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

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IN THE FAMILY COURT
AT MORRINSVILLE

I TE KŌTI WHĀNAU
KI MORENAWHIRA

FAM-2016-039-000058
FAM-2019-039-000081
[2020] NZFC 2

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI-MINISTRY FOR CHILDREN Applicant
AND	[ZM] (Deceased) Respondent
AND	[ZO] born on [date deleted] 2016 Child or Young Person the application is about

Hearing: 11 October 2019

Appearances: S Potifara for the Chief Executive
J Niemand as Lawyer for Child

Judgment: 6 January 2020

RESERVE JUDGMENT OF JUDGE S D OTENE

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[1] [ZO] is a three-year-old Māori girl in the custody of the Chief Executive. Her mother, [ZM], died in [an accident] in 2018. [ZO] has lived with her aunt, [CG], since October 2018. She is being raised within whānau. It is the proper place for her.

[2] [CG] invites the court to discharge [ZO] from the Chief Executive's custody and to legally structure her care of [ZO] with parenting and guardianship orders under the Care of Children Act 2004 ("COCA") in her favour. That course is supported by the Chief Executive.

[3] [ZO]'s lawyer, Mr Niemand, endorses [CG]'s care of [ZO] and says it meets all the COCA principles. I concur. However, Mr Niemand says also that before making the anticipated COCA orders there is obligation upon the Chief Executive and upon the court to inquire further as to [ZO]'s paternity.

[4] [ZO]'s father has not been formally identified though there is indication that he may be partner of [ZM]'s sister. He too is now deceased, having died only within recent months. He and [ZM]'s sister are parents together. [ZO] may then have siblings and an identifiable and large paternal whānau. The sensitivities of establishing [ZO]'s paternity are patent. The Chief Executive's position is that she will not take steps to determine [ZO]'s paternity given those sensitivities and that [CG] has knowledge of the circumstances and ability to address the matter as and when she deems appropriate.

[5] I summarise the basis of Mr Niemand's position as follows:

(a) If steps are not taken to establish [ZO]'s paternity, the Chief Executive is in breach of duties imposed upon her by s 7AA of the Oranga Tamariki Act 1989 ("OTA") to recognise and provide a practical commitment to the principles of the Treaty of Waitangi, specifically the duty to ensure the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi.[1]

[1] OTA, section 7AA(2)(b).

(b) The above described duties apply to the court by virtue of an obligation to interpret the OTA in light of its purpose to promote the well-being of children, their families, whānau, hapū and iwi by the means set out in s 4. Particular reference is made to advance of that purpose by provision of a practical commitment to the principles of the Treaty of Waitangi,[2] recognition of mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department[3] and maintenance and strengthening of relationships between children and their whānau.[4]

(c) To discharge the Chief Executive's custody without the further inquiry proposed is inconsistent with the principles relating to protection of mana tamaiti,[5] recognition of a child's place within whānau[6] and the special protection and assistance to be afforded to a child in the Chief Executive's custody to respect the child's whakapapa and the whanaungatanga responsibilities of the child's whānau.[7]

[6] The Chief Executive's responds that the maternal whānau have determined that they will deal with the [ZO]'s paternity as they consider appropriate and that their mana and their whanaungatanga responsibilities should be respected.

Discussion

[7] As a preliminary observation this matter properly and responsibly raised by Mr Niemand on [ZO]'s behalf reflects a far more sophisticated and nuanced concept of well-being in consequence of amendments to the OTA that took effect upon 1 July 2019. Those amendments also bring into more acute focus the rights of children, and the rights and obligations of families, whānau hapū and iwi of children subject to the care and protection system and of the state. They unquestionably call for interpretation of care and protection laws with a Te Ao Māori lens. What that might mean as a matter

[2] Section 4(1)(f).
[3] Section 4(1)(g).
[4] Section 4(1)(h).
[5] Section 5(1)(b)(iv).
[6] Section 5(1)(c).
[7] Section 13(2)(j)(iii).

of general application is for jurisprudential development by decisions in cases thoroughly evidenced and robustly argued. I caveat that this is not such a case. That is not due to the quality of submissions, but rather because this was a matter that came for determination by way of formal proof during the course of a court list with no dispute that the arrangements for [ZO]'s care are appropriate.

[8] Dealing first with the submission that the Chief Executive falls in breach of duties in s 7AA if steps are not taken to establish [ZO]'s paternity, I am satisfied that there is, on the face of it, that argument to be had. If so it might be an argument to be framed in the context of a review of the Chief Executive's decision or for declaratory relief. Those are not arguments that this court has jurisdiction to entertain.

[9] Even if it were a matter over which this court had jurisdiction it is unclear what remedy might be applied. Mr Niemand proposes that the matter be adjourned for the Chief Executive to make further inquiries. But an adjournment of itself will not advance matters if the Chief Executive maintains her position as she can elect to do. Again, that points to the need to advance any such arguments in the forum that commands a remedy for the breach.[8]

[10] The next submission, that upon application of statutory interpretation principles obligations equivalent to those in s 7AA are borne by the court, is flawed. The relevant principle relied upon is that the meaning of legislation is to be ascertained from its text in light of its purpose.[9] The text of s 7AA is clear. The duty is imposed on the Chief Executive, not upon any other person or institution. The submission appears to suggest that the court should import by analogy like obligation on the court. That simply cannot be accommodated upon any interpretation of the express text irrespective of the purposes of the legislation.

[11] The final submission has force. Discharge of the Chief Executive's custody is a decision made pursuant to s 127 of the OTA and a prerequisite to the making of the

[8] There is potential to clarify [ZO]'s paternity by placing under the guardianship of the court pursuant to s 31(1)(a) COCA for the purposes of carrying out parentage testing but that is a separate matter from remedying any default of the Chief Executive's s 7AA duties.
[9] Interpretation Act 1999, s 5(1).

anticipated COCA orders.[10] The decision to discharge must be made holding [ZO]'s well-being and best interests paramount[11] guided by the statutory principles[12] to which regard must be had. Those principles recognise, amongst other things, that mana tamaiti, whakapapa and the exercise of whanaungatanga responsibilities are constituents of a child's well-being. These aspects of well-being are obviously predicated upon knowledge of the child's identity, hence the submission's merit.

[12] There is also merit in the Chief Executive's submission to the effect that to persuade or compel they type of inquiry Mr Niemand advocates is to cross the mana of [CG] and the maternal whānau and the way in which they have determined that they will discharge their responsibilities to [ZO]'s whakapapa.

[13] The purposes and principles of the OTA make clear that identity is a crucial foundation of well-being. It follows as a general proposition that supposed rather than confirmed paternity detracts from well-being. Whether and how the court responds is an exercise in balance and proportion. Compare for instance the position of a child unable to be cared for by any of her known whānau, with the position of a child well settled in whānau care. In the former circumstance the court might more readily and urgently intervene to ensure paternity is established so that wider placement options are available, notwithstanding the risk that intervention in matters of this sensitivity might fracture rather than enhance relationships. In the latter circumstance the contingent risk may be accorded greater weight and dissuade a court from intervention.

[14] For [ZO] the blunt reality of the response urged upon the court is, as Mr Niemand identifies, that a social worker approach a recently bereaved widow and signal that her late partner may be the father to a child born to her sister. On balance I determine that would be a disproportionate response and that [ZO]'s well-being is best enhanced by entrusting matters of identity to the management of [CG] and her whānau. I hold the following material to that determination:

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[10] OTA, s 120(1).
[11] Section 4A(1).
[12] Sections 5 and 13.

(a) [CG] impressed as cognisant that her responsibility to [ZO] is to recognise the whakapapa, that she will exercise her judgment to do so in a way and at a time that is appropriate for [ZO] and the paternal and maternal whānau and that she has the personal wherewithal to negotiate the sensitivities involved.

(b) The circumstances of [ZO]'s suggested paternity are not concealed, and they are documented by virtue of these proceedings.

(c) [ZO] is settled with whānau. She is not in need of other placement.

[15] I emphasise that this a decision reached on the particular circumstances pertaining to [ZO]. It is not difficult to imagine that there are circumstances in which a court might conclude otherwise. For instance, if a child is placed outside whānau or placed with whānau unable or unwilling to recognise their responsibility to the child's whakapapa; if the child is requesting that his or her paternity be clarified; if there are medical or genetic concerns that need to be addressed by clarification of paternity.

Result

[16] I am satisfied that discharge of the Chief Executive's custody is to [ZO]'s well-being and best interests and that the COCA orders sought are in her welfare and best interests.

[17] Accordingly, I make the following orders and directions:

(a) The s 101 OTA custody order in favour of the Chief Executive is discharged.

(b) Pursuant to the COCA:

(i) [CG] is granted leave to apply for a parenting order.

(ii) There is a parenting order granting to [CG] day to day care of [ZO].

(iii) [CG] is appointed as [ZO]'s additional guardian for all purposes.

(c) Subject to any final attendances the appointment of Mr Niemand as lawyer for [ZO] is terminated with the thanks of the court. His advocacy is demonstration of the considered response that the amendments to the OTA demand of counsel and the court.

(d) Given that [ZO] was the subject of proceedings under Part 2 of the OTA, there is no order for cost contribution to Mr Niemand's fees.

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Judge SD Otene
Family Court Judge