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

NOTE: PURSUANT TO S 22A OF THE ADOPTION ACT 1955, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT HAMILTON

FAM-2016-019-000927
[2018] NZFC 3915

IN THE MATTER OF	THE ADOPTION ACT 1955
BETWEEN	[GM] AND [PW] Applicants
AND	To adopt a child

Judgment: 28 May 2018
(On the papers)

DECISION IN CHAMBERS OF JUDGE S D OTENE
[Publication of a report of proceedings]

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[1] [RM], born to a mother who hails from [location deleted] and to a Māori father, was adopted to his birth mother and her husband by order of this Court on [date deleted] 2017. It can be well imagined that there has been little more important for [R] than his adoption. A publication of a report of that event may seemingly be of less import to [R], yet it has potentially grave consequence for him, his tīpuna and his uri and the integrity of their whakapapa. This decision is to consider whether the Court may restrict a report by a professional or technical publisher to protect the integrity of that whakapapa. If it cannot then perhaps more importantly for [R], his tīpuna and his uri this decision is to account to them for the consequence. In doing so it brings into sharp relief the essential obligations of this Court to Māori and by that reveals this Court's fundamental challenge.

[2] It is a challenge illuminated by combination of the elegant vision of the interpreters of our foundation document with the artistry of the Justices of the United States Supreme Court almost a quarter century earlier: how to endure as an institution imbued with legitimacy and by that, able to do right by all manner of people in a nation shaped by two cultures, embracing many?

> Nation building is nothing if not a constant work in progress and after a generation of hard work, New Zealand is beginning yet another transition. New Zealanders are unconsciously and organically building a new and unique national identity. It will, we suggest, come to be based on two things: the extraordinary natural beauty and wealth of these islands, and the partnership between our two founding cultures. The first basis needs no explanation. The second basis is the human dimension of our identity. Māori culture locates us in the Pacific and gives us our deep roots here. Pākehā culture locates us at the same time in the West and gives us our right to the West's heritage even though, in physical terms at least, the West could hardly be further away. Bicultural fusion gives our vibrant multicultural reality a solid core with enough gravity to pull later immigrant cultures into orbit around its vision, values, and expectations. A nation cannot sustain itself without that solid core.
>
> **Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Policy Affecting Māori Culture and Identity Wai 262 Waitangi Tribunal Report 2011 at 14.**

> The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands
> …….

> The Court must take care to speak and act in ways that allow people accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.
>
> **Planned Parenthood of Southeastern PA v Casey 505 U.S. 833 (1992) at 865-866, O'Connor, Souter and Kennedy JJ**

[3] It is a challenge that in the context of the mahi of this Court might be met with guidance from Justices of our High Court when they, more than 20 years earlier, in considering the care of a Māori baby and her place within her whānau were guided by the light shone by our foundation document to conclude:[1]

> We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute. We also take the view that the familial organisation of one of the peoples a party to the treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly, we take the view that all Acts 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.

[4] It is a challenge that now confronts this Court having allowed the adoption of [R], a boy who is the very expression of the bicultural fusion that is the core of our nation, and by that action committed the detail of his whakapapa to the Court record making it susceptible to publication.

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[1] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 184.

What is the law?

[5] The statutory provisions relevant to publication are ss 11B to 11D of the Family Court Act 1980.[2] It is sufficient for present purposes to reproduce only s 11B which provides:

> **11B** Publication of reports of proceedings
>
> (1) Any person may publish a report of proceedings in the Family Court.
>
> (2) Subsection (1) is subject to subsection (3).
>
> (3) A person may not, without the leave of the court, publish a report of proceedings in the Family Court that includes identifying information where—
>
> (a) a person under the age of 18 years—
>
> (i) is the subject of the proceedings; or
>
> (ii) is a party to the proceedings; or
>
> (iii) is an applicant in the proceedings; or
>
> (iv) is referred to in the proceedings; or
>
> (b) a vulnerable person—
>
> (i) is the subject of the proceedings; or
>
> (ii) is a party to the proceedings; or
>
> (iii) is an applicant in the proceedings.
>
> (4) However, subsection (3) does not apply to—
>
> (a) a report of proceedings in a publication that—
>
> (i) is genuinely of a professional or technical nature (including a publication that is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, counsellors, mediators, or social workers); and
>
> (ii) does not include the name of—
>
> (A) any person under the age of 18 years who is the subject of the proceedings, or who is referred to in the proceedings:
>
> (B) any vulnerable person who is the subject of the proceedings:
>
> (C) any parties or applicants in the proceedings where subparagraph (A) or (B) applies:
>
> (D) any school that a person who is the subject of proceedings under the Oranga Tamariki Act 1989 is or was attending, or any other particulars likely to lead to the identification of that school:
>
> (b) a publication of statistical information relating to the proceedings.

[2] Imported into the current proceedings by s 22A of the Adoption Act 1955.

(5) The court may grant leave under subsection (3) with or without conditions.

(6) Every person who contravenes this section commits an offence against this Act and is liable on conviction, —
(a) in the case of an individual, either to imprisonment for a term not exceeding 3 months, or to a fine not exceeding $2,000:
(b) in the case of a body corporate, to a fine not exceeding $10,000.

(7) Subsection (6) does not limit the power of a court to punish any contempt of court.

(8) This section is subject to any other enactment relating to the publication or regulation of the publication of reports or particulars of a Family Court proceeding.

[6] Whilst the starting point is that a report may be published, subsections (3) and (4) operate to in effect set up only two permissible publication circumstances, one requiring leave, the other not.

[7] First if any person seeks to publish a report of proceedings other than in a publication of a professional or technical nature, subsection (3) is engaged so as to require leave for publication given that [R], as the subject of the proceedings, is under the age of 18 years. The Court is empowered to place conditions upon a grant of leave. No restrictions are placed on the nature of those conditions so conceivably that could include conditions to anonymise the identity of [R] and other persons referred to in the decision and to fictionalise the whakapapa.

[8] Secondly subsection (4)(a) authorises a report of proceedings in a publication of a professional or technical nature, without requirement for the Court's leave and absent any ability of the Court to impose conditions upon publication. The limits upon publication are the mandatory exclusions required by subsection (4)(a)(ii). In this case the publisher would have to exclude the name of [R], his adoptive parents and birth father, but not on the face of it other detail of the whakapapa. Of course it is possible, and indeed I understand it to be the practice, for a publisher in these circumstances to exclude other details beyond those mandated. I expect that the whakapapa may well be treated in this way if the publisher chose to report the proceedings. However, the point to be observed is the absence of explicit statutory ability of the Court to prohibit or restrict publication in this circumstance.

[9] For all practical purposes, the type of report that is published whether pursuant to subsection (3) or pursuant to subsection (4), may not differ: the former arising by exercise of the Court's power and discretion and the latter arising by the publisher's compliance with statutory obligation and exercise of its discretion.

[10] Having now released [R]'s whakapapa to be caught by the nets of the professional and technical publishers does the Court have any further obligation to [R], his whānau and their whakapapa? I return to the expression of the High Court Justices two decades earlier and their direction to apply the hue of the principles of the Treaty of Waitangi. It brings me to conclude that because [R] is a Māori boy, because his status and hence the potential report of the proceedings is within the jurisdiction of this Court and because this Court has set up the possibility of publication of his whakapapa, there is obligation to consider the effect of the statutory publication provisions as they relate to [R]'s whakapapa.

[11] This obligation requires inquiry into the tikanga relevant to publication of the whakapapa, not because tikanga is engaged by specific statutory reference but because tikanga is engaged whenever Māori are within the jurisdictional embrace of the Court. It places, I suggest, a duty on this Court to be observant of tikanga not only in application of the substantive law but procedurally in the manner in which judges regulate the Court's business.[3] The purpose of the procedural rules is to ensure that proceedings are dealt with in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.[4] Given that those Acts must be coloured by the principles of the Treaty, it follows that so too must the way in which they proceed through the Court.

[3] As empowered by rule 16, Family Court Rules 2002.
[4] Rule 3(1)(c), Family Court Rules 2002.

He aha te tikanga Māori?

[12] Inquiry into the tikanga relevant to potential publication of [R]'s whakapapa brings into acute focus the following questions:

(a) Is it appropriate to anonymise (whether by way of fictionalisation, redaction or otherwise) the identity of [R] and others named in the decision and detail of the whakapapa?

(b) If it is not appropriate to so anonymise such that the identities and whakapapa should remain unadulterated:

(i) Is it appropriate to publish a report by which the unadulterated whakapapa would then be available to anyone who accesses the report?

(ii) Would it be wrong to not publish a report?

[13] These questions raise issues outside the expertise of the Court therefore expert opinion was obtained from Associate Professor Thomas Roa[5] of the Faculty of Māori and Indigenous Studies at the University of Waikato. I accept his opinion as authoritative. I summarise, attempting to give accurate representation, as follows:

(a) Whakapapa is a taonga. Its preservation and protection is recognised by Article 2 of the Treaty of Waitangi.[6] It has tapu and mana. Its mana is imbued with the mana of those to whom it belongs and it imbues a mana on those who belong to it.

(b) Whakapapa should only be published with the explicit permission of the whānau to whom it belongs. Whānau should be fully apprised of the implications of publication, including how and by whom it may be

[5] The opinion of Associate Professor Roa was sought, inter alia, for his expertise specific to [R's iwi].

[6] It is noted however that some conceptualise Māori custom as an expression of tino rangatiratanga retained to Māori by Article 2 rather than an incident of the concept of taonga. See for example Justice Joseph Williams, "*Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand*" (2013) 21 Waikato Law Review 1 at 9.

accessed and further published. Authority to consent follows a hierarchical relationship structure starting with the parents.

(c) The tapu and mana of whakapapa is entirely dependent on its pono and its accuracy. Hence if whānau permission is given and a report published, the whakapapa should not be adulterated.

[14] [R]'s whakapapa emanates from his birth father. Neither his birth father nor his whānau whānui have given permission for publication. For reasons that do not require elaboration for present purposes, permission is unlikely to be obtained. This means that in relation to the questions of tikanga posed above it is not appropriate to publish a report of the decision granting [R]'s adoption because the requisite permission is not available. Even if that permission were available it would not be tika to anonymise the identity of [R], the members of his whānau named in the decision (they being integral to [R]'s whakapapa), nor the whakapapa. It would have to be published unadulterated.

[15] Associate Professor Roa did not go so far as to express an opinion on whether as a matter of tikanga it would be wrong to not publish a report, he considering that to be more properly a question of law for determination by the Court. The question was posed holding in mind [R]'s uri and the gratitude expressed by some who have had access to their whakapapa by published decisions of the Māori Land Court and the Waitangi Tribunal. It is not now necessary to answer this question given that tikanga dictates there should be no publication in these circumstances particular to [R], but it may well need answer at another time for another Māori child and whānau.

The law me te tikanga Māori.

[16] The law establishing the statutory entitlement of professional and technical publishers to report the proceedings in a way that may identify [R]'s family members and his whakapapa sits uneasy with the tikanga that prohibits such publication.

[17] Interestingly because leave is required to report proceedings by a person other than a professional or technical publisher, the Court can ensure tikanga is observed by declining leave or placing conditions on the publication. Those statutory options are not available to the Court in respect of a report by a professional or technical publisher.

[18] There is little to indicate the legislators' intent, if any, in drawing this distinction. What can be gleaned from the recommendation of the Social Services Committee that examined the Family Courts Matters Bill 2008 by which s 11B and associated amendments were introduced, is the objective of making Family Court proceedings more open. The Bill incorporated recommendations made by the Law Commission in its 2003 report, *Dispute Resolution in the Family Court*,[7] and 2004 report, *Delivering Justice for All*.[8] Clearly those recommendations were driven by regard for the role open justice plays in maintaining public confidence in the administration of justice and ensuring accountability of judges and by its contribution to the democratic process in subjecting the actions of the Executive Government and officials to public scrutiny in the context of court proceedings. That influence is evident in the following passage from the Bill's explanatory note:[9]

> Proceedings in a Family Court are closed to the public to protect the privacy of the parties. In recent years decisions of the Family Courts and the lack of access to the Courts have been increasingly criticised by individuals, interest groups, and the media. In its 2004 *Delivering Justice for All* the Law commission suggested that current restrictions on attendance and reporting may be contributing to negative perceptions of Family Court decisions. Such perceptions risk undermining public confidence in the Family Courts and the relevance and effectiveness of the services they provide.

[7] Law Commission Report 82, *Dispute Resolution in the Family Court*, March 2003.
[8] Law Commission Report 85, *Delivering Justice for All*, March 2004 at page 300.
[9] Ibid at 300.

[19] This context makes apparent that the Parliamentary mind was never turned to the possibility that its regard for open justice may not accord with norms of Te Ao Māori. However not uncommonly, as here, the passage of time and societal evolution produces circumstances not contemplated years earlier by authors of the legislation that now regulates those circumstances and in doing so makes prominent matters fundamental to our Pākeha and Māori core: the integrity of democratic process and the integrity of whakapapa.

[20] How then can this Court resolve the tension between those fundamental matters? Specifically, how can it give effect to the tikanga prohibiting publication of [R]'s whakapapa?

[21] It cannot. Despite High Court recognition that the principles of the Treaty must colour decisions for Māori children, Supreme Court recognition that "Māori custom according to tikanga is…. part of the values of the New Zealand Common Law"[10] and observation by our leading constitutional jurist that "a nation cannot cast adrift from its own foundations. The treaty stands.",[11] the force of the Treaty, at least in the application of statutory law, is interpretative rather than constitutional. The limits of the Treaty's reach are defined by the Chief Justice thus:[12]

> As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law.

And more succinctly by the then President of the Court of Appeal:[13]

> Parliament is free to enact legislation.

[22] Parliament is supreme. To restrict a professional or technical publication of a report containing [R]'s whakapapa, anonymised or otherwise, when such report is permitted by statute would be for this Court to act in a way that is constitutionally impermissible.

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[10] *Takamore v Clarke* [2012] NZSC 115, [2013] 2 NZLR 733 at [94], per Elias CJ
[11] *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301, 308-309, per Cooke P (as he then was).
[12] Ibid at note 10 at [95].
[13] Ibid at note 11 at 309.

Conclusion

[23] In this matter tikanga sits in the shadow of the law with consequence that this Court is unable to do right by [R] and his whānau. The law consigns decisions as to the publication and representation of [R]'s whakapapa, anonymised or otherwise, to a publisher entirely absent connection to [R] and his whānau. It is a consequence not merely regrettable. Rather it is incredible that approaching 180 years since formal union of Pākeha and Māori systems of law in a treaty that holds place in our national narrative as our foundation document, the law can produce a result so offensive to the world view of one of those treaty partners. This Court can afford no protection to the taonga despite protection being guaranteed by the Treaty.

[24] What however this Court can and must do is discharge its obligation to filter its decisions, whether of form or substance, through the lens of the Treaty each time the experience of Māori is entrusted to it. There is nation building yet to be done. Hopefully then, when it is done, this Court will be able to fully realise the fundamental challenge described at the outset so that it does right by [R] and others like him whom the Court serves.

[25] Ka nui tēnā.

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Judge SD Otene
Family Court Judge