

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

NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

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**IN THE FAMILY COURT
AT BLENHEIM**

**I TE KŌTI WHĀNAU
KI TE WAIHARA KEKE**

**FAM-2017-006-000144
[2020] NZFC 8449**

IN THE MATTER OF THE ORANGA TAMARIKI ACT 1989

BETWEEN [GF]
Applicant

AND CHIEF EXECUTIVE OF ORANGA
TAMARIKI—MINISTRY FOR
CHILDREN
[HA]
Respondents

AND [MA] born on [date deleted] 2016
Child or Young Person the application is
about

Hearing: 24 September 2020

Appearances: Applicant appears in Person
S Allen and R Terry for the Chief Executive
No appearance by or for the Respondent
R T Somerville as Lawyer for the Child
G Dennehy as Social Worker

Judgment: 24 September 2020

ORAL JUDGMENT OF JUDGE R J RUSSELL

[as to a dispute between guardians about whether [MA] is vaccinated under s 115 of the Oranga Tamariki Act 1989]

Introduction and Background

[1] These are proceedings under the Oranga Tamariki Act 1989 for [MA], born [date deleted] 2016. [MA] is subject of care and protection orders in favour of Oranga Tamariki, which have been in place since 2018. A s 101 custody order and s 110(2)(b) additional guardianship order have been in force in favour of the Chief Executive of Oranga Tamariki (“the Ministry”) since that time. [MA] has been placed with caregivers, and there have been regular reviews of plan as required by the Act since that time.

[2] The latest plan submitted for [MA] indicates there are no current concerns for her physical health. She runs, jumps on the trampoline, has good balance riding on a scooter or when climbing on slides or a playground climbing frame. She is reaching her developmental milestones.

[3] She has not had her childhood vaccinations because [GF] has not agreed with these being administered.

[4] As to [MA]’s identity and culture, from her maternal family she is part New Zealand Māori, affiliated to [two iwi deleted]. Her paternal family comes from the UK, [GF] having been born and raised in [a city there].

[5] [MA] attends [a preschool] in [her hometown in the South Island]. She has a good attendance record there and plays well alongside other children. The preschool staff are supportive of [MA] playing with other children in small groups. She apparently can have grumpy days at preschool, but on good days she is co-operative and transitions well from one activity to the next.

[6] She is enrolled at [a Medical Centre] and [a Community Dentist]. She has good wider family/whānau support.

The issue of immunisation

[7] [MA] has three guardians, her mother, [HA], her father, [GF], and the Chief Executive. There has been no agreement between her three guardians on the question of whether she should be immunised as recommended by the New Zealand Ministry of Health guidelines.

[8] In October 2019, [GF] filed an objection to [MA] being immunised under s 115 of the Act. He deposed in his affidavit that he had been only given partial information about the immunisation issue. He accepts some pamphlets had been provided to him. He does not agree to his daughter put into what he described as a “forced vaccination programme.”

[9] [GF] attended this hearing and gave evidence, expanding on his concerns. He initially expressed some ignorance of the contents of the social worker Ms MacDonald’s affidavit. This was served on him on 29 January 2020, and there is proof of service of this document on the court file. This affidavit is voluminous with a number of exhibits attached, which includes the Ministry of Health immunisation guidelines.

[10] [GF] gave evidence for the past hour or so, and I have listened carefully to what he has said. He was not vaccinated as a child. Firstly, he believes there is no need for immunisations because the human body has its own natural immunity systems which can safeguard the body against diseases. Secondly, he is concerned about the contents of the various vaccinations which are proposed and the potential for a child to suffer side effects from these vaccinations. He queried who would take responsibility for [MA] if anything went wrong.

[11] [GF] complains about not being able to get sufficient information from the Ministry of Health, who had not responded to the various concerns he has apparently addressed directly with them by phone. For this reason, he said he had not been able to undertake the research which he would otherwise have done.

[12] For all these reasons, [GF] opposes [MA] being vaccinated.

[13] The Ministry support [MA] being vaccinated in accordance with the Ministry of Health guidelines.

[14] [MA]'s mother, [HA], took no active part in these proceedings. She was apparently vaccinated during the course of her pregnancy with [MA], something [GF] said he took issue with at the time. [HA] has signed two consents which are attached to the social worker Ms MacDonald's evidence, in which she agrees to [MA] being vaccinated. These consents are dated 17 January 2019 and again on 9 October 2019. The evidence is that [HA] had been concerned about [MA] associating with other children in circumstances where she had not received the appropriate immunisations.

[15] The immunisations sought in the Ministry of Health guidelines are for the following: tetanus, diphtheria, and whooping cough, which have already been addressed because of the prenatal immunisation [HA] has received. Vaccination for rotavirus, diphtheria, tetanus and whooping cough, for pneumococcal disease, for measles, mumps, and rubella, chicken pox, and human papillomavirus are now sought. Some of these diseases for which immunisation is sought need to have the immunisation dosages repeated.

[16] According to the Ministry of Health guidelines, immunisations should ideally be given at the age of six weeks, three months, and 15 months. [MA] is now four years of age. [GF] quite rightly raises the issue of at what intervals the staged vaccinations are to now occur.

[17] In my view, this would be a matter of [MA]'s general practitioner to determine, and I have made it clear at this hearing that her general practitioner, rather than a registered nurse, would need to be responsible for the plan for the immunisations.

The legal position

[18] The Ministry have filed legal submissions addressing the various legal issues which need to be determined.

[19] Because Oranga Tamariki have additional guardianship of [MA] under s 110 and both [HA] and [GF] are natural guardians of [MA] by virtue of being her biological parents, there are three guardians who have a joint and equal say about this immunisation issue. Section 115 of the Act provides the jurisdiction to the court to determine this issue if the guardians do not agree.

[20] In exercising my decision-making function, I must have as the primary consideration the wellbeing and best interests of the child. This requirement is set out in ss 4(a), 5, and 13(1) of the Oranga Tamariki Act. I must have regard to [MA]’s views, if any, but at the age of four, she is too young to express those views. Her position and interests in these proceedings have been appropriately represented by Mr Somerville. His submission is that that [MA] should be immunised in accordance with the Ministry of Health guidelines.

[21] Sections 5(1)(b)(iv), 5(1)(b)(v) and 13(2)(j) contain the relevant statutory criteria:

5 Principles to be applied in exercise of powers under this Act

(1) Any court that, or person who, exercises any power under this Act must be guided by the following principles:

...

(b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—

...

(iv) mana tamaiti (tamariki) and the child’s or young person’s well-being should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group:

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

...

13 **Principles**

...

- (2) In determining the well-being and best interests of the child or young person, the court or person must be guided by, in addition to the principles in section 5, the following principles:

...

- (j) a child or young person who is in the care or custody of the chief executive or a body or an organisation approved under section 396 should receive special protection and assistance designed to—
- (i) address their particular needs, including—
 - (A) needs for physical and health care; and
 - (B) emotional care that contributes to their positive self-regard; and
 - (C) identity needs; and
 - (D) material needs relating to education, recreation, and general living:
 - (ii) preserve the child's or young person's connections with the child's or young person's—
 - (A) siblings, family, whānau, hapū, iwi, and family group; and
 - (B) wider contacts:
 - (iii) respect and honour, on an ongoing basis, the importance of the child's or young person's whakapapa and the whanaungatanga responsibilities of the child's or young person's family, whānau, hapū, iwi, and family group:
 - (iv) support the child or young person to achieve their aspirations and developmental potential:

...

[22] There is previous case authority on the immunisation issue under the Oranga Tamariki Act. As I have observed with [GF] today, he is not the only person who has taken issue with the immunisation question, and courts have been called upon

to decide this issue in other cases. I refer to the *Oranga Tamariki v [name deleted]* case and also the case of *Stone v Reader*.¹

[23] In *Stone v Reader*, I think correctly, Judge Otene sets out the applicable principles for this case in this way:

Although neither party placed before the Court any medical or other expert evidence regarding the issue, I consider that I can take judicial notice of the fact that the government agency responsible for the management and development of the New Zealand health system recommends a schedule of vaccination for all New Zealanders based upon a body of medical evidence. On this basis, the best evidence before the Court of protection of the children from disease is by way of the Ministry of Health recommended immunisation schedule. When I take into account also the acknowledged possibility that if the children are not immunised they may be prevented from attending school, I am satisfied that it is in their welfare and best interests to be so immunised.

Discussion

[24] The issue of whether a child is immunised is a fact-specific inquiry needed to be undertaken in each case. Orders and directions must be made which are in the welfare and best interests of the child. If there is any specific reason relating to a particular child which guards against immunisation in respect of any particular disease, then evidence of this needs to be presented to the Court. It is not a matter of simply applying the blanket immunisation schedule in the Ministry of Health guidelines to all children.

[25] In [MA]'s case, I do not have any specific personal or health factors advanced which would guard against the application of the Ministry of Health guidelines in their entirety. Having said this, I have made it clear that because of the delay in getting [MA] immunised, and so there is proper oversight of the immunisation plan, I am going to direct the immunisations, to be administered in accordance with the Ministry of Health guidelines, be subject to [MA]'s general practitioner agreeing with those

¹*Chief Executive of Oranga Tamariki v [AW]* [2020] NZFC 4629; and *Stone v Reader* [2016] NZFC 6130.

recommendations. The timing of the vaccinations will be a matter for that doctor in his/her discretion to determine.

[26] I have reached a view that it is in [MA]'s best interests that she be immunised in accordance with this requirement.

Outcome and orders

[27] I make the following orders and directions:

- (a) I direct [MA] may be immunised in accordance with the Ministry of Health applicable guidelines, subject to her general practitioner agreeing the immunisations are appropriate and in her best interests. The timing and dosages are a matter for the general practitioner in his/her sole discretion to determine.
- (b) I direct that it is to be [MA]'s general practitioner who is to develop the plan for the administration of the immunisations to [MA].
- (c) I direct a copy of this judgment be given to the general practitioner so that [GF]'s concerns can be considered as part of the general practitioner's decisions.

Judge RJ Russell
Family Court Judge

Date of authentication: 12/10/2020
In an electronic form, authenticated electronically.