Wendy], which have no foundation at all, and all of them in the main have been made by [Esther]. Significantly, [Esther] under cross-examination indicated that she had only made one notification to Oranga Tamariki and yet the evidence that was given by the social workers, [Social Worker 1], [Social Worker 2] and [Social Worker 3] together with written documentary evidence, made it quite clear that that [Esther] has made a number of notifications herself, or being behind other notifications.

[84] On the evidence before me it is quite clear that [Esther] has decided that she regretted her decision that [Rhonda] should be the whāngai child of [Winston] and

[Wendy] and that she has done all she can to try and get [Rhonda] back into her care, including making a number of notifications to Oranga Tamariki, which have been proven to have had no foundation. It is significant, in my view, that [Esther] is [occupation deleted] and therefore knows what to say in order to get an enquiry commenced. As I have set out above, in one sense I can understand her concerns, given what [Rhonda] is alleged to have said, but on the other hand there has been no objective analysis by her of some of the notifications. At a human level I can understand entirely why she is so desperate to have [Rhonda] back in her care. However, what she has done is undermine [Rhonda]'s relationship with [Winston] and [Wendy], that having been one of the most significant relationships in [Rhonda]'s life to date. It is quite clear to me on the evidence that within her and [Colin]'s household [Rhonda]'s relationship with [Winston] and [Wendy] is not supported and will not be supported in the future.

[85] Thus, in terms of s 5(c) if [Rhonda] is in the care of [Esther] and [Colin] I would not grant the application by [Winston] and [Wendy] to be appointed an additional guardian as there simply will be no ongoing consultation and co-operation by [Esther] with them in relation to guardianship issues. However, if [Rhonda] is to be in the parties' shared care or in [Winston] and [Wendy]'s care, then guardianship should be considered as a consequence.

What weight should be afforded to the principle that [Rhonda] should have continuity in her care?

[86] Justice Priestley in *Brown v Argyll* has made it clear that this principle is not determinative in every case, but rather each case must be assessed on its own particular facts. It is for some children, where continuing their care arrangements will be in their best interests and welfare and therefore that principle will be given significant weight in the exercise of the evaluation as to what is in a child's best interests and welfare. In other cases, it would be given lesser weight.

[87] In this case, as I have set out, [Rhonda] has been primarily in the care of [Winston] and [Wendy] for the early part of her life, with regular periods in which she was in the care of [Colin] and [Esther]. There was then a two-year period in which

she was in the shared care of the two households, but for the last 14 months she has been in the care of Mr and Mrs [Tatchell]. As a consequence of their concession they now wish to go back to being grandparents, continuity of care in the sense of what has occurred for the last 14 months cannot be continued and for [Rhonda] there will be change. She will either be in the primary care of her biological parents, the primary care of her whāngai parents or the shared care of them both. Thus, continuity of care is not a principle that on the facts of this case I give particular weight to. Its relevance is in her having continuity of the four adults in her life providing care for her, recognising that if she is to move to live in [location 2 deleted], that that will preclude the reality of day-to-day continuity of care.

[88] That section also provides for continuity in [Rhonda]'s development. An important factor for me to consider in this context is [Rhonda]'s schooling. She is attending [location 1 deleted] Primary School, being the school nearest to where Mr and Mrs [Tatchell] live. [Esther], to her credit, so as to foster the relationship between [Rhonda] and her brothers, [Toby] and [Mitchell], has travelled every day from [location 2 deleted] where she and [Colin] live to [location 1 deleted] so that [Toby] and [Mitchell] can attend the same school. [Toby] has now moved on as he is now in intermediate years, but it is [Esther]'s intention, so as to ensure stability for [Rhonda], that [Mitchell] and [Rhonda] will continue to attend that school if [Rhonda] is in her care. If the decision is [Rhonda] is to be in [Winston] and [Wendy]'s care, then that will require a move from [Location 1 school name deleted] back to her school in [original location deleted], namely [School name deleted].

What is the significance for [Rhonda] of her Māori culture and the ongoing involvement with her whānau?

[89] [Rhonda]'s cultural heritage is Māori ([name deleted] te Iwi; [name deleted], [name deleted] nga Hapu; [name deleted] te Marae) and Pakeha. For the [Nikau] family Te Ao Māori is an integral and intrinsic part of their everyday life. Some live at "the pa" and their marae is an integral part of their day-to-day lives. [Winston], [Wendy] and [Colin] speak te reo. Indeed, at the start of Ms Paul's submission she began with a mihi, acknowledging Te Atua/God, Ranginui (the sky father) and Papatuanuku (the earth mother), acknowledging myself as Judge, the parties and their

whānau, counsel and Mr and Mrs [Tatchell] as grandparents. As she did so I noticed [Wendy] and [Colin] weep when te reo Māori was spoken in Court.

[90] As [Esther] and Mr [Tatchell] pointed out, [Rhonda] also has a Pakeha heritage (English, Irish and French). [Rhonda] is therefore bicultural by birth. Sections 5(e) and (f) provide for [Rhonda]'s relationship with her family group, whanau, hapu or iwi, and her identity (which includes her culture and te reo) should be both preserved and strengthened. The two concepts are quite different; preservation relates to the maintenance of relationships and identity, but strengthening denotes a growth of development of building upon of those relationships and identity.

[91] While acknowledging that [Rhonda] is bicultural, the preservation and strengthening of her Māori family relationships and her Māori identity are quite different to that of her Pakeha family and identity. This has been recognised by a full bench of the High Court in *Barton-Prescott v Director-General of Social Welfare*.[46] In that case Gallen and Goddard JJ referred to an article by Professor Hirinui Moko Mead:[47]

> Which provides a helpful and detailed summary of a place within the whānau of a child, with an emphasis on the obligations of the whānau to ensure that the child has not only the protection and care of the whānau when growing up, and has available to it that accumulated knowledge of the child's inheritance, physical and spiritual, as part of a family extending back through whakapapa to remote ancestors…the emphasis in the ideal situation ought to be on the preciousness with which a child is regarded within its whānau and the accumulated cultural heritage by which the child's place is defined and secured.

[92] It is unclear what it exactly means to be a Pakeha/European child in New Zealand. But I suggest it is clear what it is to be Māori, and if a Māori child is to be raised in te Ao Māori that involves an exposure to that world; to tikanga, to te reo and to opportunities to experience life within te Ao Māori. It is a world-view, a way of thinking, and a way of living that is quite different to a Pakeha world-view. As an example, I asked Ms Paul whether in terms of mātua whāngai [Rhonda] would be seen as the child of [Winston] and [Wendy] or the child of [Colin] and [Esther], cared for by [Winston] and [Wendy]. Her response was that there was a sense in which she

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46 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).
47 At [183].

could not answer that question because it involved concepts of possession of a child which is entirely foreign to tikanga Māori and to a Māori world-view.

[93] For [Esther], she clearly sees that she is the biological mother of [Rhonda] and that it is her right to have [Rhonda] in her care to be raised by her, and potentially [Colin], and to have a sibling relationship with [Toby] and [Mitchell]. For [Winston] and [Wendy] and the majority of the [Nikau] family, they see [Colin] not as belonging to anyone, but belonging to the whānau, and thus the assertion by [Esther] that [Rhonda] should be returned to her care because she is her mother is a world-view which the [Nikau] family struggle to comprehend. [Esther] and Mr and Mrs [Tatchell] have an incomplete understanding of the Māori world-view of children; Mrs [Tatchell] constantly referred to [Rhonda] being "[Esther]'s child", and [Rhonda] as having to be with her mother.

[94] Ms Paul in her submissions discussed the urbanisation of Māori, and how it is less than ideal for Māori children to be raised in an urban environment, away from their whānau, hapu or iwi. While this proposition was asserted by Ms Paul in her submissions, the effects of colonisation and urbanisation for Maori are well established. Toki has stated, "the physical and spiritual move of Maori away from their turangawaewae (place to stand) over the generations have effectively alienated many urban Maori from their culture."[48] The Waitangi Tribunal in its report, Te Whanau o Waipereira stated:[49]

> The Maori reality prior to European contact appears to have been quite different. It was the whanau and hapu that were the effective and autonomous units of Maori social and political organisation. These provided a person's primary source of security and identity, because members lived and acted together as a community.

[95] Thus, the submissions of Ms Paul have significance on the facts of this case. I have determined that it is unnecessary to call for evidence as to the existence in fact of that proposition in her submissions. It is analogous to s133 reports in the past asking for expert opinion evidence on the effects of conflict and violence on children; most

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48 Valmaine Toki Will Therapeutic Jurisprudence Provide a Path forward for Maori (2005) 13 Waikato L Rev. 169 at 173.

49 Waitangi Tribunal *Te Whānau o Waipereira* (Wairoa 414, 1998) at 18.

judges now would accept that it is axiomatic that high conflict and violence has adverse impacts on children as there is such a weight of peer reviewed research on this issue. Similarly, there is a wealth of research which shows that urbanisation as a consequence of colonialization for Maori, and indeed many indigenous peoples, has had adverse impacts upon their culture and identity. Just because the majority Pakeha culture does not understand the effects of the imposition of its culture upon Maori, does not give rise to a justification for ignoring and dismissing those impacts based in ignorance. This submission of Ms Paul, who is herself immersed in both in Te Ao Maori and Te Ao Pakeha, is afforded significant weight by me.

[96] [Colin], in his evidence, believed he would be capable of strengthening the children's[50] te reo and [Esther] was supportive of this; she does not speak te reo, but she is learning with the children to incorporate te reo into their every day-to-day life. [Colin] was clear that he would take the children back to their marae and to tangi,[51] but as Ms Paul said in her submissions a person's sense of identity as Māori is more than simply attending tangi. Gallen and Goddard JJ further stated:[52]

> We accept the contentions of the appellant that the cultural background of the child is significant in that, in addition, the special position of a child within a Māori whānau, reporting as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child.

[97] That is, there are aspects of Māori culture which cannot be taught objectively from afar, but which need to be lived and breathed and experienced, to be learnt through osmosis so as to become an integral part of a person's life. It is only through this process that [Rhonda]'s identity and culture can not only be preserved, but also strengthened. In [original location deleted] her Maori identity will be cherished and thrive in a way that it cannot from a distance from her whanau, hapu and iwi. Justice Williams in an address to the New Zealand Law Society Family Law Section conference last year discussed the Puao-te-ata-tu report from 1986, the development

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50 [Toby], [Mitchell] and [Rhonda].

51 [Colin] has sent to the registrar an email to me subsequent to the hearing, indicating what other steps he would now undertake to further [Rhonda]'s cultural awareness. I have disregarded that email as the evidence I consider can only be that given during the hearing. I accept [Colin]'s intentions were well meaning, but it was quite improper for this email to have been sent to the court, and then forwarded onto me by the Registry.

52 *Barton-Prescott v Director-General of Social Welfare*, above n 45 at [185].

of the Children, Young Persons, and Their Families Act 1989, and in relation to that report said:[53]

> The report looked forward to the coming days where reinvigorated triumphs would take decentralised and devolved control of Māori children welfare in the areas and relocate (whether culturally or physically) the children within the kin complex that are Māori terms at least, makes them who they are.

[98] His Honour described what he argued was a lost opportunity, but also challenged Judges and practitioners to spark a revolution in light of the current Oranga Tamariki Reforms. He said:

> Except this time Judges and lawyers are at least familiar with the ideas of tikanga even if they have never really had to implement them…the relationships will no longer be colonial. That time has passed. I think what is going to happen is now the tribes will begin to counter-colonise the Family Court as they did with the Māori Land Court, and then the Environment Court in the '90s and early 2000. A generation late, but better late than never…In te ao Māori what makes the political economy work is whanaungatanga. The idea that all economic, social and political rights and obligations are organised and controlled through kinship. But one's wealth and social status is a product not of one's property or income, but of location within a kinmatrix…and your relationship with a physical world is not defined by property rights, but by the existence of a kinship relationship with those resources. The land and the water are not your property, but your ancestor…whānau are still, for the vast majority of Māori, a functioning reality (it is just that lawyers and Judges are so bad at recognising it. Indeed, most did not even think whānau as relevant). That means that hapu, traditional marae and village, are also a reality at some level for most Māori.

[99] Whilst his Honour's comments were primarily centred in the amendments (most of which are yet to come into force) of the Oranga Tamariki Act, they are nevertheless apposite for proceedings under the Care of Children Act, and the recognition to which the Courts should be affording Māori children, particularly those, such as [Rhonda], who have been so immersed within her whānau. It is not a new issue; as far back as 1997 Gallen and Goddard JJ held:[54]

> Accordingly, we take the view that all Acts [which much include COCA] dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect.

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53 Justice Joseph Williams, "Address to Family Law Conference" (New Zealand Law Society Family Law Section Conference, Rotorua, 20 October 2017).

54 *Barton-Prescott v Director-General of Social Welfare*, above n 45 at [184].

[100] The principles of the Treaty of Waitangi require the Courts to give particular importance to the preservation and strengthing of whānau relationships and of identity to Māori children over and above that of other cultures. For the Treaty itself recognises that Māori as tangata whenua, have a special relationship with the Crown, and whilst the exact meaning of some of the language of the Treaty has vexed academics and legal minds for a number of years, it is well accepted that the Treaty invokes a partnership between the Crown and Māori[55]. The *Barton-Prescott* decision is High Court authority that Te Tiriti o Waitangi has relevance and weight in relation to proceedings under COCA. For far too long, often by omission rather than deliberate intention (although at times clearly the latter), Te Ao Pakeha has taken dominance over Te Ao Māori centred in ignorance and a lack of understanding as to what "being Māori" means for Māori.

[101] But as Williams J has set out in his paper, there is a sea of change which should occur whereby Māori children are to have a particular pre-eminence, not by virtue of race, but by virtue of a recognition that their culture and identity mandates such an approach. Maori cannot and should not be expected to leave their Tikanga at the court door. The time for Pakeha to feel threatened by such concepts has long passed.

[102] The Family Court, in recognition of its Treaty obligations, should embrace Te Ao Māori and afford to Māori children, when considering ss 5(e) and (f), a particular and careful focus on ensuring that the relationships as set out in the Act and a child's sense of identity as Maori can be particularly and specially both preserved and strengthened.

[103] I do not see any inconsistency in this approach with the Supreme Court's decision in *Kacem v Bashir*. That case establishes the proposition that s 5(a) must be mandatorily considered, but that as amongst the other principles in s 5 there is no internal weighting. However, in that case the Supreme Court were not considering Māori children and the issues which I have identified did not fall for consideration. The approach that I suggest is not that radical in reality. For fundamentally whilst there should be a requirement that ss 5(e) and (f) is afforded particular importance in

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[55] See for instance The Waitangi Tribunal report, *Te Whanau o Waipereira*, above n 48, at 27; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 644 per Cooke P.

considering parenting issue for Māori children, the full bench of the High Court in *Barton-Prescott v Director-General of Social Welfare* reaffirmed that such internal weighting would be:[56]

> …subsumed within the concept of the welfare of the child, which provides the ultimate standard under all of the statutory provisions concerned…that means that the child's interests will not be subordinated in the interests of any other members of the family or whānau, nor will the interests of the child be subordinated to those of the whānau as a whole. In addition, the ability of the whānau itself and the caregivers within that whānau must be assessed with regard to the particular circumstances of the case and the needs of the child itself. It cannot be assumed that in all cases the standards and values accepted by the traditional society from which the child comes will be preserved or available within the whānau to which reference must be made."

[104] Thus, as both the Supreme Court in *Kacem v Bashir* and Priestley J in *Brown v Argyll* have stated any assessment by the Court must be an individualised assessment. On the particular facts of this case I intend to give significant weight to the principles in ss 5(e) and (f). For [Rhonda], for most of her life, has been raised in [original location deleted] within a whānau in which Te Ao Māori has been a living reality and which has contributed to her sense of identity as a young child within that whānau and within Aotearoa and for her that sense of identity needs to be preserved and strengthened.

[105] I agree with the submissions of Ms Paul that whilst it could be partially addressed in the care of [Colin] in [location 2 deleted], it will be most fully expressed and given effect to if [Rhonda] lives in [original location deleted]. For [Rhonda], her identity as a Māori can best be preserved and strengthened should she return to live with whānau in [original location deleted]. Thus, on the facts of this case I give significant weight to this principle, but in doing so recognise that this principle needs to be considered in light of the other principles and subordinate to be overarching consideration as to what is in the welfare and best interests of [Rhonda].

To what extent are the personal circumstances of the four adults relevant?

[106] As set out, all four adults lived in [original location deleted]. However, once Mr and Mrs [Tatchell] obtained an interim parenting order [Esther] reconsidered her

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56 *Barton-Prescott v Director-General of Social Welfare*, above n 45 at [189].

options. The wider stress of the breakdown within the [Nikau] family, the arguments about [Rhonda]'s care, and the fact that [Rhonda] was now living with her maternal grandmother and her husband in [location 1 deleted] placed enormous stress on [Esther] and [Colin]'s relationship. Eventually, [Esther] decided to leave that relationship and she shifted to live in [location 2 deleted] with [Toby] and [Mitchell] so as to be close to [Rhonda]. [Colin] agreed that he would travel from [original location deleted] to [location 1 deleted] to see [Rhonda] and his boys; there can be no argument that he is an extremely committed and devoted father towards his children. In time [Colin] began to query where he would live and having obtained employment as a [occupation deleted] for a company based in [location 1 deleted], he too shifted to live in [location 2 deleted].

[107] He and [Esther] are living in an arrangement which they described as "co-parenting but separate". That is, they live in the same house, but they do not consider that they are in a marital relationship, although they consider themselves to be in some sort of relationship. At the time [Colin] moved from [original location deleted] to [location 2 deleted], they intended that he would find his own house and the evidence of [Esther] and [Colin] was that that remains their intention. That is, that [Colin] will find separate accommodation for him and that he and [Esther] will live apart. [Colin], however, was quite clear in his evidence that he expects that he will find a home big enough to accommodate [Esther] and their three children and that their relationship will continue. [Esther] in her evidence was somewhat equivocal as to where she sees their relationship in the future, and the clear sense I got from her evidence is that [Esther] will look after [Esther] and her children, and if her relationship with [Colin] needs to be cast aside in order to achieve that goal, then she will do so.

[108] There is much about their relationship which worries me. Firstly, as I have set out above, they have clearly involved [Rhonda] in their dispute with [Wendy] and have exposed [Rhonda] to issues to which she should not have been exposed. Mr Higgs described the process of the number of interviews that have occurred for [Rhonda] (due to the allegations made by [Esther]) as being abusive of [Rhonda]. As I have set out above, I have real concerns as to whether [Esther] can filter what [Rhonda] says and to reality test what [Rhonda] says to her.

[109] Despite extensive cross-examination by counsel and questions from myself, I still have no real sense as to what exactly the relationship is between [Esther] and [Colin]. It is quite clear within their relationship that they have adopted traditional roles in that [Colin] abrogates all responsibility for parenting to [Esther] and [Esther] sees [Colin] as the primary bread-winner for the household. That is in and of itself not a necessarily wrong parenting paradigm, but my concern, in the context of what has occurred for [Rhonda], is that this is perpetuating a style of relationship and parenting in which [Esther] is the dominant person. My concern is that she makes decisions in relation to [Rhonda] unchallenged and that [Rhonda] potentially will be involved further in the conflict between [Esther] and [Wendy]; [Esther] would not allow a moderating voice in her life. I very much share Ms Paul's concerns that there is the potential, regardless of any orders that I make, for [Esther] to continue to seek to expunge [Wendy] and [Winston] from [Rhonda]'s life and to simply get on raising [Rhonda] with having only her and [Colin] as the parental figures in [Rhonda]'s life. Given that she is so clearly securely attached to all four adults, for [Rhonda] that would be contrary to her welfare and best interests.

[110] In saying that there have been significant financial advantages to [Colin] and [Esther]'s household in shifting to Auckland. [Colin], through tears, explained that for the first time in his life he is earning a decent wage and he is now able to buy things for his children instead of having to scrimp and scrape for the bare necessities in life. That has fuelled his sense of pride as a father and provider for his family. A return to [original location deleted] would have a consequent decrease in the financial resources available to that household.

[111] [Winston] and [Wendy]'s financial position in their day-to-day life remains unchanged from when [Rhonda] was in their care. They continue to both be in employment and to have supportive whānau around them. Their lives will simply continue regardless of the outcome of this decision, although of course it will continue with an enormous hole in their lives if [Rhonda] is not returned to their care. Notwithstanding this, they recognise that they need to continue to be involved in [Rhonda]'s life, and thus they are committed to monthly contact and contact during school holidays so as to continue their relationship with a child whom they see very

much as their daughter. They too have concerns, however, that the allegations will not stop and that [Esther] will in time seek to remove them from [Rhonda]'s life.

To what extent is the wider family conflict relevant?

[112] Of significance in this case is the conflict within the whānau. [Esther] in her evidence exhibited Facebook postings which show that she has been the subject of the most vitriolic comments on Facebook. She described being abused verbally around [original location deleted]. Both she and Mrs [Tatchell] gave evidence of members of the [Nikau] family ramming supermarket trolleys into the back of [Esther]'s legs when she had [Toby] and [Mitchell] with her in their local supermarket in [original location deleted].

[113] The house in which she and [Colin] were living in [original location deleted] was burnt to the ground. [Esther] is adamant, in the absence of any proof, that it was arson and that the property was deliberately set alight in order to try and hurt or kill her. This is notwithstanding a letter from the owner of the property, which indicates that the Fire Service investigation indicated that the fire was started by an electrical fault. In response, [Esther] dismissed that report saying she had obtained one of her own, which proved it was arson, but that report was not in evidence before the Court.

[114] Indeed, that was a significant theme of [Esther]'s evidence; that is, when there was objective evidence contrary to what she had to say she would assert that it had simply been influenced by those favourable to [Wendy] and [Winston]; to be fair, [Wendy] made the same allegations in relation to evidence which she did not accept alleging that [Esther] had somehow interfered and manipulated people.

[115] [Esther] and [Colin] also woke one morning to find spray painted on their house "die you fucken white bitch". As a consequence, [Esther] is adamant that she cannot and indeed will not return to [original location deleted] ever to live. Both she and Mrs [Tatchell] were adamant that her safety was at risk and in their minds, that has been elevated to the possibility that they will be killed by the [Nikau] family.

[116] [Wendy] and [Winston] were aware of the Facebook postings and as soon as it came to their attention they contacted the parents of the teenagers who had posted those comments to Facebook. I accept their evidence that those postings were made at the initial stages of this dispute when [Esther] indicated that she wished to have [Rhonda] returned to her care and that she had changed her mind about the "permanency" of the whāngai arrangements. I accept [Wendy]'s evidence that those postings are therefore historic and are not reflective of what has occurred more recently.

[117] In relation to the assaults on [Wendy] in the supermarket and the other intimidation of her, I accept that neither [Wendy] or [Winston] had knowledge that this was occurring until they read [Esther]'s affidavit. I accept the evidence of [Esther], corroborated by Mrs [Tatchell], that whilst in the supermarket she has been verbally abused and assaulted through the ramming of a supermarket trolley into the back of her legs and that this occurred in front of [Toby] and [Mitchell].

[118] It seemed to me on the evidence that the [Nikau] family is very much divided into "camp [Esther]" and "camp [Wendy] and [Winston]". [Colin] in his evidence talked of having to sneak in to see his grandparents (who, in effect, raised him as a child and young man) when other family members were around so that he would not be caught up in the rarurarau of the [Nikau] family around this issue. Quite clearly, the possibility that [Rhonda] may be removed from their family has been devastating for the [Nikau] family. As I have set out above, a child in Te Ao Māori is part of the [Nikau] whānau, hapu and their iwi.

[119] I agree with Ms Paul's submission that the rift between [Wendy] and [Esther] is so deep that it is unlikely to be repaired. Unlike Ms Paul I have some hope that [Colin] and [Winston] would be able to form a working relationship and that there could be some restoration in their relationship, although I do wonder whether [Esther] will allow that to occur.

[120] That [Esther] has been the victim of such abuse and assaults in [original location deleted] is a significant factor that I need to consider. A decision which provides for shared care in relation to [Rhonda] in [original location deleted] would

be returning [Esther] to an environment in which she does not want to live and one in which she does not feel safe. That too has the potential to expose [Rhonda] to further conflict and that is a significant issue on the facts of this case for her.

What is the importance of the sibling relationship between [Rhonda] and [Toby] and [Mitchell]?

[121] It is clearly an issue I need to consider in terms of the principle in s 5(e) of the Care of Children Act. As Ms Ross said in her cross-examination, sibling relationships are often the most enduring relationships in life, although as the current split within the [Nikau] family shows that is not automatic. It is clear that [Rhonda] has now spent a significant period living with her brothers, both during the period in which she was in the shared care of the two households and then following her mother moving [Toby] and [Mitchell] to Auckland she has had a lot of contact with them during periods in which she has been having contact with her mother in Auckland. It is clear from Mr Higgs's evidence and reports that these are significant relationships for [Rhonda] and this is a factor that I need to give significant weight to. Clearly, if the decision I reach is that [Rhonda] is to live with [Winston] and [Wendy] in [original location deleted], it will have an adverse impact upon not only the preservation, but also the strengthening of those relationships.

What are the options for [Rhonda]'s care?

[122] As I have already set out should [Rhonda] be in the care of [Esther] and [Colin], then she will move to live in [location 2 deleted] and have contact with [Winston] and [Wendy] for a weekend once a month and for half of the school holidays. [Colin] seeks the making of a parenting order providing for [Rhonda] to be in his and [Esther]'s day-to-day care. That is, of course, problematic if they follow through with their intention to live in separate homes and/or their relationship breaks down permanently. Recognising that [Esther] seeks that [Rhonda] is in her primary day-to-day care on the basis that she and [Colin] will work out the contact arrangements for [Rhonda] should she and [Colin] end their relationship.

[123] There are issues in relation to [Esther]'s proposal in terms of s 52 of the Care of Children Act. For that section provides that if the Court makes a parenting order that does not give a parent the role of providing day-to-day care, then the Court must make an order for the other parent to have contact with the child. Thus, if I were to make a final parenting order in relation to [Rhonda] providing that she be in the day-to-day care of [Esther] only, then I need to make an order providing for periods in which [Rhonda] is having contact with [Colin]. Alternatively, if I make an order that [Rhonda] is in the day-to-day care of [Esther] and [Colin] that becomes farcical should they separate, and invites the potential for further litigation.

[124] While [Colin] is adamant he does not want to separate, I note that following their separation last year [Esther] quickly entered into what proved to be a brief relationship with a [name deleted], with that relationship ending following a callout to the police because of concerns around family violence. As Mr Higgs opined, whilst the relationship between [Colin] and [Esther] appears stable at present, should their relationship break down and either of them re-partner, then that has the potential for [Rhonda] to be split further as between [Esther]'s household, [Colin]'s household and [Winston] and [Wendy]'s household.

[125] Should I decide that [Esther] is to be in the care of [Winston] and [Wendy], then conversely [Rhonda] would see her parents once a month and for half of the school holidays. Again, that becomes problematic if [Colin] and [Esther] were to separate and/or live in separate homes as they intend to do in the foreseeable future.

[126] A third option is to provide for [Rhonda] to be in the shared day-to-day care of [Winston] and [Wendy] and [Esther] and [Colin] in [original location deleted]. It would necessitate [Colin] and [Esther] returning to live in [original location deleted], and would be contrary to [Esther]'s adamant assertion that she will never return to live in [original location deleted] and certainly would not be supported by Mr and Mrs [Tatchell]. It would also result in [Colin] having to leave his employment in [location 1 deleted] and return to employment in [original location deleted] which in his evidence would result in earning substantially less income in [original location deleted] than he does in [location 1 deleted]. That will have a direct impact upon [Rhonda] in that there will be less money available within the family home for her and

her brothers' day-to-day needs, and [original location deleted] would provide a very different experience and lifestyle to that of [location 2 deleted], especially given the latter's proximity to Auckland.

What are [Rhonda]'s Views?

[127] [Rhonda] has been afforded opportunities in terms of s 6 of the Act to express views. She has done so through Mr Higgs and through her counsel, Ms Paul. The consistent tenor of [Rhonda]'s views are:

(a) She sees herself as having two mums and two dads.

(b) More often than not she referenced "Mummy [Esther]" and "Mummy [Wendy]/Aunty [Wendy]" rather than [Winston] and/or [Colin].

(c) To Mr Higgs she sought that things would return to the shared care arrangement that had been in place before her uplift.

[128] [Rhonda]'s views need to be weighed against her age and maturity.[57] Given [Rhonda]'s age I would not expect her to fully understand the consequences of her views. What is consistently clear, and what I do place weight upon, is that [Rhonda] wishes to maintain relationships with the four most significant adults in her life, [Colin] and [Esther] and [Winston] and [Wendy].

Analysis

[129] For the reasons I have set out above, [Rhonda] has the best chance of preserving and strengthening her whanau connections and her identity (Maori and Pakeha) and of experiencing Te Ao Māori by returning to live in [original location deleted]. Whilst she could maintain and grow her sense of being Māori in [location 2 deleted], it would not be to the same extent as would occur in [original location deleted].

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57 *C v S* [2006] 3 NZLR 420 (HC).

[130] Living in [original location deleted] would mean for [Rhonda] that she can have a meaningful and significant relationship with [Winston] and [Wendy] as opposed to their becoming caregivers that she visits from time to time; it is akin to the difference between listening to Coldplay on Spotify, and attending their concert. One is infinitely more present, and intimate, and tangible than the other. For [Rhonda] this is important as she is securely attached to them and they have been her parents for the formative years of her life. It is contrary to her best interests and welfare to live in [location 2 deleted] as she will be unable to strengthen this relationship.

[131] It is significant that [Rhonda] has not been living with [Esther] and [Colin] for the last 14 months; she has been in the care of her grandparents in [location 1 deleted]. This means that the decision I have reached does not entail removing [Rhonda] from the care of her birth parents, but instead returning her to the shared care of her birth and whāngai parents.

[132] A return to [original location deleted] does have the potential for [Rhonda] to be exposed to further conflict from the wider [Nikau] family if [Esther] and [Colin] returned to live in [original location deleted], and that is a matter that I need to carefully weigh. My hope is that now that the care arrangements are settled pursuant to this decision, that the need for the fight over the 'possession' of [Rhonda] will end, and that the whanau can simply get on with supporting [Rhonda] and the four most important adults in her life. I am confident that [Winston] and [Wendy] now understand the serious consequences for [Esther] and [Rhonda] of the past harassment and intimidation of members of the [Nikau] family, and that they will ensure that their family will not continue to intimidate [Esther].

[133] There is a risk that the relationship between [Colin] and [Esther] does not endure for the reasons I have set out above. If that is the case, the loss for [Rhonda] will be mitigated by the ongoing tangible involvement of [Winston] and [Wendy] in her life, and this can most easily occur in [original location deleted]. Conversely, if [Rhonda] is living in [location 2 deleted], and if [Esther] and [Colin]'s relationship does not endure, then she will be split three ways between spending time with [Esther], [Colin] and [Winston] and [Wendy].

[134] Remaining living in [location 2 deleted]/ [location 1 deleted] area means that [Rhonda] can continue to attend [location 1 deleted] Primary, continue to live in a house in which she lives with her brothers, and that she can be raised by her birth parents. It also enables her to maintain a relationship on a regular basis with Mr and Mrs [Tatchell], with whom she has lived for the last 14 months.

[135] [Rhonda] will live in a household in which she can enjoy a better standard of living in that [Colin] and [Esther] are able to earn higher wages in Auckland than they are in [original location deleted], and a higher standard of living that in [Winston] and [Wendy]'s household. But a decision as to what is in this child's best interests and welfare requires more than a consideration of financial circumstances. Parents all the time make sacrifices for their children, and while it is important for [Colin] in particular to feel like he can provide for his family, his desire to do needs to be considered in light of the overall circumstances as to what is in the best interests and welfare of [Rhonda]. The advantages for [Rhonda] in being close to and in the shared care of [Winston] and [Wendy], and in [original location deleted] where she can best strengthen her Maori identity and culture, outweigh the advantages for [Rhonda] in continuing to live in [location 2 deleted] and where her parents will be more financially secure.

[136] A risk for her returning to live in [original location deleted] is that [Esther] will continue to make allegations against [Wendy] in an effort to secure [Rhonda] being in her care. A clear risk is that [Esther] will refuse to shift to [original location deleted] as she stated in her evidence. But it is clear to me that [Rhonda] means everything to [Esther], and she has done all she can to have [Rhonda] back in her care, including promoting allegations which I found to be unproven. I am confident that [Esther] will relocate so that she and [Colin] can be a part of [Rhonda]'s life. Now that a decision has been made in relation to [Rhonda]'s care, I trust that the need to make allegations against [Wendy] will cease; certainly, if there continue to be allegations made against [Wendy] by [Esther] that are unfounded, then it may be that the Court at that time has no choice but to place [Rhonda] in [Winston] and [Wendy]'s sole care. I am confident that [Esther] would not want that to happen, and that she therefore will accept this decision and make it work for the sake of [Rhonda].

[137] Any decision I reach has to be centred in not what is best for the adults, but what is in the best interests and welfare of [Rhonda]. What is best for the adults can only be given significant weight if it accords with the welfare and best interests of [Rhonda]. For [Rhonda], for most of her life, she has had very significant relationships with the four most important adults in her life. Given that I have not found the allegations against [Wendy] proven, there is no reason why those relationships should not continue and be preserved and strengthened. For [Rhonda] that is the best outcome; that is, returning to a shared care arrangement between [Esther] and [Colin] and [Winston] and [Wendy]. While I understand entirely the desire of [Esther] in particular to not return to [original location deleted], I trust [Esther] is able to put what she wants ahead of what is best for [Rhonda].

[138] Additionally, the other factor that I give significant weight to is that a return to [original location deleted] means that [Rhonda] will return to her whānau and Te Ao Māori; it enables her to preserve and strengthen her relationships with her whānau, hapu and iwi in a way in which she will not be able to do while living in [location 2 deleted]. On the particular facts of this case and the particular welfare and best interests consideration of this child, given [Rhonda]'s background and immersion in Te Ao Māori, and given that she has been raised by these four adults and has a strong attachment to them all, I determine that the preservation of those relationships and the preservation and strengthening of her identity in terms of s 5(e) and (f) are determinative principles in evaluating what is in the best interests and welfare of [Rhonda].

[139] My hope is that [Esther] and [Colin] will relocate back to [original location deleted]. Thus, the orders that I am going to make below will not start until the end of Term 1 2018. This will give time for [Esther] and [Colin] to make what will be a very difficult decision for them, and if they decide to relocate give them time for [Rhonda] to finish school and to relocate back to [original location deleted].

Consequent Orders

[140] For those reasons, and taking into account the totality of the reasoning of this judgment, I now make the following orders in relation to [Rhonda]:

(a) I make a final parenting order in relation to [Rhonda Nikau] , born [date deleted] June 2010 as follows:

(i) From the date of this judgment until 13 April 2018:

1. [Rhonda] shall remain in the day to day care of Mr and Mrs [Tatchell].

2. [Rhonda] will have contact with [Colin] and [Esther] as agreed between them and Mr and Mrs [Tatchell].

3. [Rhonda] will have contact with [Winston] and [Wendy] every second weekend[details deleted]

(ii) Should [Colin] and [Esther] return to live in [original location deleted] by 27 April 2018, [Rhonda] will be in the parties' shared care as follows:

1. In the care of [Esther] and [Colin] [details deleted], and thereafter every second week from after school Friday until the start of school the following Friday.

2. In the alternate week from after school Friday until the start of school Friday in the care of [Winston] and [Wendy].

3. For half of each of the school term and Christmas holidays, on the basis that the changeover shall be at 12.00 noon on Friday instead of before/after school.

4. At such other times as the parties can from time to time agree.

(iii) Should [Esther] and [Colin] not return to live in [original location deleted], by 27 April 2018, then [Rhonda] will be in the

day-to-day care of [Winston] and [Wendy] at all times, except when she is in the care of [Esther] and [Colin] as per (iv) below.

(iv) [Rhonda] is to be in the care of [Esther] and [Colin] as follows:

1. The [detail deleted] weekend of each month[changeover and other details deleted].

2. For the [deleted] week of each school term holidays from 12.00 noon on the Saturday after the end of term through until 12.00 noon on Sunday in the middle weekend.

3. For the [deleted] half of the Christmas holidays in even numbered years and the [deleted] half of the Christmas holidays in odd numbered years.

4. At such times and places as the parties can from time to time agree.

5. [Rhonda] is to have contact with [Esther] and [Colin] each [two weeknights details deleted] by phone and/or Skype at a time to be agreed between the parties.

[141] I make an order appointing [WinstonHohepa] and [Wendy Nikau] guardians of [Rhonda Nikau] born [date deleted] June 2010 in addition to [Colin Nikau] and [Esther Nikau] .

[142] I make a referral pursuant to s46G for counselling for [Esther] and [Colin] and [Winston] and [Wendy]; the purpose is to make this order work by improving the communication and relationships as between the four adults.[58] I recommend that the registrar approve and fund up to 15 sessions of counselling.[59]

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58 Care of Children Act 2004, s 46G(2)(a) and (b).

59 The number of sessions is governed by s 46M; there have been no Regulations made, and thus the number of sessions can only be those determined by the Registrar. I can only recommend the number of sessions; only the Registrar has the power to determine the actual number of sessions.

[143] This being the end of the proceedings Ms Paul's appointment as lawyer for [Rhonda] is terminated with the thanks of the Court.

[144] I dismiss Mr and Mrs [Tatchell]'s application for a Parenting Order.

[145] I again want to thank the parties and counsel for the way in which they have all conducted themselves during this hearing. It was an extremely emotional time for all concerned as all the parties care deeply for [Rhonda]. I trust the parties understand how carefully I have wrestled with this decision, and how difficult it has been. My hope is that what has been will remain in the past, and that [Esther], [Colin], [Winston] and [Wendy] can all now focus on improving [Rhonda]'s life, and in supporting each other in raising this child. As you all have entrusted me with making a decision as to what is in the best interests of [Rhonda], I now hand [Rhonda] back to you, and I ask that you all now cherish and nurture her, and that you do so together and in unity.

S J Coyle
Family Court Judge