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 https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT HASTINGS

I TE KŌTI WHĀNAU
KI HERETAUNGA

FAM-2016-045-063
[2020] NZFC 4046

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	ORANGA TAMARIKI, MINISTRY FOR CHILDREN Applicant
AND	[AR] [IT] [AP] [RH] Respondents
	Child or Young Person the application is about: [RT] born on [date deleted] 2016

FAM-2017-020-273

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
AND BETWEEN	[AP] Applicant
AND	ORANGA TAMARIKI, MINISTRY FOR VULNERABLE CHILDREN Respondent
AND	[AR] Respondent

FAM-2017-020-273

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
AND BETWEEN	[RH] Applicant
AND	[AR] Respondent

Hearing:	4,5,6,7 and 8 May 2020
Appearances:	A Gallie and M Medcalf for Oranga Tamariki A Souness for [AP] J Niemand for [RH] No appearance for [AR] No appearance for [IT] D Carroll Lawyer for Child
Judgment:	19 June 2020

RESERVED JUDGMENT OF JUDGE M A COURTNEY

Background

[1] [RT] was born in [the first location] on [date deleted] 2016. That same day, the Chief Executive of Oranga Tamariki obtained an interim custody order on a without notice basis under s 78 Oranga Tamariki Act 1989 ("OTA") placing [RT] in the custody of the Chief Executive. The Chief Executive also made an application on notice for a declaration [RT] was a child in need of care and protection.

[2] The basis of the applications by the Chief Executive was a number of concerns regarding the actions of [RT]'s mother, [AR]. On 8 March 2016 [RT]'s three older siblings [KR], [RR] and [PT] (then respectively aged [under 12], [under 10] and [under 5]) were removed from their mother's care, with a s 78 interim custody order being made in favour of the Chief Executive of Oranga Tamariki on a without notice basis.

The concerns Oranga Tamariki held about the mother leading to that application included:

(a) Extensive methamphetamine use.

(b) Screaming at the children and locking them out of the home.

(c) Repeated exposure of the children to family violence, including the children witnessing a Mongrel Mob member smashing items in the home with an axe,

(d) the children being afraid of living with their mother.

[3] Following the making of that s 78 interim custody order, the three children were placed with their maternal grandmother, [RH], in [the second location].

[4] When Oranga Tamariki subsequently became aware [AR] was pregnant with [RT] they held further concerns for the unborn child including:

(a) Ongoing criminal activity on the part of [AR]. By this stage she had 103 previous convictions, mostly for dishonesty and drug related offending.

(b) Reports of concern about the unborn baby from the police involved in dealing with ongoing criminal offending by [AR], including transience and failing to engage with professionals regarding her unborn child.

[5] The s 78 order made with regard to [RT] was just some eight months after the earlier order had been made with regard to the older siblings. Both Oranga Tamariki and [RH] recognised it could be disruptive to have a new-born baby placed in the family whilst [RH] cared for the older children. [RT] was therefore not placed with [RH]. He was initially placed in the care of a non-kin caregiver approved by Oranga Tamariki.

[6] [AR] identified the father of [RT] as [AW], who was not the father of [AR]'s three older children. [AP], a niece of [AW], was identified as a possible caregiver for [RT].

[7] A whanau hui was held for [RT] on 5 December 2016. [AR] attended that hui in person, together with the person then caring for [RT] and the social worker then involved for him. Attending by phone were [AW], [AP] and [RH]. The record of that hui includes the following:

(a) All whanau agreed they wanted [RT] to go north and to be cared for by a family member.

(b) [AR] wanted to have a chance to parent [RT], it being made clear to her there would need to be a period of time during which [AR] showed her commitment to putting [RT] first in her life before he would be placed in her care.

(c) [RH] reported that she had visited [AP] in [the third location] the previous weekend and was very happy [RT] might go there, saying he must go to family and that [AP] and those she lives with "have the aroha".

(d) All whanau made it clear that they agreed strongly with the plan and wanted to see it progressed as soon as possible.

[8] On 19 December 2016 [RT] travelled with his mother and a social worker to [the third location] to be placed in the care of [AP], who lives [in a village in that area].

[9] [AR] stayed with [RT] for a short time before moving on to [the second location] to see her older children and subsequently to the South Island with [AW], who by this stage had become seriously ill.

[10] [AW] passed away [in early] 2017.

[11] There was a significant delay on the part of Oranga Tamariki in arranging a family group conference to address issues for [RT], but one was finally held on 9 June

2017. There was extensive attendance by maternal whanau, including the maternal grandmother [RH], [RT]'s three older siblings, [AP] and her whanau. [AR] did not attend, as at that stage she was incarcerated.

[12] Agreement was reached in the course of the family group conference that [RT] was a child in need of care and protection, upon the grounds set out in s 14(1)(a) and (b) OTA.

[13] The family group conference also considered an issue which had by then arisen, namely whether or not [AW] was indeed [RT]'s father. The family group conference attendees agreed that [RT] would remain in the care of [AP] until the issue of his paternity had been determined, when his placement would be reassessed having regard to the outcome of paternity testing.

[14] As [AW] was deceased, no parentage testing could take place involving him. [EK] was identified by [AP] as a son of [AW] and therefore as a candidate for DNA testing to see if [EK] and [RT] had the same father. DNA testing results were received in August 2017, which strongly supported that [EK] and [RT] do not have the same biological father. This result, of itself, did not prove that [AW] was not the father of [RT]. To draw that conclusion from the testing, it would have to be established for certain that [EK] was a biological child of [AW]. Following the receipt of the DNA test results, doubt was raised by [AP] as to whether [EK] was a child of [AW], even though she had put him forward as such.

[15] Notwithstanding that issue being raised, Oranga Tamariki, by taking the DNA results as proving [RT] and [AP] were not related, determined it was not appropriate for [RT] to remain in [AP]'s care. A plan was prepared for [RT] to transition from [AP]'s care to [RH]'s care over the course of some eight days in September 2017.

[16] [RT]'s mother, [AR], supported [RT] being moved to live with [RH] and his siblings in [the second location].

[17] The decision of the social worker then involved with [RT], Ms Thatcher-Wharehinga, to move him to live with [RH] in [the second location] was said to be taken in accordance with the provisions of the OTA as then set out in sections 4, 5, 6

and 13. In particular, there were two principles which the social worker took into account in making this decision, namely:

(a) Principle 13 (2) (b):

> The principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapū, iwi, and family group, and that accordingly –
>
> (i) A child's or young person's family, hapū, iwi, and family group should be supported, assisted, and protected as much as possible; and
>
> (ii) Intervention into family life should be the minimum necessary to ensure a child or young person's safety and protection;

(b) Principle 13 (2) (d):

> Where a child or young person is considered to be in need of care or protection, the principle that, wherever practicable, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whanau, hapū, iwi, and family group.

[18] As a result, the social worker considered it was in [RT]'s best interest to be placed with his maternal family and, most importantly, with his three siblings.

[19] The transition plan formulated by Ms Thatcher-Wharehinga involved [RH] travelling to be in [the third location] for the entire period of the plan, which was to be implemented as follows:

(a) Monday 18 September 2017 to Friday 22 September 2017 – [RT] to be in the care of [RH] from 10.00am until 3.00pm each day.

(b) Saturday 23 and Sunday 24 September 2017 – [RT] to be in the care of [RH] from 10.00am Saturday, overnight and until 10.00am Sunday.

(c) Monday 25 September 2017 and Tuesday 26 September 2017 – [RT] to spend each day with [RH] from 10.00am to 3.00pm.

(d) Wednesday 27 September 2017 at 10.00am - the social worker to collect [RT] and his belongings so that he could then travel to [the second location] with [RH].

[20] On Monday 18 September [RT] was collected by a social worker to begin the transition process. On 20 September [AP] applied to the Court to discharge the s 78 interim custody order in favour of the Chief Executive and for orders under the Care of Children Act 2004 ("COCA") providing for her to have the day to day care of [RT] and appointing her as an additional guardian of [RT].

[21] At the same time, [AP] also applied on a without notice basis seeking an injunction preventing [RT]'s transition to [RH]. The application was based on [RT] then being 10 months old, the fact he had formed an attachment to [AP] and [AP]'s concern as to the distress the implementation of the transition plan was having on [RT]. The Court did not grant an injunction. It pointed out that the application made by [AP] was on the wrong legal basis and a different application was suggested to address the issue. In doing so, the Court invited the Chief Executive to defer the relocation process until the proceedings then before the Court had been addressed.

[22] On 27 September 2017, the day [RT] was to travel to [the second location] with [RH], Oranga Tamariki advised they were not proceeding with the transition of [RT] to [RH]'s care.

[23] In February 2018 the Court directed a s 178 psychological report be provided, with a brief as agreed between counsel for all parties.

[24] The s 178 report was provided by Kath Naughton, clinical psychologist, in April 2018. That report considered the least disruptive option for [RT] would be to remain with [AP] and have meaningful contact with his maternal whanau. In light of that report the social worker then involved, Ms Hori, no longer supported a placement of [RT] with [RH]. Based on her observations, Ms Hori considered [RT] adored [AP] and was strongly attached to her.

[25] By this stage, [IT], the father of [RT]'s three older siblings, was identified as possibly being [RT]'s father. Oranga Tamariki were taking steps for further DNA testing to be undertaken in an attempt to ascertain [RT]'s paternity. This was noted as being important, as [RT] deserved to know who his father is and also his whakapapa.

[26] Ms Hori was of the view at that stage, given the strength of the relationship between [RT] and [AP], that regardless of the outcome of the DNA testing she supported [RT] staying in the permanent care of [AP].

[27] This view was held notwithstanding that [RT]'s whakapapa would not connect to [AP]. Ms Hori was of the view that [RT] would continue to have the right to know his whakapapa and no matter where he is placed, this would always belong to him. Ms Hori was confident that [AP] would provide [RT] with the knowledge he required to know where he came from and where he belongs, which would also be reinforced by the Kohanga Reo he attended. Ms Hori had spoken with the manager of the Kohanga Reo who assured her they would be teaching [RT] his own whakapapa, that of his own iwi, whatever that might be as a result of the DNA testing.

[28] The application for a declaration that [RT] was a child in need of care and protection came before the Court on 16 July 2018. By that time [RT]'s mother, [AR], had filed an affidavit stating she supported [RT] moving in to the care of her mother, [RH]. In the meantime, the lawyer previously acting for [AR] had filed an application for a declaration under Family Court Rule 88 that she no longer acted for [AR]. That declaration was made on 11 July 2018. [AR] has taken no further steps in the proceedings which had been filed to that date or in any of the proceedings filed since then, all of which have been served on her.

[29] At the time the declaration application came for hearing [RH] was not a named party in the proceedings. She had, in March 2018, filed documentation seeking to be added as a party to the proceedings and seeking consolidation of the OTA proceedings and the COCA proceedings commenced by [AP]. Whilst [RH] was not therefore a party to the proceedings in July 2018 she did, by way of her counsel Mr Neimand appearing by telephone, take part in the judicial conference on 16 July 2018. All involved at that stage, being Oranga Tamariki, [AP], [RH] and lawyer for [RT], agreed

that [RT] was a child in need of care and protection and a declaration to that effect was made under sections 14(1)(a) and (b).

[30] With the making of that declaration the Court also directed the Chief Executive to file any applications for disposition orders following on from the declaration. The Court also directed that any party who wished to take a position with regard to [RT]'s care was to file their applications.

[31] On 27 July 2018 the Chief Executive filed applications under the OTA seeking a s 101 custody order in favour of the Chief Executive, an order under s 110 appointing the Chief Executive as an additional guardian and a further order under s 110 appointing [AP] as an additional guardian of [RT].

[32] In August 2018 [RH] filed proceedings seeking to discharge the s 78 interim custody order and under the COCA she applied for leave to apply for a parenting order, for day to day care of [RT] and appointment of herself as an additional guardian of him.

[33] In August 2018 further DNA testing was undertaken, the results of which strongly support [IT], the father of the three oldest siblings, also being the father of [RT]. Whilst there has been no declaration of paternity made by the Court, all have proceeded on the basis [IT] is [RT]'s father. [RT]'s birth has now been registered with the surname [T].

[34] As a consequence of the paternity test results, [IT] was served in November 2018 with all proceedings which by then had been filed with regard to [RT]. He has taken no steps in the proceedings.

[35] When making the declaration in July 2018 and giving various directions regarding further proceedings to be filed, the Court encouraged the parties to attempt to resolve all issues surrounding [RT] by way of agreement. Agreement was not able to be reached and counsel filed a prehearing checklist in December 2018 seeking a hearing to address all outstanding applications.

[36] The Court and the parties required an update on the s 178 report which had been provided in April 2018. Ms Naughton was unavailable to complete an update. Peter Bowker was appointed by the Court to provide a psychological report. Mr Bowker provided a report to the Court dated 6 August 2019 in which he stated:

> 47. …[RT] is still not old enough to be able to understand the decision to relocate to [the second location]. If he is to be moved under the current circumstances then there would need to be increasing amounts of time spent with [RH] and his siblings. It will be difficult given the geographic separation unfortunately which is why it was so difficult last time this was tried.
>
> 48. From a practical point of view it is hard to see how this can happen without trauma unless one of the parties agrees to relocate. …
>
> 49. The other alternative would be to delay the transition until he is old enough to be able to communicate about the process and have the reasons explained to him as well as have a say in the process and decision himself. This could be anywhere between ages 5 – 10 years…
>
> 53. …It is accepted that [RT]'s whanau are in [the second location] and there is a case that his rightful place is amongst them. Equally however he has a secure attachment to his current caregiver and to his young mind she is his mother. He is well cared for and he is still too young to have that snatched away without considerable grief and distress.

[37] The proceedings were subsequently allocated hearing time on 4 to 8 May 2020, with advice of such hearing being advised to all counsel and the parties by way of notice dated 31 January 2020.

[38] As it happens, the hearing dates fell within the Covid 19 lockdown. By joint memorandum of counsel dated 21 April 2020 (at which time the Level 4 lockdown was still in effect) counsel were concerned to know if the proceeding would be able to go ahead and, if so, in what format. This was against the background that [RH] and her lawyer were resident in [the second location] and would need to travel to [the third location] for the hearing. Counsel also raised a number of procedural and evidential matters in advance of the hearing.

[39] I convened a pre-hearing telephone conference on 23 April 2020, by which time it was known that the country was to move to Level 3 lockdown at midnight on 27 April. I advised counsel that indications received from the Chief District Court Judge's office were that it was anticipated Court proceedings will continue under Level 3 and those parties who were expected to be at Court should be at Court unless

otherwise advised. Having discussed with counsel the practicalities of proceeding with the hearing under Level 3, I directed the hearing was to proceed.

[40] The joint memorandum of counsel dated 21 April 2020 advised that counsel for [AP] had only been advised on 9 April that the Ministry had changed its view as to [RT]'s placement. They were no longer supporting [RT] continuing in the care of [AP], but proposed he transition into the care of [RH]. An unsworn affidavit from the social worker involved, Ms Olsen, had been provided to the Court and counsel. I made directions regarding the filing of a sworn affidavit and gave [AP] the opportunity to file evidence in reply. I also made directions regarding the filing of affidavits to address matters set out in family violence summaries received by Ms Carroll, the lawyer for [RT], from the New Zealand Police. Directions were also made to have two former social workers involved with [RT] who had sworn affidavits in the proceedings but are now living overseas, Mr Clark and Ms Thatcher-Wharehinga, appear at the hearing by AVL.

[41] In the course of the prehearing conference reference was made to a memorandum apparently filed on behalf of the Chief Executive in December 2019. That memorandum was not on the Court file and, consequently, I had not seen it by the time of the conference. A copy was then emailed to the case officer in Court and printed out in Court for me to consider.

[42] That memorandum primarily dealt with the evidence of Mr Clark. The memorandum went on to say a new social worker had been allocated to [RT] and some time had passed since evidence was last filed. The Ministry sought leave to file updating evidence by 24 January 2020. The memorandum went on in the penultimate paragraph to say:

> Given the issues in contention, the Ministry requests that a cultural report pursuant to s 187 Oranga Tamariki Act 1989 is directed by the Court.

[43] The memorandum did not set out what "the issues in contention" were, nor did it advise that there had been a change in the position of Oranga Tamariki with regard to [RT]'s placement. As the memorandum had never been referred to a Judge, the request for a cultural report had not been addressed by the Court. When all counsel

completed the prehearing checklist in December 2018, no request had been made for a cultural report. Following the issue of the fixture notice in January 2020 advising of the hearing in May, Oranga Tamariki did not follow up on their earlier request for a cultural report nor on the fact that such request had not been addressed by the Court.

[44] By April 2020 [RT] was almost three and a half years old, with the proceedings having been before the Court for all of his life. I was concerned that if the matter did not proceed on 4 May then it was highly unlikely a further fixture date would be allocated this year. No counsel, including counsel for the Chief Executive, insisted a cultural report be obtained before the matter was heard. I therefore directed that the matter proceed to hearing and did not direct the obtaining of a cultural report.

Issues considered at the hearing

[45] The hearing therefore commenced on 4 May to address the following applications:

(a) Oranga Tamariki's applications for a s 101 custody order in favour of the Chief Executive in place of the s 78 order and to appoint the Chief Executive and [AP] as additional guardians of [RT], although by the commencement of the hearing Oranga Tamariki had changed its position to no longer support [RT] being in [AP]'s care nor to be appointed as an additional guardian of [RT],

(b) [AP]'s applications to discharge the s 78 interim custody order under the OTA and replace it with a parenting order and an additional guardianship order in her favour under the COCA, and

(c) [AP]'s subsequent application to discontinue her applications under the COCA, which application was not pursued

(d) [RH]'s applications to discharge the s 78 interim custody order under the OTA and replace it with a parenting order and additional guardianship order in her favour under the COCA.

[46] There are a number of underlying issues to be considered with regard to each of these applications which will be addressed below.

[47] Ms Olsen, the current social worker for [RT], set out in her affidavit dated 22 April 2020 the background to the Ministry's previous position in supporting placement of [RT] with [AP] together with the reasons for the subsequent change of view on behalf of the Ministry with regard to such placement. In April 2018 the Ministry had received and considered the s 178 psychological report from Ms Naughton. There had been a change of social worker from the one who had put in place the transition plan in September 2017, with Ms Hori being appointed as [RT]'s social worker. Having considered the s 178 report, Ms Hori no longer supported [RT] being transitioned into a permanent home environment with [RH] and his siblings.

[48] Ms Hori went on sick leave from the Ministry in around May 2019 and has not yet returned to work at the Ministry. [RT] was therefore without a social worker until Ms Olsen was appointed as his replacement social worker in October or November 2019. On considering the file, Ms Olsen and the Ministry came to the view that the approach being taken by the Ministry, which reflected Ms Hori's view[1]:

> …did not uphold the principles of Te Tiriti o Waitangi. In particular, the interpretation of whakapapa whanau which connects mokopuna Maori to their tipuna, marae and whenua was not incorporated into the s 178 report nor was its significance raised at the Roundtable meeting.

[49] The roundtable meeting referred to was one held in May 2018 involving Oranga Tamariki, [AP], [RH] and lawyer for [RT] which had considered the s 178 psychological report.

[50] Ms Olsen also referred to what she saw as an obstructive approach on the part of [AP] to implementing and supporting access between [RT] in and his maternal grandmother and siblings in [the second location].

[51] As neither of [RT]'s parents have taken an active part in the proceedings, the contenders for his day to day care are [AP] and [RH]. Whilst Oranga Tamariki is seeking a s 101 custody order to replace the current s 78 interim custody order, it has

[1] At paragraph 43 of her affidavit.

variously been of the view to place [RT] with either [AP] or [RH]. The Chief Executive is not considering placing [RT] with any other person if the s 101 custody order is made.

Proceedings relating to [RT]'s older siblings

[52] [RH] has commenced separate proceedings under the COCA in the Family Court at [the second location][2] seeking parenting orders providing her with the day to day care of [RT]'s older siblings in her care and appointing her as an additional guardian of them.

[53] Those applications were considered by Judge Blair on 29 April 2020. In a brief decision the Court noted that the children were in the care of [RH] who had applied to discharge the OTA orders and have COCA orders in their place. The decision noted that each of the children's parents had been served in prison and no notices of response had been filed.

[54] The decision recorded [KR] was involved in Youth Justice processes as a result of serious offending. It was agreed by all counsel it would not be appropriate to discharge the OTA orders as far as [KR] was concerned. Those orders remain in place.

[55] The decision went on to note that the situation was different for [RR] and [PT], acknowledging it would be appropriate to discharge the OTA orders and provide [RH] with the COCA orders she sought. Accordingly, the Court discharged the OTA orders in favour of the Chief Executive and made a parenting order providing for [RH] to have the day to day care of [RR] and [PT]. The order went on to provide that each parent will be restricted to supervised contact on terms and conditions approved by [RH]. [RH] was also appointed as an additional guardian of the two children.

[56] Apart from those general comments, the decision did not address any of the specific circumstances applicable to the children or [RH] in coming to its decision. It was an outcome achieved by consent of those involved, namely Oranga Tamariki, [RH] and lawyer for the children. It appears Judge Blair was not made aware of

[2] Under FAM-2011-025-000514.

circumstances relating to those children or [RH] which are to be considered in this decision.

The Law

[57] There are various applications under the OTA and the COCA before the Court. There are principles and purposes in each of the Acts which the Court must take into account when dealing with applications under each Act.

(a) The Oranga Tamariki Act 1989

[58] Both [AP] and [RH] have applied under s 125 OTA seeking that the Court discharge the existing s 78 custody order pursuant to s 127 OTA. In *MEM v SBN and Chief Executive of the Ministry of Social Development*[3] the Court outlined a three-tier test which applies when the Court is asked to discharge orders under the OTA, being to;

(a) Consider the original care and protection concerns.

(b) Consider the child's current situation, including the presence or absence of care and protection concerns, and

(c) Assess the consequences for the child if protective orders are no longer in place.

[59] The Court is therefore to determine in the context of the OTA whether or not there are ongoing care and protection concerns for [RT]. If there are such concerns the Court is to address whether or not protective orders under the OTA are required. The alternative is to consider whether or not orders under the COCA as sought by [AP] or [RH] might fully address and protect [RT]'s welfare and best interests and provide appropriate protection for him.

[3] *MEM v SBN and Chief Executive of the Ministry of Social Development* FAM-2001-019-000230, 22 June 2009, Judge M A MacKenzie.

[60] Section 4A(1) OTA mandates that the wellbeing and best interests of the child are the first and paramount consideration of the Court when considering the application of the Act. In determining the wellbeing and best interests of the child the Court is to have regard to the principles set out in sections 5 and 13 of the Act.

[61] The general principles which apply to any proceedings under the OTA are set out in s 5 which provides:

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:

(a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:

(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,—

(i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—

(A) treated with dignity and respect at all times:

(B) protected from harm:

(ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:

(iii) the child's or young person's need for a safe, stable, and loving home should be addressed:

(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:

(vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—

(A) developmental potential; and

(B) educational and health needs; and

(C) whakapapa; and

(D) cultural identity; and

(E) gender identity; and

(F) sexual orientation; and

(G) disability (if any); and

(H) age:

(vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(viii) decisions about a child or young person with a disability—

(A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

(c) the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised, and, in particular, it should be recognised that—

(i) the primary responsibility for caring for and nurturing the well being and development of the child or young person lies with their family, whānau, hapū, iwi, and family group:

(ii) the effect of any decision on the child's or young person's relationship with their family, whānau, hapū, iwi, and family group and their links to whakapapa should be considered:

(iii) the child's or young person's sense of belonging, whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group should be recognised and respected:

(iv) wherever possible, the relationship between the child or young person and their family, whānau, hapū, iwi, and family group should be maintained and strengthened:

(v) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in decisions, and regard should be had to their views:

(vi) endeavours should be made to obtain the support of the parents, guardians, or other persons having the care of the child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

(d) the child's or young person's place within their community should be recognised, and, in particular,—

(i) how a decision affects the stability of a child or young person (including the stability of their education and the stability of their connections to community and other contacts), and the impact of disruption on this stability should be considered:

(ii) networks of, and supports for, the child or young person and their family, whānau, hapū, iwi, and family group that are in place before the power is to be exercised should be acknowledged and, where practicable, utilised.

(2) Subsection (1) is subject to section 4A.

[62] The proceedings relating to [RT] are under the Care and Protection provisions of the OTA. The principles relating to care and protection of children are set out in s 13 as follows:

13 Principles

(1) Every court or person exercising powers conferred by or under this Part, Part 3 or 3A, or sections 341 to 350, must adopt, as the first and paramount consideration, the well-being and best interests of the relevant child or young person (as required by section 4A(1)).

(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:

(a) it is desirable to provide early support and services to—

(i) improve the safety and well-being of a child or young person at risk of harm:

(ii) reduce the risk of future harm to that child or young person, including the risk of offending or reoffending:

(iii) reduce the risk that a parent may be unable or unwilling to care for the child or young person:

(b) as a consequence of applying the principle in paragraph (a), any support or services provided under this Act in relation to the child or young person—

(i) should strengthen and support the child's or young person's family, whānau, hapū, iwi, and family group to enable them to—

(A) care for the child or young person or any other or future child or young person of that family or whānau; and

(B) nurture the well-being and development of that child or young person; and

(C) reduce the likelihood of future harm to that child or young person or offending or reoffending by them:

(ii) should recognise and promote mana tamaiti (tamariki) and the whakapapa of the child or young person and relevant whanaungatanga rights and responsibilities of their family, whānau, hapū, iwi, and family group:

(iii) should, wherever possible, be undertaken on a consensual basis and in collaboration with those involved, including the child or young person:

(c) if a child or young person is considered to be in need of care or protection on the ground specified in section 14(1)(e), the principle in section 208(2)(g):

(d) a power under this Part that can be exercised without the consent of the persons concerned is to be exercised only to the extent necessary to protect a child or young person from harm or likely harm:

(e) assistance and support should be provided, unless it is impracticable or unreasonable to do so, to assist families, whānau, hapū, iwi, and family groups where—

(i) there is a risk that a child or young person may be removed from their care; and

(ii) in the other circumstances where the child or young person is, or is likely to be, in need of care and protection (for example, where a family group conference plan provides for assistance to be given to a child or parent to address a behavioural issue that may lead, or has led, to the child's removal from the family):

(f) if a child or young person is identified by the department as being at risk of removal from the care of the members of their family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers, planning for the child's or young person's long-term stability and continuity of living arrangements should—

(i) commence early; and

(ii) include steps to make an alternative care arrangement for the child or young person, should it be required:

(g) a child or young person should be removed from the care of the member or members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual

caregivers only if there is a serious risk of harm to the child or young person:

(h) if a child or young person is removed in circumstances described in paragraph (g), the child or young person should, wherever that is possible and consistent with the child's or young person's best interests, be returned to those members of the child's or young person's family, whānau, hapū, iwi, or family group who are the child's or young person's usual caregivers:

(i) if a child or young person is removed in circumstances described in paragraph (g), decisions about placement should—

(i) be consistent with the principles set out in sections 4A(1) and 5:

(ii) address the needs of the child or young person:

(iii) be guided by the following:

(A) preference should be given to placing the child or young person with a member of the child's or young person's wider family, whānau, hapū, iwi, or family group who is able to meet their needs, including for a safe, stable, and loving home:

(B) it is desirable for a child or young person to live with a family, or if that is not possible, in a family-like setting:

(C) the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga should be recognised and promoted:

(D) where practicable, a child or young person should be placed with the child's or young person's siblings:

(E) a child or young person should be placed where the child or young person can develop a sense of belonging and attachment:

(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:

(k) if a child or young person is placed with a caregiver under section 362, the chief executive, or, if applicable, a body or an organisation approved under section 396, should support the caregiver in order to enable the provision of the protection and assistance described in paragraph (j).

[63] I will return to consider these principles later in this decision.

[64] Section 11 of the OTA provides that in proceedings under the Act, the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity, unless the Court is of the view that participation is not appropriate having regard to the matters to be heard and considered. Section 11 also provides that the child or young person must be given reasonable opportunities to freely express their views on matters affecting them and any views expressed (either directly or through a representative) must be taken into account.

[65] The Court appointed Ms Carroll to act as lawyer for [RT] in all proceedings filed. It is accepted, having regard to the issues involved and [RT]'s age, that it is not appropriate to obtain his views. It is, however, accepted by all involved that [RT] would see [AP] as his "mother" to whom he has a primary attachment, that he enjoys living with [AP] and that he also enjoys seeing [RH] and his siblings.

[66] A major consideration for Oranga Tamariki when changing their view in early April 2020 about where [RT] should be placed were the factors set out in s 7AA of the OTA, which section was included as part of significant amendments to the OTA which

took effect from 1 July 2019. That part of s 7AA which informed the change of view provides:

7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)

(1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).

(2) The chief executive must ensure that—

(a) ....

(b) 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:

(c) …..

[67] The 2019 amendments included additions to the purposes of the Act in s 4, requiring the promotion of the wellbeing of children, young persons and their families, whanau, hapū, iwi and family groups by:

(a) Section 4(1)(a)(i) - affirming mana tamaiti (tamariki),

(b) Section 4(1)(f) - providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in the Act,

(c) Section 4(1)(g) - recognising mana tamaiti (tamariki), whakapapa, and the practise of whanaungatanga for children and young persons who come to the attention of the department.

(d) Section 4(1)(h) - maintaining and strengthening the relationship between children and young persons who come to the attention of the department and their –

(i) family, whanau, hapu, iwi, and family group; and

(ii) siblings

[68] The concepts of mana tamaiti (tamariki), whakapapa and whanaungatanga are referred to in many provisions in the OTA including ss 4, 5, 7AA and 13. They are defined in s 2 of the Act as follows:

> **mana tamaiti (tamariki)** means the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person
>
> **whakapapa**, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend
>
> **whanaungatanga**, in relation to a person, means—
>
> (a) the purposeful carrying out of responsibilities based on obligations to whakapapa:
>
> (b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:
>
> (c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection

[69] Tikanga Maori in turn is defined in s 2 to mean Maori customary law and practices.

[70] Ever since the OTA's enactment in 1989[4] there has been an obligation on judges to understand, observe and apply tikanga Maori by virtue of the model of child protection established by the Act. In addressing the 1989 legislation Justice Joe Williams said;[5]

> Words of statutory power were introduced into the new care and protection regime that required a Māori child to be seen within a kin matrix – whanau, hapū and iwi. It required that these layers of the kin matrix should participate in decisions affecting their children; that whanau, hapū and iwi views should be considered by the Act's deciders (often, in the end, [judges]); that connections of whanau, hapū and iwi should be maintained and strengthened wherever possible; and the sustainability of whanau, hapū and iwi should be a matter of judicial concern. Of course all of this was subject to the welfare and best interests of the child…What was revolutionary was the child was not just a child of two parents but a child of an extended family, a village and a tribe. For a country still caught in a natives and settlers paradigm, this was radical.

[4] Which Act was then known as the Children, Young Persons and Their Families Act 1989.
[5] Address to the New Zealand Family Court Judges' Triennial Conference, Christchurch, 11 October 2017.

[71] His Honour went on to refer to the proposed 2019 amendments, stating:

> What is important and exciting right now is that the current Oranga Tamariki reforms present us with another chance to do what Puao-te-Ata-Tu said we should have done in 1989: spark the revolution.

[72] What was no doubt a "…radical policy underlying [the] legislation was not met by radical practice"[6]. Some 30 years on, statutory amendment was required to emphasise and expand the importance of tikanga Māori and the Treaty of Waitangi when administering the Act.

[73] Judge Otene went on in her address to state:[7]

> However, putting aside the fact specific application and engaging an overarching evaluation, my view is that the balance of the principles continue to weigh with heft in favour (sic) the well-being of children and young persons being entwined with the well-being of their whanau and best assured when responsibility for their care rests primarily with their family, whanau hapu or iwi. Indeed, I suggest that the repeated recognition of tikanga Maori concepts of mana tamaiti (tamariki), whakapapa and the practice of whanaungatanga in the purposes and principles of the Act re-emphasises the policy drawn from the recommendations of Puao-te-Ata-Tu and can be taken as a Parliamentary statement that those charged with administration of the Act, including the judiciary, have not effected the legislation as originally intended so the legislature has therefore made its intent clearer.

[74] Whilst reference to the Treaty of Waitangi in the OTA had been recognised by the Courts over the years[8], the 2019 amendments to the OTA "represent the strongest assertion of the treaty's relevance because Parliament has chosen to make it a matter of explicit statutory reference"[9].

[75] In that same paper Judge Otene went on to state[10]:

> The judicial function to interpret the law in the particular factual context remains the same. But these amendments, I say, mean that judges in the exercise of that function can no longer shy from examining the "how" of continued attachment between the Maori child and his or her whanau. That examination must be through a Treaty lens.

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[6] Judge S D Otene, *Te Hurihanga Tuarua?*, Address to the New Zealand Family Court Judges Family Court Update, August 2018 at [15].
[7] At [23]
[8] For example, see *Barton – Prescott v Director – General of Social Welfare* [1997] 3 NZLR 179.
[9] Judge S D Otene, *NZLS CLE Seminar – Oranga Tamariki Act – Changes,* June 2019, at page 8.
[10] At page 8

[76] Judge Otene recognised that consideration of tikanga Maori still had to take place in the context of an overall assessment of harm to a child. In discussing that balance she said[11]:

> [28] …Do our risk assessments take sufficient account of longitudinal harm? Are they appropriately cognisant of the growing body of evidence as to the contribution of cultural disconnect on negative life outcomes? If we find those longitudinal harms present how do we balance them with the more immediate harm?
>
> [30] There can of course be no suggestion that children and young persons be exposed to situations where they suffer or are likely to suffer serious harm. Sometimes the individualised assessment that must be undertaken for each child or young person will mandate placement in non-kin care or swiftly effected permanency of placement or highly restricted access.

[77] The proceedings filed by Oranga Tamariki with regard to [RT] commenced in 2016, well before the 2019 amendments to the OTA noted above. The Chief Executive's current applications for a s 101 order and s 110 orders were filed in July 2018, once again before the amendments to the Act.

[78] There is nothing in the transitional provisions of the OTA which speaks to s 14 of the Children, Young Persons, and their Families (Oranga Tamariki) Legislation Act 2017, which section inserted many of the provisions in the Act I have referred to above, in particular ss 4(1)(f), 4(1)(g) and 7AA. I therefore take the view that the principles which came into effect in 2019 by way of the amending legislation are to be applied in determining this case, notwithstanding the proceedings commenced prior to that legislation coming into effect.

(b) The Care of Children Act 2004

[79] As far as the proceedings under the COCA are concerned, the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration of the Court. In assessing the welfare and best interests of a child, the Court must take into account those principles set out in s 5 of the Act which have relevance for the child. The Court may also take into account the conduct of any

[11] At [28] and [30]

person who is seeking to have a role in the upbringing of the child to the extent that such conduct is relevant to the child's welfare and best interests.

[80] Section 5 provides:

> **5 Principles relating to child's welfare and best interests**
>
> The principles relating to a child's welfare and best interests are that—
>
> (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
>
> (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
>
> (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
>
> (d) a child should have continuity in his or her care, development, and upbringing:
>
> (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
>
> (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[81] As with the OTA, the COCA provides that a child must be given reasonable opportunities to express views on matters affecting the child, which views, if expressed, must be taken into account by the Court.

(c) The relationship between the OTA and COCA

[82] Both the OTA and COCA have the welfare and best interests of the child at heart[12] although the OTA has a wider concept of "well-being", which is defined to "include" the welfare of the child.[13] However, each of the Acts is specific in relation to different situations. The OTA requires consideration of the wellbeing and best

[12] COCA, s 4; and OTA, ss 4A(1) and 13(1).
[13] Section 2 OTA.

interests of a child who is in need of care and protection. The COCA on the other hand requires consideration of the welfare and best interests of a child in their particular circumstances having regard to the principles of s 5, which have a primary focus on parental responsibility for decision-making and care of children.

[83] Section 120 OTA provides that no guardianship or parenting order for day to day care or contact of a child can be made under the COCA if the child is subject to custody (ss 78 and 101) or guardianship (s 110) orders under the OTA.

[84] In the present case Oranga Tamariki is seeking orders under s 101 and 110 OTA. If such orders are made, parenting or guardianship orders under COCA cannot be made in favour of [AP] or [RH]. Conversely, if a parenting order is made under COCA, the Court cannot make a support order under s 91 OTA.[14]

[85] Notwithstanding the above provisions, all applications by the parties will be considered, keeping in mind the outcomes and consequences of granting one order over the other. The principles and purposes of both Acts will be considered in order to formulate a response best suited to [RT].

[RT] and those involved with him

[RT]'s name

[86] When proceedings were commenced on the day of [RT]'s birth he was referred to as Baby [R], being the then unnamed child of [AR]. He subsequently became known as [RW], with the surname being that of [AW] who was presumed to be [RT]'s father.

[87] Following receipt of the DNA test results which strongly identified [RT] as the son of [IT], the father of the three older siblings, [RT]'s name was registered on his birth certificate as [RT].

[88] [RT] was the name of [AW]'s great grandfather.

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[14] Section 92A OTA.

[89] The name [deleted] appears to have been given to reflect that [RT] was seen as precious.

[90] [Name deleted] is taken from [RT]'s maternal whanau.

[91] [H] is the name of [RT]'s maternal grandmother.

[92] [T] is [RT]'s father's name.

[RT]'s whanau

[93] [RT]'s mother is [AR].

[94] Notwithstanding that a declaration as to paternity has not been made, all involved accept [IT] is [RT]'s father, he being registered as such on [RT]'s birth certificate.

[95] [RT] has the three older siblings who were placed with [RH] by Oranga Tamariki following their uplift from their mother. [KR] is now [teenaged], [RR] [a pre-teen] and [PT] aged [under 10].

[96] [KR] is not presently living with [RH]. As a result of the charges [KR] faces in the Youth Court, including [details deleted].

[97] [RR] and [PT] continue to live with [RH] and her husband.

[98] [RT] has a younger [sibling], who was born in [month deleted] 2019. [The sibling] is living with paternal family in Australia as a result of a family arrangement, not as a result of any orders under the OTA.

[99] [RH]'s and her husband's iwi is [deleted]. Their marae is [deleted]. Their hapū is [deleted]. They have a significant number of whanau members who live around the [the second location] area.

[100] [RH]'s children are [AR], [and four others].

[101] None of [RH]'s children now live in her home, although they visit regularly. [AR] is presently incarcerated.

[102] [One of RH's children] lives [close by] and has a [young child].

[103] [RH]'s parents live in Australia.

[104] [RT]'s father, [IT], is presently in prison. His hapū is [deleted]. [RT]'s paternal grandparents live [near the second location]. There is a large whanau, many of whom also live [near the second location].

[105] [RT] spends time with both paternal and maternal whanau when staying with [RH].

The [P] whanau

[106] [RT] has lived continuously with [AP] since being placed with her and, as a result, has had extensive involvement with her whanau. [AP] lives primarily with her grandmother in her grandmother's home at [a village in the third location]. [AP]'s [father] lives at the next-door property. [AP]'s [mother] lives [in a nearby suburb]. [AP] lives with her mother from time to time, so that the care of her grandmother can also be covered by her [sibling]. [Her sibling] has a [young child].

[107] [RT] attends [a Kohanga Reo] which is situated not far from where he lives. There is an extensive involvement in Te Reo Maori by [AP]'s whanau. [AP]'s [grandmother] helped set up [a Kura Kaupapa] where she [details deleted]. [AP's grandmother] received [an Award] to recognise her contribution to Te Reo Maori. [AP]'s [mother is involved with Māori-language education].

[108] [RT] spends a considerable amount of time at the [local Marae] where [AP]'s family has a significant ongoing involvement.

Considerations relevant to determining the applications regarding [RT]

[109] As noted above, there are many factors which the Court is required to take into account under both the OTA and the COCA. Many of those overlap. I intend to give consideration to all relevant factors under both Acts in coming to a determination as to [RT]'s placement. If there are no care and protection concerns for [RT], the proceedings fall to be determined under the COCA.

[110] The policy of the OTA, as stressed in the excerpts from the addresses of Justice Williams and Judge Otene referred to above, emphasises the requirement to see a Māori child within a kin matrix. This is identified in the first purpose of the Act contained in s 4(1)(a)(i) by reference to mana tamaiti, the intrinsic value and inherent dignity derived from a child's whakapapa and their belonging to a whanau, hapū, iwi or family group in accordance with tikanga Maori. Of particular importance is the child's whakapapa, the multi-generational kinship relationships of a person which help to describe who the person is in terms of their matua (parents) and tupuna (ancestors) from whom they descend. The importance of whakapapa is identified in the concept of whanaungatanga.

Section 5 OTA Principles

Child's views

[111] The principle in s 5(1)(a) that a child must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process or decision affecting them, and their view should be taken into account, is not able to be given effect to in these proceedings having regard to [RT]'s young age and the complex issues surrounding the determination of his placement.

UNCROC Rights

[112] The principle in s 5(1)(b)(i) is that a child's rights (including those rights set out in the United Nations Convention on the Rights of the Child) ("UNCROC") must be respected and upheld.

[113] Counsel for [RH] has addressed specific Articles in UNCROC which are said to be applicable to [RT]. These include:

(a) Article 5 – [RT] having the right to expect his parents or extended family members to provide appropriate direction and guidance in the exercise of his rights. [RT]'s parents will continue as his guardians notwithstanding any of the orders sought to be made. Their practical involvement in his life has been extremely limited and both are currently in prison. Neither of them are seeking placement of [RT] with them as a result of these proceedings. To the extent that "extended family members" refers to biological family, this Article favours [RT] being with [RH]. To the extent it also includes psychological family, the Article favours [RT] being with his primary attachment and caregiver, [AP].

(b) Article 7 (2) – [RT] has the right, as far as possible, to know, and be cared for by his parents. Given their history, the terms of the current parenting order with regard to [RR] and [PT] and the parents' current incarceration, there is little prospect [RT] will be able to be cared for by his parents. The most recent plan prepared for [RT] under s 128 OTA dated 20 April 2020 acknowledges there is no realistic possibility of the return of [RT]'s care to [IT] and/or [AR]. It is not known what plans either of [RT]'s parents have following their release from prison (nor is it known when they will be released), but given that each of their parents live in [the second location], the ability of [RT] to get to know his parents better would be enhanced by him living with [RH].

(c) Article 8 – preservation of [RT]'s identity, nationality, name and family relations and appropriate assistance and protection to re-establish speedily to his identity. This Article is addressed more specifically in consideration of other principles under the OTA and COCA.

(d) Article 9 (3) – given [RT]'s separation from his parents, his right to maintain personal relationships and direct contact with his parents on a

regular basis. He will not have the ability to exercise that right in any meaningful sense whilst his parents are in prison. In addition, the Family Court decision with regard to his siblings recognises that any contact between him and his parents needs to be supervised. This is as a result of risk and safety issues with regard to each of the parents, which will be addressed further in this decision.

(e) Article 14 (2) – having the rights and duties of his parents and legal guardians respected to provide direction to [RT] in the exercise of his rights. [AR] supports [RT] being with [RH]. [IT] has given no indication of his view.

(f) Article 18 – [RT]'s parents should have common responsibilities for his upbringing and development, and have common and primary responsibility for the upbringing and development, with his best interests being the basic concern. Apart from the initial decision to place [RT] with [AP] and the subsequent decision to support placement with [RH], [AR] has taken no responsibility for the upbringing and development of [RT]. [IT] appears to have had no involvement in this regard.

(g) Article 20 - Having been deprived of his original family environment upon the making of the s 78 interim custody order, [RT] is entitled to special protection and assistance provided by the State with due regard being paid to the desirability of continuity in his upbringing and his ethnic and cultural background. Continuity in upbringing supports [RT] being in the ongoing care of [AP]. As both contenders for [RT]'s care are Māori, there will be a continuity of an ethnic and cultural background in either placement. However, the overall cultural considerations, which will be discussed in further detail later in this decision, favour [RT] being placed with [RH].

(h) Article 30 – [RT]'s right not to be denied enjoyment of his own culture. [RT] will be exposed to his own culture in either placement, but for

reasons to be expanded upon further in this decision, this would be enhanced by placement with [RH].

Dignity and respect

[114] Section 5(1)(b)(i)(A) requires [RT] to be treated with dignity and respect at all times. This is, in essence, a repeat of mana tamaiti, the intrinsic value and inherent dignity derived from a child's whakapapa and their belonging to a whanau, hapū, iwi or family group in accordance with tikanga Māori. For reasons which will be expanded upon later in this decision, this principle favours placement of [RT] not only being aware of his whakapapa, but living the experience within his whanau, hapū and iwi.

Safety / harm

[115] The principle in s 5(1)(b)(i)(B) is that [RT] must be protected from harm. This encompasses a wider concept than physical harm. It includes emotional harm.

[116] Family violence reports were provided to the Court at the commencement of the hearing by Ms Carroll, [RT]'s lawyer. These reports named both [RH] and [AP] as having been involved in some way in the circumstances covered in those reports.

(a) Events involving [RH]

[117] [In early] 2019 police received calls about an incident occurring at [a Motel] in [the second location] following reports of an argument at the motel and people leaving rapidly in a car. Shortly after, police received two further calls from members of the public advising they had each witnessed an assault taking place in a motor vehicle.

[118] The argument at the motel was between the children's parents, [IT] and [AR]. [KR], [RR] and a cousin of theirs were at the motel at the time.

[119] The police case summary report records what the boys told the police had taken place at the motel. [IT] has "come home" to make "their boys" some lunch. [IT] got

angry because [AR] did not come home with cigarettes. This resulted in an argument. [IT] and [AR] then got into what is now identified as [IT]'s mother's [car] and drove off. [RR] was in the car with them.

[120] At the intersection of [two streets] a witness has seen a male in the vehicle grab a female from the back-passenger seat, pull her towards him and punch her. The witness described the punch as very aggressive and said the female looked very distressed.

[121] [AR] was first spoken to by the police over the phone. She told them she was fine and that she gets annoyed when she cannot yell without police being called. She said there was an argument over smokes but everything was fine.

[122] Police then attended on [AR] at [RH]'s house. [AR] was sitting on the lawn, very distressed, crying and upset. She would not tell the police what had happened.

[123] [IT] also stated that nothing had happened and he was angry police were talking to him. He said he was simply dropping [AR] at her parents' home.

[124] Police spoke to two of the boys at the motel who gave the information set out above and said there was a verbal argument over a packet of cigarettes. They said they made the youngest brother ([RR]) go with the parents to make sure they did not fight again. The two boys were said to be in good spirits, playing video games together.

[125] The police officer who attended the scene, [name deleted], was called as a last-minute witness. He had not provided an affidavit, but his case summary report had been provided to the Court. [The Constable] attended the hearing by AVL.

[126] [The Constable] was concerned, given the level of argument which had resulted in a police call to the motel, that both boys were relaxed and calm. In his experience of dealing with family harm matters, he was under the impression the boys normalise such behaviour.

[127] [The Constable] did not go right inside the motel unit, but he was of the opinion children were living in the motel, due to children's items which he saw there and the fact there were mattresses on the floor in the lounge of the motel.

[128] As a result of the incident, [IT] was charged with assault on a person in a family relationship.

[129] [RH] says on that particular day [KR] and [RR] had gone to town on the bus with a cousin to go to the pictures. She did not know they were going to the motel and it was not with her approval that they went there.

[130] [RH] was cross examined quite extensively by Ms Souness as to whether or not the three children visited their parents at motels or stayed with them at motels. [RH]'s evidence was rather evasive on this point. At first she said the children did not stay with their parents and only saw them at her home. She then acknowledged the children had stayed with their parents on one occasion, in addition to the occasion attended by [the Constable].

[131] [RH] was also asked how, if the children went into town to go to the pictures, did they know where their parents were staying. The knowledge of this particular motel was emphasised because the parents have apparently been removed from three different motels. When it was put to [RH] the boys would know where to go because they regularly visit their parents at motels, her response was "maybe I've been there with them". When pressed, [RH] acknowledged contact did take place at the motel the parents were staying in.

[132] [RH] was, in my view, not forthcoming about the extent to which the children may have been seeing their parents. I believe it is highly likely they had seen their parents in motels, and stayed with them on more than the one additional occasion [RH] acknowledged.

[133] [A week later] a neighbour of [RH]'s contacted the police as a result of events said to have occurred at [RH]'s home. The neighbour had heard arguing and saw a female chasing a male down the road after a lot of arguing at the home.

[134] On attendance, the police were not able to locate either party, who the police understood to be [IT] and [AR]. [IT] had been arrested the week before on a charge of assaulting [AR] and had bail conditions not to associate with her.

[135] The police saw the [motor vehicle], which now had a smashed front and rear windscreen. The police spoke with [IT]'s mother, who said her son had telephoned her to say [AR] was smashing up the car.

[136] The police considered the damage could have been caused by an object such as an axe.

[137] The police were also contacted by an off-duty police officer who said he had also heard the couple arguing at [RH]'s address, both that day and every other day during the week. He saw a female chasing a male down the road and considered the female to be the aggressor.

[138] [RH] acknowledged the children living with her would have witnessed their parent's abuse as reported to the police.

[139] On [date deleted] 2019 the police received a call regarding an argument at an address other than that of [RH]. As police approached the address, [IT] ran from it and was arrested. [AR] then came out of the house and was swearing and belligerent towards the police. She refused to answer any questions, only saying she feared retribution from [IT]'s family. [IT] was arrested for breaching bail.

[140] Four of the family violence reports provided to the Court related to incidents involving [RH]'s daughter [RE] on the following dates:

(a) [In mid] 2019 – [RE], who the report noted was living with her parents, was reported to have got angry and started to demand to use her mother's phone. When her mother denied the use, [RE]'s anger level is said to have increased even more. She then started throwing items around the house, while yelling and screaming. The police were then called.

When the police arrived, [RE] was quiet in her room but on seeing the police began yelling, questioning why the police were called. Police

attempted to talk to [RE] but she continued to scream and not answer any question. [RE] tried to attack a person whose identity is redacted, but was pulled away by the police before an assault could take place. As police were handcuffing [RE] she started to kick the police. Her behaviour was still extreme as she was escorted to the police car. [RE] told the police she gets angry with her family as they pick on her.

[RH] had called the mental health line before police got there. Mental health staff spoke to [RE] at the police station. They assessed [RE]'s issues as behavioural. She was referred to Child and Adolescent Services.

The report notes that a child was witness to the incident but the name of the child is redacted.

(b) [A few days later] – It is not identified why the police were called, but as they arrived [RH] was about to leave in a car. She was described as being very short with the attending staff and said everything was alright and [RE] was okay. She said she did not want the police in her property. [RE] came out of the home and was very rude and belligerent.

Whilst the report was being written up outside the address, [RH] came out and told police [RE] had just tried to hang herself with a belt and she sought police assistance. [RE] was taken to [Hospital].

The report says it could not be identified whether children were in the property, as both parties refused to speak with police.

The police noted that they may need to "keep an ear out for this address as something may occur later."

(c) [In late] 2019 – It is reported that at that stage [RH], her husband, [RE] and [AR] are primarily at the address. It is noted [AR] is bailed to the

address and that [RE] is currently working with Mental Health Services.

An unspecified incident had occurred between [RE] and [AR]. When the police arrived only [RH] and [RE] were at home. [RE] had damaged a door and smashed a glass.

After talking with [RH] and [RE], police arranged additional appointments for [RE] with Mental Health Services so that she could be formally assessed.

The report noted [RH] was the victim in this instance.

The report recorded that whilst [AR] has two children aged seven and 11 residing at the property, they were noted to be not present at the time. [RH] advised police she believed the children are not subject to the episodes of violence "as they only happen when they are not around".

[RH] told police she was sick of [RE]'s behaviour and wanted her gone. She stated that [RE] "just loses it at time (sic)".

The police considered further support around the family working together was necessary "as it is clear mum is not being very supportive of [RE]."

(d) [Several weeks later] – Police were called following an argument between [RH] and [RE] over a pair of shoes, resulting in a heated verbal exchange. Neither party were forthcoming with information, stating it was an argument and there was no need for a police presence. It is not clear who called the police.

No children were noted to be present.

[141] [RH] says that [RE] no longer lives with her, although she acknowledges [RE] does visit frequently, every day if she could. [RE] has been prescribed medication which [RH] says has been beneficial in calming [RE] down.

[142] There were a number of other safety issues raised with regard to [RH]'s family. These include:

(a) When the first s 178 report writer, Ms Naughton, visited [RH], [KR] had his hand in a plaster cast, he having broken it when he punched a wall.

(b) [RH]'s [son] was at the time of Ms Naughton's visit in a mental health residence, having a history of mental health issues which are ongoing. He is now out of residence. [He] has a Youth Justice history.

(c) [RH]'s [daughter] had, at some stage following the three older children being placed with [RH], been asked to move out of the house by the children's social worker because of her violence towards the children.

(b) Events involving [AP]

[143] Three family violence reports were provided to the Court with regard to [AP].

[144] [AP] was previously in a relationship with [PK]. By 2017 they were living on and off at separate addresses.

[145] On [date deleted] 2017 [AP] was staying at her grandmother's address in [the village]. [PK] had also been living there, apparently having nowhere else to stay. There was a verbal argument between the parties and [PK] refused to leave the address when asked as he believed [AP] had his cell phone. On arrival the police located the cell phone in the address, returned it to [PK] and he left.

[146] No children were present.

[147] The relationship with [PK] has not resumed.

[148] On [date deleted] 2018 the police attended as a result of an argument between [AP]'s father and [PK], who [PK] was living with for a couple of months. [AP] was

spoken to by police at the door and was described as being “very blunt” stating the argument did not involve her but was between her father and [PK].

[149] On [date deleted] 2019 [AP] and her mother were staying with [AP]’s grandmother, taking care of the grandmother because she has dementia. [RT] was staying with his aunt in [a nearby suburb] at the time.

[150] [AP]’s [uncle] attended at the property and was abusive towards the grandmother. [AP] told [AW] to leave her grandmother alone, following which [AW] has punched [AP] in the face. Police were called.

[151] [AW] was described as aggressive and did not calm down. He carried on shouting at family members in the presence of police. He was taken into custody. A five-day police safety order was issued.

[152] [AP] was described as “good to deal with”. She was described as reasonably upset about the situation but did not wish to make a complaint, being more worried for her grandmother’s wellbeing.

[153] [A month later] [AP] and her mother were staying with her grandmother and caring for her. [AP’s uncle] has been there, “smacking” [AP] and being verbally abusive towards her grandmother. [AP] and her grandmother have locked themselves in the house to keep [AW] away.

[154] On arrival of the police [AW] was refusing to comply with police directions and was aggressive and impatient.

[155] [AP] advised the police that [AW] was “having a rant” at her grandmother and standing over her. [AP] was concerned [AW] was about to become physically violent and she stepped in to protect her grandmother, telling [AW] to leave her alone. She tried to take her grandmother from her home to the next-door property.

[156] [AW] has then punched out at [AP], knocking her over, causing an injury to her leg on the doorframe.

[157] In the course of the police attendance [AW] has accused "them at [deleted] of dealing meth from the house".[15]

[158] That part of the family violence report under the heading "Children" has been redacted. Given there is a redaction, I assume that either a child's name or children's names were included. It is not known who they are. [AP] says that [RT] has never seen violence in her whanau, thereby suggesting [RT] was not present during the incident.

[159] The police were called again at 10.30pm that day. [AW] had returned to retrieve property from the address and has argued with people there. He has then threatened and intimidated family members, causing [AP] to become scared for her safety. This was apparently the second occasion on which [AW] had returned to the property since a police safety order was issued.

[160] When police arrived, [AW] was described as volatile and aggressive, being upset about the entire situation and not believing he should have been removed from the home.

[161] A further police safety order was issued to cover other members of the family, including [AP].

[162] No children were noted to be present at the incident.

[163] [AP] states that [AW] now has help with the support of the whanau.

(c) Conclusions regarding safety in each home

[164] Whilst there have been events involving [AP], including her being assaulted by [AW], none of these occurred in the presence of [RT]. [AP] is no longer in a relationship with [PK]. I consider the risk of [RT] being exposed to family violence in [AP] home as being very low.

[165] The same cannot be said regarding [RH]'s home. The events [in early] 2019 are most concerning. [RH] described the events of that day as a "little incident".

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[15] Apart from this statement, there is no suggestion or evidence of drug use or drug dealing in the [P]'s household.

[166] I am of the view that the older siblings have had regular contact with their parents at motels in which they have been staying. Given the events the children had been exposed to which led to them being uplifted from their parents and placed in the care of [RH], I am concerned [RH] has not acted properly to protect the children from witnessing further family violence. This was certainly the case on [that date] for at least [KR] and [RR].

[167] The events [a week later] raise real concerns that [RT] could be exposed to ongoing family violence between his parents if he were living with [RH]. The evidence of the off-duty police officer who had heard the parents arguing at [RH]'s address every day that week is alarming.

[168] [RH] was cross-examined as to whether or not she had informed the social worker for the three older siblings that [AR] had smashed up the [car] outside her house. She responded that it might have slipped her mind to tell him and that she did not think he was aware of that. She also acknowledged she may not have told the social worker about the incident in the motel, about [IT] punching [AR] when she was driving the car nor about the family violence call outs relating to her home provided to the court. [RH] said she had a lot going on in her head and it may have slipped her mind. When it was put to her the reason these events had slipped her mind was because "stuff like this happens all the time" with the children being exposed to a lot of violence, she acknowledged they had been. [RH] struggled to understand how [RT] could be exposed to similar violence in her home.

[169] It was put to [RH] that if she had told the children's social worker about these events then he would not have supported them coming out of Oranga Tamariki custody and in to her care. She responded "Most probably not, but that wasn't a thought in my head at the time."

[170] The evidence of [the Constable] who attended the motel incident is a strong indicator that [KR], at least, normalises violence.

[171] In addition, there is ongoing concern about potential exposure of [RT] to incidents occurring between [RH] and [RE]. Whilst [RE] no longer lives with her mother, she does visit regularly.

[172] I also have concerns about the behaviour of [KR], in particular his history of anger and the serious offending for which he is now appearing before the Youth Court. Whilst [RH] may not be responsible for how [KR] now presents, he no doubt having been severely damaged by exposure to his parents' activities, I have concern regarding her ability to exercise reasonable parental control over him.

[173] [RH] acknowledged that [KR] is not used to being told "no" and was prone to act out his frustrations aggressively. She acknowledged that [KR] is "damaged", with the damage being ongoing. [KR]'s reluctance to accept direction was reflected in his refusal to attend counselling which had been arranged for him and the fact that he had not been attending education for some two years. His alleged criminal offending occurred when he left [RH]'s home in the middle of the night.

[174] [RH] said she wishes to have [KR] return to live in her home once his Youth Justice proceedings have been concluded. I accept [RH]'s evidence [KR] loves [RT] and there is probably little risk he would assault [RT]. However, I have significant concerns about [RT]'s exposure to [KR]'s behaviour and role modelling. [KR] turned [age and month deleted] and I consider it is highly likely the behaviours which he has exhibited over recent years will continue throughout his teenage years.

[175] My concern is compounded by [RH]'s failure to recognise the impact of the behaviour of those in her family on the children. She has allowed both of [RT]'s parents to argue and fight in an around her home to the extent the police have had to be called. She has allowed [IT] to see [AR] at her home when [IT] had bail conditions not to associate with [AR]. She was prepared to have [AR] bailed to her home, notwithstanding [AR]'s violent behaviour earlier in the year. When questioned regarding this, [RH]'s response was that [AR] is her daughter and she could not turn her away.

[176] Having had the various family violence reports referred to above put to her, [RH] accepted they recorded the events which had occurred. When specifically asked if "chaos and mayhem" of the type caused by [RE] presented any risk to [RT], [RH] answered "no". This answer was on the basis that [RE] was no longer behaving that way. [RH] acknowledged she could not guarantee [RE] would not behave the same way in the future. [RE] has continued access to the home.

[177] I agree with the submission of Mr Gallie on behalf of Oranga Tamariki when he said [RH]:

> …has, effectively, taken the position that her whanau takes precedence over the individual interests of [RT] and his right to not be exposed to violence in any form. These factors combined represent a significant risk to [RT].

[178] When dealing with the family violence issues the Courts recognise the best predictor of future behaviour is past behaviour.[16] The stated events which have occurred raise a considerable risk that [RT] could be exposed to significant family violence if he were to be living with [RH].

[179] I consider there are real care and protection concerns of harm to [RT] whilst spending time with [RH] or being in her care. There are no similar care and protection concerns if he continued in the care of [AP].

The need for a safe, stable and loving home

[180] The principle in s 5(1)(b)(iii) is best addressed by [RT] remaining in [AP]'s home. There are no issues of safety for him in the home. He has been there virtually since birth. There is no doubt that he is loved and cared for by [AP] and her whanau.

[181] I have already addressed the issues of safety in [RH]'s home.

[182] Apart from the issues of violence, there is no suggestion [RT] would not have a loving home if he were to live with [RH].

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[16] See for example *Surrey v Surrey* [2010] 2 NZLR 581 when considering the possibility of repeated domestic violence.

[183] The evidence of the psychologist, Mr Bowker, is that [RT] has a strong psychological attachment to [AP]. However, he also considers [RT] is developing an attachment relationship with [RH]. Mr Bowker was also of the view that, given an appropriate transition plan, [RT] could cope with moving into the care of [RH]. This would require overnight visits for 12 to 18 months combined with a more positive and trusting relationship among his caregivers. Even if that could be achieved, the principle of stability favours [RT] remaining in his current placement.

Mana tamaiti and the child's wellbeing should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whanau, hapū, iwi and family group – s 5 (1)(b)(iv)

[184] The concept of mana tamaiti and whakapapa require [RT] to be deeply involved with the [H] whanau, preferably living with them. He would be living on the whenua of his iwi, having regular contact with whanau, hapū and iwi and in particular would have the ability to have regular visits to [his Marae]. The significance of the marae in Maori culture has been described as:

> …the centre point of any Maori community – the embodiment of its values, its whakapapa, its great stories, its illustrious ancestors, its living and its dead. It is at once a cathedral, a Parliament, a university, a book and a monument. It represents all the great ideals of Te Ao Maori. It is the very epicentre of the kinship web.[17]

[185] [RT]'s cultural wellbeing would be at risk of further harm if he were to remain in the care of [AP] and his ability to maintain his relationship with his maternal and paternal whanau was restricted by [AP].

[186] It appears that rather late in these proceedings, and possibly as a result of Oranga Tamariki advising in early April 2020 that they no longer supported [RT]'s placement with her, [AP] has undertaken some research into her whakapapa. That strongly suggests she has a whakapapa link back to the same [Marae] to which [RT] has a whakapapa connection. [RH] acknowledged that [AP] has a whakapapa link back to [hapū deleted] pointing out that [AP]'s lineage and [RH]'s lineage are totally different. Notwithstanding [AP] may have such whakapapa connection, the fact

[17] Address of Justice Joe Williams to NZ Family Court Judges Triennial Conference.

remains [RT] does not have the whakapapa connection to [the Marae] through [AP]. He has that connection through his maternal whanau.

[187] In addition to many references in the OTA to family, whanau, hapū and iwi there is repeated reference to "family group", which is defined in s 2 as follows:

> **Family group**, in relation to a child or young person, means a family group, including an extended family,—
>
> (a) In which there is at least 1 adult member—
>
> (i) With whom the child or young person has a biological or legal relationship; or
>
> (ii) To whom the child or young person has a significant psychological attachment; or
>
> (b) That is the child's or young person's whanau or other culturally recognised family group:

[188] A child's "family group" is therefore not limited to a biological or legal relationship, but can include a relationship involving a significant psychological attachment.

[189] The reports of both psychologists engaged by the Court make it clear that [RT] has a strong psychological attachment to [AP]. That is not in dispute. As a result, [AP] and her family form part of [RT]'s family group.

[190] The s 2 definition includes a child's extended family that is the child's "other culturally recognised family group". Tikanga Maori is defined in the Act to mean Maori customary law and practices. The issue has arisen as to whether or not the practice of whāngai applies to [RT].

[191] [AP] has referred to herself as [RT]'s whāngai mother. As a result of Oranga Tamariki changing its view in early April 2020 regarding the placement of [RT] with [AP], she provided evidence from two witnesses regarding whāngai relationships which have occurred within her whanau.

[192] The first was [OM] who is [AP]'s uncle. He was brought up (or as described by him, "whāngai-ed") by his grandparents, who were [AP]'s great grandparents.

[OM] says there are a lot of whāngai relationships in their whanau. [AP]'s father was "whāngai-ed" by his grandmother. [AP] was largely "whāngai-ed" by her grandmother. [OM] and his partner have "whāngai-ed" a son, who is the son of one of his first cousins. That cousin had been "whāngai-ed" by his grandparents.

[193] [OM] gave evidence about how positive these whāngai relationships have been within his family, including his upbringing and the upbringing of his whāngai son. [OM] says he was fortunate to grow up in a home surrounded by te reo Maori, with a strong knowledge of and respect for tikanga Maori. He says [RT] will also grow up in that environment.

[194] [MW] also provided an affidavit in support of [AP]. When he was about six weeks old he was placed with his paternal grandparents in [the village] who (in his words) "whaangai-d" him as one of their own children. These were the grandparents who also "whāngai-d" [AP]. He and [AP] grew up as brother and sister. They had another [whāngai brother].

[195] [MW] attributes the very successful professional career he has had to his upbringing and the love and support he received from his family. He says he was taught never to forget who he is and where he comes from – his identity and his whakapapa. He says his upbringing was not totally limited to the immediate [W] whanau or his [village] whanau. Throughout his life he was always in touch with his biological whanau and was encouraged to do so. Whilst he does not live in the same area as them, he says that when he was old enough to understand, his [village] based whanau made sure he knew who he was and where he was from. He says the [village] whanau has always welcomed his biological whanau, not only at events but whenever they are passing through.

[196] Whāngai is a Maori customary practice where a child is raised by someone other than their birth parents, usually by a relative.[18]

[18] Basil Keane "Whāngai – customary fostering and adoption – The custom of whāngai" Te Ara – the encyclopaedia of New Zealand.

[197] Whāngai often involves placing a child with their grandparents, but it can also be another family member or someone unrelated. It can be a short term, long term or permanent arrangement. A child is never placed without discussion and never placed with people whom the whanau does not know.[19]

[198] Whāngai is intrinsically linked to whakapapa and whanaungatanga[20]. Belonging is of great significance, especially with whom the child is connected as knowledge of a child's own ancestral history and lineage is important in a child's sense of self.[21]

[199] Whāngai is informal. A whāngai placement is arranged directly between the birth parents and the matua whāngai - the parents who will raise the child.[22] A whāngai child usually knows their birth parents and has an ongoing relationship with them.

[200] Whilst [RT] was placed with [AP] as a result of a whanau hui, this was a placement in the context of a s 78 interim custody order earlier obtained by the Chief Executive. [RT] was not placed by way of a whāngai arrangement.

[201] Following doubts being raised as to whether [AW] was [RT]'s father and the obtaining of the DNA results suggesting [IT] is his father, [AR] has withdrawn her agreement to [RT] being in the care of [AP]. [AR] now wants [RT] to live with his siblings and maternal grandmother.

[202] I therefore do not accept there is a whāngai relationship which needs to be given recognition in terms of tikanga Maori. Even if it could be considered that the first placement of [RT] with [AP] was in accordance with such concept in the belief [RT] and [AP] were related, [AR] has now withdrawn her consent to that.

[203] Notwithstanding I do not consider there is such a relationship, that does not detract from the benefits, including tikanga benefits, which [RT] may derive from living with [AP] and her wider whanau as if he were in a whāngai placement.

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[19] Mētara Kāwharu and Erica Newman "Whakapaparanga: social structure, leadership and whāngai" in *Michael Reilly and Others* "Te Ko parapara – an introduction to the Maori world" 48 at [61]
[20] Kāwharu and Newman above, N 15 at [60]
[21] At [60]
[22] *Nikau v Nikau* [2018] NZHC at [21]

[204] Whilst there may not be a whāngai relationship, [AP] and her whanau clearly are a "family group" for [RT] as defined in the OTA.

[205] A factor which needs to be considered is the cultural harm which might be occasioned to [RT] if he were to remain in [AP]'s care and she were to obstruct or restrict [RT]'s contact with his biological whanau, including his siblings. This requires an analysis of the allegations of obstructiveness on the part of [AP] to allowing contact to take place and an assessment of the actual contact which has taken place between [RT] and [RH] and her whanau.

[206] Following his placement with [AP] in December 2016 there appears to have been little contact between [RT] and his siblings and [RH] for some six months. It is not immediately apparent why this did not take place, but as [RT] was in the custody of the Chief Executive it would have been for Oranga Tamariki to make any access arrangements.

[207] Contact by way of AVL took place in around May 2017, which was followed by face to face contact with [RH] and her family at the Family Group Conference held in June 2017. [RH] states that multiple attempts to organise contact through Oranga Tamariki were unsuccessful and she was upset that Oranga Tamariki had allowed this situation to develop.

[208] As a result, the first time there was face to face contact after [RT] had moved into [AP]'s care in late 2016 was not until June 2017.

[209] Following the Family Group Conference, steps were taken to arrange for DNA testing to be undertaken. This occurred the following month, with the results becoming available in August 2017. Oranga Tamariki took no steps during this time to put in place any face to face contact between [RT] and his siblings or maternal whanau.

[210] A further Family Group Conference was held on 15 September 2017 to consider the results of the DNA testing. Agreement could not be reached regarding the care of [RT].

[211] Having regard to the DNA test results Oranga Tamariki decided to transition [RT] into the care of [RH] by way of the plan referred to in [19] above. [RT] was then 10 months old, had been in [AP]'s care for nine months and had not seen his siblings or [RH] for 99 days as a result of Oranga Tamariki not organising contact.

[212] This resulted in [RT] spending time with [RH] and her family members from 10.00am until 3.00pm on the following Monday through Friday and overnight with the [H] whanau on the Saturday night.

[213] The transition plan commenced on the Monday with [RT] being picked up and spending the day with [RH] and her whanau. Whilst [AP] was concerned this was causing trauma and distress to [RT], the evidence of the social workers is that [RT] appeared to be settled during his days with [RH].

[214] [AP] was concerned that the transition of [RT] was taking place too quickly, was upsetting for him and was not in his welfare and best interests given the attachment she says he had formed with her. [AP] therefore applied to the Court for an injunction to stop the transition as described in [21] above. I accept that in the circumstances which then existed it was appropriate for [AP] to take that step. While the Court did not grant the injunction sought, it invited the Chief Executive to defer taking any steps to relocate [RT]. Both psychologists subsequently appointed by the Court to report under s 178 OTA considered the haste involved in the relocation plan to not be in [RT]'s best interests.

[215] As a result of the applications made by [AP], Oranga Tamariki decided the transition would not be continued after the overnight stay on the Saturday.

[216] Contact next occurred by AVL on 12 October 2017, during which arrangements were made for contact to take place in [the third location] on [RT]'s birthday on [date deleted].

[217] [RH] and her whanau travelled to [the third location] and had [RT] for an overnight stay before his birthday the following day.

[218] The next arrangement for contact was on 26 January 2018, [over 50] days after [RT]'s birthday. This was a significant contact visit for [RH] and her whanau, because [AP] and her whanau took [RT] to [the second location] for contact. It was, as [RH] described, the first time [RT] "…had stepped foot in our home and his whenua and tūrangawaewae."

[219] Contact next took place on 16 March 2018, again in [the second location]. It was during this visit that the s 178 report writer, Kath Naughton, observed [RT] with his siblings and maternal whanau.

[220] The next contact occurred on the weekend of 30 March/1 April. Changeover took place in [the fourth location], with both whanau travelling there from their respective homes. On 1 April [RT] was taken by [RH] to [the location] to visit his marae and to meet his tupuna. [RH] described that visit in the following way:

> Words cannot express how special this moment was for everyone and for [RT] to finally stand on his true whenua and experience some of the whanau values of tikanga, whakapapa and whanau kotahitanga.

[221] The parties met again the following day in [the fourth location] for [RT]'s return to [the third location].

[222] A further contact visit was arranged for 13 April 2018. Whilst travelling to [the fourth location] for the changeover, [RH] received a phone call from the social worker then involved for [RT], Ms Hori, to say that contact had been put on hold due to what was contained in the s 178 report. This was a decision taken by Oranga Tamariki.

[223] Whilst the September 2017 transition plan had been abandoned, it was the intention of Oranga Tamariki up until the time it received the s 178 report that [RT] would still transition to live with his siblings and [RH] in [the second location]. Following the receipt of the s 178 report, Oranga Tamariki took the view [RT] should remain in [the third location] with [AP], but continue to have ongoing contact with his [the second location] whanau.

[224] A meeting held in May 2018 (which [RH], her lawyer and the social worker for the children in [the second location] attended by AVL) reached agreement regarding contact by way of Facebook Messenger on Wednesdays and Sundays. It was also agreed that face to face contact would take place on a monthly basis, with visits alternating between [the second location] and [the third location]. In each place the visit would be on Friday afternoon, Saturday morning and Sunday morning.

[225] The first of this monthly contact took place on 8, 9 and 10 June in [the third location]. That was followed by contact in [the second location] on 13, 14 and 15 July, with [AP] and her whanau taking [RT] there for contact.

[226] Visits did not always take place on this agreed basis and it is not precisely clear why this was the case. [RT] did not have a social worker acting for him from around May 2019 until November 2019, which no doubt did not assist in ensuring that contact visits were arranged and took place during that period. This lack of social work support was demonstrated in or around September 2019 when [AP] arranged time off work to take [RT] to [the second location], but was not advised until the day before it was to take place that the visit had been cancelled because it did not suit [RH]. [AP] was told a meeting would be held to organise new dates, but she heard nothing further until Ms Olsen was appointed as [RT]'s social worker.

[227] Following Ms Olsen's appointment as [RT]'s social worker, the monthly alternating contact visits have resumed on a regular basis, although the contact planned for January 2020 could not take place as Oranga Tamariki had not booked motel accommodation for the [H] whanau to stay in when they travelled to [the third location]. This was replaced with contact which took place in [the third location] over 7, 8 and 9 February 2020. The contact visit proposed for March 2020 had to be cancelled due to the Covid 19 Level 4 lockdown.

[228] The evidence of the social worker primarily involved with [RT] in the earlier days, Ms Thatcher-Wharehinga, and the social worker most recently involved, Ms Olsen, is that they considered [AP] to be difficult and obstructive in putting in place contact arrangements between [RT] and the [H] whanau.

[229] From about May 2017, when Ms Thatcher-Wharehinga was involved, doubts had been expressed as to [AW] being [RT]'s father. Thereafter there was always the possibility he may not have been [RT]'s father, with the consequent outcome that [RT] would be removed from [AP]'s care, she not being whanau. This came to fruition following the first DNA test results being received and by implementation of the transition plan prepared by Ms Thatcher-Wharehinga.

[230] Ms Hori swore an affidavit in the proceedings, but was unable to attend at the hearing to be cross examined on her affidavit due to health reasons. However, it appears to be common ground that she was supportive of [RT] being in the care of [AP] following receipt of the s 178 report, and was the one who called a halt to the transition plan. Consequently, there appears to have been a good relationship between Ms Hori and [AP]. There was no suggestion by Ms Hori of any difficulty on the part of [AP] with regard to contact during that time.

[231] [AP] acknowledges she could have been seen to be behaving obstructively. It was [AP] who suggested that [EK] should undertake DNA testing in order to establish a biological relationship with [AW]. When the DNA test results did not show that [RT] and [EK] shared the same father, it was [AP] who then suggested that [EK] may not be a child of [AW]. [AP] called into question the right of [AR] to be making decisions regarding immunisation for [RT] at a time when [AR] was in prison. [AP] continued to stress the strength of her relationship with [RT] over and above his whanau relationship, even when DNA testing ascertained [IT] was most likely his father.

[232] [AP] believes she had justifiable reasons for behaving in a way that could have been seen as obstructive. Having been asked to care for [RT] at a very young age and having formed a strong bond with him, there was no certainty [RT] would remain in her care following the family group conference in June 2017. She says she has felt most comfortable supporting maternal contact at the times Oranga Tamariki supported [RT] remaining in her care. These responses from [AP] are understandable given the time [RT] had been in her care and, as a result, was securely attached to her and seeing her as his primary attachment.

[233] There has also been criticism of [AP] with regard to some of the contact visits. This has included criticism of being one and half hours late in getting [RT] to [the second location] for one of the weekend contact visits. [AP] says that this was due in part to traffic and weather conditions, which is supported by evidence given by Ms Hori who also travelled to [the second location] that weekend.

[234] There was also criticism that [AP];

(a) was ten minutes late attending at the changeover on one occasion in [the fourth location],

(b) was late for one of the changeovers in [the third location], and

(c) took three trips getting [RT], his bags and car seat from her car parked along the street from the Oranga Tamariki building in [the second location], up to the Oranga Tamariki office on the 5th floor of the building.

[235] I consider those criticisms to be inconsequential having regard to the fact that both [AP] and her [mother] have taken time off work on various Fridays in order to take [RT] to [the second location] for contact or to [the fourth location] for contact changeovers. On the weekend Ms Naughton saw [RT] with his siblings and [RH], [AP] drove to [the second location] to drop [RT] off, returning to [the third location] that same day. She drove back to [the second location] at the end of the visit to collect him, returning to [the third location] the same day. The time delays complained of are not, in my view, indicative of an obstruction of contact. If that had been [AP]'s intention, then that would most likely have been achieved by her refusing to even transport [RT] for contact, leaving it to social workers to do so. [AP] has also turned up early for contact.

[236] There has also been criticism of non-physical contact such as Facetime not taking place as regularly as it should have. A summary of both physical and non-physical contact visits which should have taken place since the beginning of September 2019 was annexed to the latest affidavit from [RH]. That suggests that

over 50 percent of the contact did not occur due to what are said to be failures on the part of [AP]. It is accepted that some of the contact calls did not take place for genuine reasons, including [RH] not being available when [AP] tried to call her.

[237] There has been a significant breakdown in the relationship between [RH] and [AP]. [RH] has seen [AP] as being difficult and obstructive as far as contact is concerned. She believes [AP] has placed her own relationship with [RT] ahead of his biological relationship with his siblings, [RH] and her whanau and ahead of his whakapapa, which is [the same as RH's].

[238] I accept [AP]'s statement, and the opinion of Mr Bowker that the stress and uncertainty of outcome in these proceedings has not been conducive to ensuring seamless cooperation between the two families in ensuring contact takes place. This aspect was also commented on by Ms Naughton in her s 178 report. Whilst concluding that [RT] remaining with [AP] would be the least disruptive option for him, Ms Naughton considered there should be an access plan acceptable to both families "so that [AP] could change her behaviour from fear and sabotage to trust and cooperation."

[239] There is, the unknown of how [AP] would foster [RT]'s whakapapa if he were to remain in her care. She has ensured he knows his pepeha and it has been provided to his Kohanga reo. Both [OM] and [MW] spoke positively of knowing their whakapapa notwithstanding they were in a whangai relationship. Those people who cared for them will not be responsible for the day to day care of [RT] but some of them would continue to have involvement in his life.

[240] There is still some uncertainty as to how [AP] might foster [RT]'s relationship with his whanau, hapū and iwi. Even if she were to be fully cooperative there will be cultural harm for [RT] if he were to live with [AP] and not with the [H] whanau.

[241] The reference to whakapapa places particular importance on relationships through matua (parents) and tupuna (ancestors) from whom the child descends. Even although neither of [RT]'s parents are available to care for him, the principle in s 5 (1)(b)(iv) strongly favours placement of [RT] with his maternal grandmother and three of his four siblings over placement with [AP]. Any cultural harm for [RT] which could

arise from [RT] not living with matua would be minimised or eliminated by being in the care of [RH] and her family.

[242] The emphasis on mana tamaiti, whakapapa and whanaungatanga are repeated and strengthened in the principle set out in s 5 (1)(c) that the child's place within their whanau, hapū, iwi and family group should be recognised and respected, primary responsibility for caring for and nurturing the wellbeing and development of the child lying with the family, whanau, hapū, iwi and family group and that the effect of any decision on the child's relationship and their links to whakapapa should be considered.

A holistic approach is to be taken

[243] Section 5(1)(b)(vi) requires the Court to take a holistic approach which sees the child as a whole person. Such approach includes, but is not limited to considering the child's developmental potential, education and health needs, whakapapa, cultural identity, gender identity, sexual orientation, disability (if any) and age. Those items which are relevant to [RT] have been addressed in the above discussion.

Section 13 OTA principles

[244] Those principles contained in s 13 which have relevance to [RT] have been addressed in the above discussion apart from two, being the principles set out in s 13 (2)(g) and (h).

[245] The principle in s 13(2)(g) is that:

> A child…should be removed from the care of the member or members of the child's…family, hapū, iwi, or family group who are the child's…usual caregivers only if there is a serious risk of harm to the child.

[246] On the face of it, this principle suggests [RT] should only be removed from [AP]'s care if there is a serious risk of harm to him remaining in her care. I accept the submission of Mr Neimand, counsel for [RH], that if a child is removed from the care of his parent and placed with a non-kin caregiver then, even if the child forms an attachment with their caregiver, s 13(2)(g) does not restrict the return of the child to

the parents to only occurring if there were a serious risk of harm in leaving the child with the caregiver.

[247] I consider the reference to "usual caregivers" to be those who have had the care of the child prior to any need to engage the provisions of the OTA, rather than a reference to caregivers pursuant to an order under the OTA. There may, in some circumstances, need to be a weighing up of the competing factors of return to a family member at the expense of breaking a significant psychological attachment after a long period of time with a caregiver. However, in general circumstance, I expect it would be understood by all that if, in due course, the circumstances which led to a child being removed from family and placed with caregivers have been properly addressed, the child should return to family even if there is no risk of serious harm to the child in continuing to live with the caregivers.

[248] Even though there is no risk of serious harm to [RT] in continuing to live with [AP], I do not consider that s 13(2)(g) amounts to a prohibition on his removal and placement elsewhere if other considerations require that. Section 13(2)(g) applies to circumstances such as those which existed when the Chief Executive obtained the original s 78 order, requiring [RT]'s uplift from his mother's care.

[249] The principle in s 13(2)(h) is that if a child is removed in circumstances described in s 13(2)(g) then the child should, wherever that is possible and consistent with the child's best interests, be returned to those members of the child's family who are the child's usual caregivers. [AR], from whom [RT] was uplifted at birth, has never been his usual caregiver. There is no prospect of his return to her care in accordance with the principle in s 13(2)(h).

Section 5 COCA principles

[250] The principle in s 5(a) that a child's safety must be protected and, in particular be protected from all forms of family violence favours [RT] remaining in [AP] care.

[251] The principle in s 5(b) that a child's care, development and upbringing should be primarily the responsibility of his or her parents and guardians does not apply in

this case. Both parents are presently in prison. Neither parent is realistically seen as having the capacity to have the responsibility for the care development and upbringing of [RT].

[252] The principle in s 5(c) is that a child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians and any other person having a role in his or her care under a parenting or guardianship order.

[253] As [RT]'s parents will not be involved in his ongoing day to day care, the issue of co-operation and consultation has to be addressed as between [RH] and [AP]. I have detailed the criticism made of [AP] by two of the social workers and by [RH]. Whilst [AP] has not been as co-operative as she may have been, this lack of co-operation developed after she had been caring for [RT] for some months, had developed a strong bond with him and then saw his placement with her being at risk. The fact that [AP] has taken significant periods of time off work to transport [RT] to both [the second location] and [the fourth location] for contact displays a significant level of commitment to co-operation with [RH].

[254] Notwithstanding there has been the tension of ongoing proceedings, I detected a wish on the part of both [AP] and [RH] to put the differences which have arisen throughout these proceedings behind them and work together for the promotion of [RT]'s wellbeing and best interests.

[255] I hold reasonable confidence that once these proceedings have been resolved with the making of final orders, the stress and tension between the primary parties will be significantly reduced and hopefully removed.

[256] The principle in s 5(c) is, in my view, neutral.

[257] The principle in s 5(d) that a child should have continuity in his or her care, development and upbringing favours [RT] remaining in the care of [AP]. He has been in her care for all but four weeks of his life. He has a strong psychological connection to her.

[258] The principle in 5(e) is that a child should continue to have a relationship with both of his parents and that a child's relationship with his family group, whanau, hapū, or iwi should be preserved and strengthened.

[259] [RT]'s ability to have a relationship with both of his parents will be enhanced by him being in the care of [RH], recognising that the extent of that relationship will need to be restricted because of the risk both his parents pose to him.

[260] Most of [RT]'s family is in [the second location]. His three siblings live there. Both sets of grandparents live there. It is highly likely his parents could return to live in that area once released from prison. [RT]'s iwi is [the same as RH's]. His marae is [the same as RH's].

[261] Whilst [RT]'s "family group" also includes [AP] and her family as a result of the psychological connection he has with them, the principle in s 5(e) strongly favours [RT] being in the care of [RH].

[262] The principle in s 5(f) is that a child's identity, including his culture and language, should be preserved and strengthened. I have no doubt that [RT]'s exposure to Māori culture will be preserved and strengthened if he were to continue to live with [AP]. The evidence from her, her mother, [OM] and [MW] satisfy me that [RT] would have significant exposure to tikanga māori and te reo.

[263] Enquiries by [AP] and her whanau, which are continuing, show there are whakapapa links shared by [RT] and [AP]. [RT]'s [iwi] connections are supported by [AP] and her whanau and by [RT]'s kohanga reo.

[264] However, [RT]'s identity as stressed in the concepts of mana tamaiti, whakapapa and whanaungatanga set out in the OTA strongly support [RT] being in the care of [RH] and having the benefit of living on his whenua, within his iwi.

Submission of the parties on OTA orders following the hearing

[265] Both [AP] and the most recently appointed social worker for [RT], Ms Olsen, acknowledged in the course of the hearing that their relationship could have

commenced "on the wrong foot". Ms Olsen initially held the view that [AP] was being hostile. However, when cross-examined she was not able to point to any messages, emails or case notes that would support such a perception. Ms Olsen had suggested that text messages from [AP] had not demonstrated cooperation. She was granted leave to refer to her cell phone whilst giving evidence. On going through each of the text messages, they all demonstrated a positive and cooperative approach by [AP].

[266] In the course of Ms Olsen and [AP] giving their evidence they both recognised there had been misunderstandings in their perceptions of each other. Ms Olsen acknowledged she could have been more constructive in dealing with [AP] regarding [RT]. They both committed in the course of giving their evidence to working together better. I consider, as a result of the greater understanding that each has of the other having heard each other's evidence, the relationship is likely to improve significantly. This will be enhanced by the fact that Oranga Tamariki now support [RT] remaining in the care of [AP].

[267] There was a recognition in the course of the hearing that the perceived obstructive and challenging behaviour on the part of [AP] may have been as a result of breakdowns in communication at key points on the part of the social workers involved. What appeared to be insurmountable difficulties between the social workers and [AP] are no longer seen that way.

[268] As I have set out above, the Chief Executive's view as to where [RT] should live changed around a month before the hearing was to begin, from supporting placement with [AP] to supporting placement with [RH]. However, in submissions filed following the hearing, the Chief Executive's position changed once again. The Chief Executive now supports [RT] remaining in the care of [AP], having regard to:

(a) The evidence which emerged in the course of the hearing in relation to the risk of [RT] being exposed to family harm if he is in the care of [RH].

(b) The identification of whakapapa links shared by [RT] and [AP].

(c) [AP] acknowledging the importance of fostering [RT]'s whakapapa connections with the [H] whanau.

(d) [AP] and [RH] acknowledging a desire to work towards a conciliation of their differences and for the better promotion of [RT]'s wellbeing and best interests.

[269] The Ministry therefore supports [RT]'s continued placement with [AP]. However, permanency is not supported at this stage. The Ministry wishes to monitor the acknowledgements and undertakings of [AP] and her whanau about developing access between [RT] and his whakapapa whanau. The Ministry proposes this be reflected in a s 101 custody order in favour of the Chief Executive, appointment of the Chief Executive as an additional guardian for all purposes and an access order providing for access between [RT] and his maternal whanau. The Ministry wishes to undertake a safety/risk assessment before any contact occurs in [the second location] and, if required, a safety plan implemented.

[270] The Chief Executive does not currently seek a 101 additional guardianship order in favour of [AP]. The Chief Executive would be prepared to reconsider such appointment if [AP] is able to demonstrate that she can work towards the goal of ensuring regular contact between [RT] and his maternal whanau.

[271] [AP] seeks a discharge of the s 78 order and an order under COCA as opposed to a s 101 OTA order which would carry with it a sense of temporary placement, being reviewable every six months.

[272] [RH] proposes a discharge of the s 78 OTA order and a parenting order being made in her favour. As an alternative, it is submitted a s 101 custody order could be made in favour of the Chief Executive with a plan for transition of [RT] into the care of his maternal whanau, to be replaced in due course by a parenting order under the COCA.

[273] Counsel for [RT], Ms Carroll, proposes that [RT] remain in [AP] care, but in the context of a s 101 custody order in favour of the Chief Executive. Ms Carroll

refers to Mr Bowker's comments that the decision about whether [RT] should move to live with his grandmother is delayed until [RT] is old enough to communicate about the process, which could be anywhere between the ages of five to ten years. However, Ms Carroll goes on to say that [RT] also needs certainty of placement in the interim, with that being achieved by the s 101 order and an additional guardianship order under s 110 in favour of [AP].

Should all orders under the OTA be discharged?

[274] I have referred to the three-tier test which applies when the Court is asked to discharge orders under the OTA.[23]

Are there still care and protection concerns for [RT]?

[275] I have already set out the original care and protection concerns which led to these proceedings being filed[24].

[276] The evidence above clearly establishes that there are still care and protection concerns with regard to [RT]'s parents, namely:

(a) Ongoing family violence as evidenced by events [three separate dates in early 2019],

(b) [IT] being charged with assaulting [AR],

(c) Non-engagement of the parents in the current Court proceedings,

(d) The fact that both of [RT]'s parents are in prison.

[277] Oranga Tamariki hold no concerns regarding the care [RT] is receiving from [AP] and hold no safety concerns about him in her care. The Court shares that view.

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[23] [58] above.
[24] At [2] and [4] above.

[278] There are clearly identified concerns for [RT]'s safety if he was in [RH]'s care.

[279] There is ongoing cultural harm for [RT] as a result of him living with [AP] and not with his whanau, in his hapū and iwi. That cultural harm can be reduced by having appropriate ongoing contact with his whanau. [AP] has given a commitment to access arrangements working better in the future than they have in the past and to maintaining [RT]'s whakapapa.

[280] That commitment needs to be put to the test if [RT] is to remain in [AP]'s care. If it is not maintained the risk of cultural harm to [RT] by not upholding his mana tamaiti will be exacerbated.

[281] Consequently there are ongoing care and protection concerns for [RT] in his current situation and his proposed situation with [RH].

[282] In order to assess the consequences for [RT] if protective orders are no longer in place, I need to give consideration to what might be appropriate orders under the COCA and whether or not they would be sufficient to be protective of [RT].

What orders will best address the care and protection concerns for [RT]?

[283] The care and protection concerns for [RT] which remain relate to safety if he were to be in the care of [RH] and relate to ensuring his whakapapa connections are maintained and strengthened if he were to be in the care of [AP].

[284] Whilst [RT]'s mana tamaiti and the recognition of his whakapapa and the whanaungatanga responsibilities of his family strongly mandate [RT] being placed with [RH], both Justice Williams and Judge Otene recognised such principles can be subject to an overriding obligation to ensure that [RT] is not exposed to a situation where he may suffer or is likely to suffer harm. The serious safety concerns that I have covered with regard to [RH]'s home outweigh the importance of placing [RT] there to maintain and strengthen his whakapapa connections. Whilst placement of [RT] with [AP] is not the optimal placement to ensure he can strengthen his whakapapa

connections, I take significant comfort from the fact he will be in an environment where tikanga Maori features strongly in daily life as demonstrated by the evidence of [OM] and [MW] and the significant involvement [AP]'s whanau has had in establishing the Kohanga reo which [RT] attends. There is also the connection that [RT] will have through [AP] to [his marae], although that is not by way of his whakapapa. [RT]'s placement with the [P] whanau is the best placement which could be found for [RT] that is a non-kin placement.

[285] I therefore determine that [RT] should remain in [AP]'s care.

[286] The safety concerns in [RH]'s home can be addressed by making a parenting order under the COCA in favour of [AP], with contact provisions which ensure safe contact between [RT] and his siblings, his parents and the [H] whanau.

[287] The concerns regarding maintaining and strengthening [RT]'s whakapapa can be addressed by way of an appropriate contact regime being in place to ensure regular contact with those in his whenua.

[288] Having regard to the difficulties which have arisen in organising access in the past, which has been due to a multitude of factors, and having regard to the risk factors which need to be addressed in [the second location], I am not satisfied that the care and protection concerns for [RT] can be adequately addressed at this stage without orders under the OTA. As there cannot be concurrent parenting and OTA orders[25], it will be necessary in the first instance to have a s 101 custody order in place under the OTA. That order could be made in favour of [AP]. If such order were made and there were no access order in favour of [RH], then [AP] would have the sole authority to decide whether, and on what terms and conditions, [RH] was to have access to [RT].

[289] Having regard to the history of organising access and the fact that at this stage a risk assessment needs to be undertaken to determine an appropriate form of access, I believe matters should be dealt with in the first instance by the making of a s 101 custody order in favour of the Chief Executive. That will be on condition:

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[25] See [83] and [84] above.

(a) [RT] continues to be placed with [AP], and

(b) An appropriate and safe access regime is developed, resourced, and implemented by Oranga Tamariki.

[290] Such order will enable an appropriate structure to be put in place, which I envisage should be well established and operating within three to four months such that there are no longer any care and protection concerns surrounding [RT] and no need for ongoing involvement by Oranga Tamariki. I envisage a review of the s 101 order around that time, in the expectation it can be discharged and replaced with a parenting order under COCA providing for [AP] to have day to day care of [RT] and including contact orders reflecting an access regime which is by then up and running.

[291] Both [RT]'s parents have shown little interest in him since his birth and are in prison. There are no effective guardians available to make decisions for [RT]. Whilst the obvious person to be making such decisions is [AP], s 120 OTA provides that if a child is subject to an order under s 101 of the Act, a guardianship order may not be made under COCA.

[292] There is no such restriction on appointing [AP] as an additional guardian under s 110 OTA. One of the applications made by the Chief Executive is to appoint the Chief Executive and [AP] as additional guardians. Final submissions on behalf of the Chief Executive seek only appointment of the Chief Executive as an additional guardian. Submissions on behalf of Ms Carroll seek an additional guardianship order in favour of [AP] to not only participate in decision making for [RT], but also to encourage her to engage with [AR] to ensure that consent is obtained on any guardianship decisions. Ms Carroll goes on to submit that if the Court is concerned [AP] might not consult with [AR], an additional guardianship order could be made in favour of the Chief Executive to ensure such consultation does occur.

[293] Given the breakdown in family relationships, I consider it would be appropriate to have the Chief Executive involved to ensure that appropriate consultation does take place to the extent that [RT]'s parents demonstrate any willingness to be involved in such decisions.

[294] Consequently, I consider it appropriate to appoint both [AP] and the Chief Executive as additional guardians of [RT] for the duration of the s 101. Once the s 101 order is discharged, it would be appropriate for the OTA guardianship orders to be discharged and for [AP] to be appointed as an additional guardian of [RT] under COCA.

[295] Before the Court can make an order under s 101 OTA it is required pursuant to s 128 to obtain and consider a plan prepared in accordance with ss 129 and 130. The Court has been provided with a plan dated 20 April 2020. That plan contemplated [RT] having contact with his siblings three times every eight weeks, with one of those contact visits occurring in [the second location] and two occurring in [the third location]. That plan was considered against Oranga Tamariki's view that [RT] would eventually transition into the care of [RH]. It was also made without the benefit of the evidence given in the hearing highlighting safety issues in [RH]'s home. A new plan will be required to address the issues of safety during access and to reflect an appropriate contact regime, recognising [RT] will not be transitioning to [RH]'s care but will remain in the care of [AP]. The contact will need to be sufficiently regular to ensure [RT]'s whakapapa relationships are maintained and strengthened.

Orders and directions.

[296] I make the following directions and orders:

(a) The current s 78 order is to continue.

(b) [AP] and the Chief Executive of Oranga Tamariki are appointed as additional guardians of [RT] pursuant to s 110 OTA.

(c) The Chief Executive is to file an amended plan within 21 days of release of this judgment which is to incorporate the details of a risk assessment of [RH]'s home and the proposals for contact between [RT] and his siblings, his parents (when released from prison) and [RH].

(d) Upon receipt of the updated plan, the file is to be referred to me in chambers for consideration of it and, if appropriate, to then discharge the s 78 order and make a s 101 custody order in favour of the Chief Executive, to be reviewed 3 months after the making of such order.

(e) [RH]'s applications under COCA for day to day care and to be appointed as an additional guardian of [RT] are dismissed.

(f) [AP]'s applications under COCA for a parenting order for day to day care and to be appointed as an additional guardian of [RT] are adjourned to case management review to be considered alongside the review proposed of the s 101 order.

(g) [AP]'s application to discontinue the applications under COCA was not pursued and is now dismissed.

M A Courtney
Family Court Judge