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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2017-070-000208
[2024] NZFC 15117

IN THE MATTER OF	THE ORANGA TAMARIKI ACT 1989
BETWEEN	[MATTHEW REGAL] Applicant
AND	ORANGA TAMARIKI – MINISTRY FOR CHILDREN First Respondent
AND	[EDWIN DAVIS] [BETH DAVIS] Second Respondents
AND	[LISA REGAL] Third Respondent
AND	[ANNE REGAL] Born on [date deleted] 2017 Child or Young Person the application is about

Hearing: 8 October 2024

Appearances: H Senior for the Applicant
A Gray for the First Respondent
E Ross for the Second Respondents
No appearance by or for the Third Respondent
M McCarty as Lawyer for the Child

Judgment: 25 November 2024

RESERVED DECISION OF JUDGE L de JONG
[OTA: application to vary special guardianship order]

Introduction

[1] On 8 October 2024 I presided over a submissions hearing about [Anne Regal] born [date deleted] 2017. [Anne] is the subject of a special guardianship order under the Oranga Tamariki Act 1989 ("OTA") and her father wants this order changed. He needs the Court's permission to do this.

[2] Under the current Court order [Anne]'s father is allowed supervised access every three months. He wants more frequent access with a view to monthly access. [Anne]'s caregivers are opposed to the application to increase access.

What is the relevant background?

[3] [Anne] is the only child of Mr & Mrs [Regal]'s 10 year relationship that ended on 24 March 2020.

[4] [Anne] was originally the subject of a without notice interim custody order made under s 78 of the OTA on 19 April 2017 when she was also placed in the care of Mr & Mrs [Davis]. They remain [Anne]'s caregivers. No agreement was reached about [Anne] at an FGC on 14 June 2017.

[5] A psychological assessment was obtained under s 178 of the OTA dated 17 November 2017. In general terms Ms Lightfoot's psychological opinion was that Mr & Mrs [Regal] "did on occasion acknowledge the challenges they would face in parenting [Anne], they were more likely to suggest [Oranga Tamariki] staff had intervened against God's will, than to identify anything they could change to meet [Oranga Tamariki] concerns."[1]

[1] Paragraph 7.13 of s 178 report.

[6] In Ms Lightfoot's opinion "there were significant limitations on Mrs [Regal]'s current capacity to parent a child by herself. Furthermore I consider there would be considerable risk for [Anne], if Mrs [Regal] undertook her sole care."[2] Mrs [Regal] was assessed to "meet the criteria for Asperger's syndrome, with a level 2 severity (requires substantial support)."[3]

[7] In Ms Lightfoot's opinion Mr [Regal] "appeared reasonably adept with [Anne], although somewhat lacking confidence."[4] Mr [Regal] was loyal to his wife, and protective of her, to the extent that he was unrealistic about her parenting ability. He "fluctuated in his ability to acknowledge"[5] Oranga Tamariki concerns and both parents "were frequently defensive and dismissive of concerns." In Ms Lightfoot's opinion Mr [Regal] "could quite quickly adopt a position that he was being wronged."[6] He was found to have "strong religious beliefs, and these influence how he views the matter of [Oranga Tamariki] intervention."[7]

[8] It was Ms Lightfoot's assessment that Mr [Regal] "would have reasonable capacity to parent a child by himself if he was prepared to:[1] learn more from attending a parenting programme, [2] accept [Oranga Tamariki] concerns and put aside his defensive reactions to these issues, and [3] accept the need to engage with professionals, and take their advice."[8]

[9] Neither parent was found to have a "significant attachment"[9] with [Anne].

[10] A declaration was made on 27 March 2018 that [Anne] was a child in need of care and protection on the grounds set out in s14(1)(a), (b) & (f). On 18 September 2018 the Chief Executive of Oranga Tamariki was granted a custody order under s 101 and appointed an additional guardian under s110(1)(a) & (2)(b).

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[2] Paragraph 7.15 of s178 report.
[3] Paragraph 8.4 of s178 report.
[4] Paragraph 7.18 of s 178 report.
[5] Paragraph 7.22 of the s178 report.
[6] Paragraph 7.23 of s178 report.
[7] Paragraph 7.24 of s178 report.
[8] Paragraph 7.29 of s178 report.
[9] Paragraph 11.2 of s178 report.

[11] On 5 August 2019 Judge Cook discharged all orders in favour of the Chief Executive and made orders appointing Mr & Mrs [Davis] as additional guardians under s110(1)(e) & (2)(b) of the OTA and appointed them special guardians under ss110(4) & 113A. A final restraining order was also made against each parent under s 87 with an order allowing them supervised access four times a year for two hours at a time supervised by Kidzkare. At that time Judge Cook noted the parents had sporadic access until they stopped having access altogether on 11 January 2018.

[12] Mr [Regal]'s evidence is that once orders were made in favour of Mr & Mrs [Davis] he began exercising access quarterly in terms of the order and decided to separate from his wife.

[13] In 2020 Mr [Regal] applied to vary the special guardianship order to increase his supervised access time but elected to withdraw that application before the scheduled hearing.

[14] In October 2023 Mr [Regal] filed the current application to vary the special guardianship order. His mother filed an affidavit in support.

What does Mr [Regal] say?

[15] Mr Senior submits that Mr [Regal] is seeking to vary the special guardianship order because he is unable to apply for a s121 access order, presumably because of the limits imposed by s121(2). Mr Senior observes there is a high threshold when making a special guardianship order because of the effect of such order. For this reason Mr Senior accepts this Court is only able to vary the special guardianship order if there has been a "significant change of circumstances." Mr Senior urged me to grant leave and make timetabling directions to progress the substantive application to vary the special guardianship order.

[16] What Mr [Regal] wants is to have access every two months supervised by his mother, with a view to progressing to monthly access.

[17] Mr [Regal]'s evidence is that he accepts with "regret"[10] that he focussed on his wife and her mental health issues at the expense of [Anne] to the extent that [Anne] was placed with Mr & Mrs [Davis] on 19 April 2017. Mr [Regal] acknowledges he was granted an interim access order on 7 August 2017 but did not exercise access "primarily around issues with Mrs [Regal]."[11]

[18] It is acknowledged by Mr [Regal] that he commenced the current supervised access in June 2020 and it is submitted there has been regular but limited access since. It is acknowledged there were two access visits last year and two this year which are submitted to have been affected by difficulties with booking the supervised access sessions and to suit Mr & Mrs [Davis].

[19] Mr [Regal] says the significant change in circumstances are that

(a) [Anne] is now aged 7 ½. She has had quarterly access with Mr [Regal] for about 4 ½ years but is growing out of the Kidzkare programme. [Anne] has built a relationship with Mr [Regal] over this time. [Anne] is settled in the care of Mr & Mrs [Davis].

(b) Mr [Regal] has remained separated from Mrs [Regal] since March 2020, he has been in regular employment as a support worker for 5 years, he has completed two parenting programmes and is attending an online programme, he engaged in personal counselling at his church to "gain insight into my behaviours,"[12] Mr [Regal] lives by himself in a cottage on his mother's rural property, Mr [Regal] has been diligently attending the supervised contact venue, a relationship has built up between [Anne] and her father.

What is the position of the Chief Executive?

[20] Ms Gray submits that [Anne]'s primary attachment is to her mother. While there are problems in the parental relationships with Oranga Tamariki and the

[10] Paragraph 8 of Mr [Regal]'s affidavit dated 21 September 2023.
[11] Paragraph 10 of submissions filed by lawyer for Mr [Regal] dated 2 October 2024.
[12] Paragraph 30 of Mr [Regal]'s affidavit dated 21 September 2023.

caregivers, [Anne] has contact with her maternal grandparents and supervised access to her father. [Anne] does not have a relationship with her mother because of issues Mrs [Regal] is experiencing.

[21] The Chief Executive acknowledges Mr [Regal] has made some changes by separating from Mrs [Regal], and exercising supervised access. However, it is submitted for the Chief Executive that these changes would not have led to the earlier presiding Judge making different access arrangements.

[22] It is submitted that the Chief Executive was left concerned after reading the supervised access reports and there is no evidence to support increased access. It is acknowledged by the Chief Executive that the development in [Anne]'s access is that she "has gone from crying (access on 10 February 2021), keeping her distance (access on 20 May 2021) and hiding (access on 16 September 2021) to playing with Mr [Regal] and having fun at times (access on 25 November 2023 and 13 April 2024). Yet still, she remains reserved."[13]

What do Mr & Mrs [Davis] say?

[23] It is submitted on behalf of Mr & Mrs [Davis] that making a special guardianship order required a high threshold before the order could be made. For this reason granting leave to vary the special guardianship order also demands a high threshold and "therefore should only occur in extremely limited circumstances."[14]

[24] Counsel relies on the provisions of s 139A of the Care of Children Act 2004 when considering whether leave is granted. Counsel also relies on the grounds and reasons relied on by Judge Cook when the special guardianship order was made.

[25] I am invited by counsel for Mr & Mrs [Davis] to take into account of the decision of Doogue J in *McHugh v McHugh* the existence of a restraining order against Mr [Regal]; the difficulties encountered by the social worker when orders were

[13] Paragraph 25 of submissions filed by counsel for the Chief Executive dated 3 October 2024.
[14] Paragraph 17 of submissions filed on behalf of Mr & Mrs [Davis] dated 2 October 2024.

originally made; and the lack of evidence about any insights Mr [Regal] may have developed into his own behaviour and effect of that behaviour on others.[15]

[26] Mr & Mrs [Davis] rely on the submissions filed on behalf of the Chief Executive. They reiterate the risk to [Anne]'s stability and security arising from ongoing proceedings. It is noted that [Anne] has been in the care of Mr & Mrs [Davis] since she was 8 days old.

[27] Counsel for Mr & Mrs [Davis] submits that the current access arrangements meet [Anne]'s wellbeing and best interests having particular regard to s 5(c)(iii), (iv) & (d)(i). It is submitted that it is not the purpose of access to increase the time spent and/or frequency.

What is [Anne]'s position?

[28] [Anne] is aged about 7 ½. No issue is taken by any party with the care and living arrangements provided by Mr & Mrs [Davis]. The only contact [Anne] has with Mr [Regal] is at supervised access visits.

[29] Lawyer for child refers to the most recent supervised access visits on 25 November 2023, 13 April 2024 and 28 September 2024 which suggest the visits are five monthly rather than three monthly in terms of the orders. Ms McCarty submits that the "supervisor's reports suggest [Mr [Regal]] continues to struggle with appropriate behaviour in [Anne]'s presence."[16]

[30] Lawyer for child is concerned that the initial proposal for bi-monthly access in place of the current five monthly arrangement represents a "significant increase."[17] Lawyer for child submits there is a risk of further litigation because Mr [Regal] proposes monthly access after a period of six months and unsupervised access.

[31] Lawyer for child is concerned the lack of Mr [Regal]'s insight was a feature of earlier proceedings and this is not addressed in the current proceedings to help the

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[15] *McHugh v McHugh* [2022] NZHC 1174 at [35].
[16] Paragraph 9 of lawyer for child's memorandum dated 5 October 2024.
[17] Paragraph 10 of lawyer for child's memorandum dated 5 October 2024.

Court understand what insights and skills have been developed. Further, Mr [Regal] has not addressed what benefits there might flow for [Anne] from the proposed orders.

[32] Lawyer for child's inquires reveal [Anne] is doing well and thriving in her family unit, which includes Mr & Mrs [Davis] maintaining "an ongoing relationship with [Anne]'s wider whanau."[18]

[33] Lawyer for child observes that no one is suggesting there has been any change in [Anne]'s circumstances. Lawyer for child does not support a change to the current orders.

What is this Court's decision?

[34] The hearing for this matter proceeded by way of submissions only. Mrs [Regal] elected not to participate in the proceeding involving Mr [Regal]'s latest application.

[35] When Judge Cook made an order appointing Mr & Mrs [Davis] as special guardians of [Anne] in terms of s 113A she did so "for the purpose of providing [[Anne]] with a long-term, safe, nurturing, stable, and secure environment that enhances [her] interests" and in terms of s113A(1AA) for all purposes other than in respect of [Anne]'s name. At the same time Judge Cook issued final restraining orders against both parents except in relation to supervised Kidskare access four times a year.

[36] Mr [Regal] has since applied to vary the special guardianship order for the purpose of increasing the frequency of access with a view to working towards monthly access supervised by [Anne]'s paternal grandmother.

[37] Under s125(1A) the Court's approval is required to vary a special guardianship order and can only do so under s125(1B)(b) if there has been a "significant change of circumstances" of the child or child's parents.

[38] The submissions hearing focussed on the meaning of the phrase "*significant* change of circumstances" (emphasis added). Counsel were unable to locate any

[18] Paragraph 12 of lawyer for child's memorandum dated 5 October 2024.

decisions addressing this phrase and agreed that the closest analogy is a "*material* change of circumstances" (emphasis added) in respect of applications in terms of s206A of the OTA and repeat applications affected by s139A of the Care of Children Act 2004. There is no statutory interpretation of either phrase.

[39] For this reason I reserved my judgment. After exhaustive inquires the Tauranga District Court judges' clerk located two Family Court judgments dealing with the phrase "significant change in circumstances." In *Chief Executive of Oranga Tamariki v [T]* Judge Collin found that a "significant change in the circumstances" involves a "high threshold."[19] In *Chief Executive of Oranga Tamariki v [H]*[20] Judge Montague agreed with counsel that "significant" represented a "high threshold to meet"[21] and that, if established, required her honour to "consider whether those circumstances, if before Judge Grace [the judge who made the original order] in 2019 would have led him to a different conclusion and different access arrangements."[22]

[40] Some cases suggest that "material change" and "significant change" are used interchangeably[23] and therefore mean the same thing. However, presumably Parliament intended there to be a distinction between "*material* change in circumstances" in s206A of the OTA and "*significant* change in circumstances" in s125(1B) of the OTA to reflect the significance and implications of making a special guardianship order under s113A.

[41] If a distinction is to be made, it maybe more helpful to think of a "significant change" as an "important change," and a "material change" as a one of substance.

[42] Whether or not there is to be a distinction, the significant or important change in circumstances of a parent and/or child must be relevant to the child's well-being and best interests in the context of ss 4A(1) & 13(1) because that is the "first and paramount consideration." To this extent I find it is relevant to take into account

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[19] *Chief Executive of Oranga Tamariki v [T]* [2019] NZFC 8199 at [16].
[20] *Chief Executive v [H]* [2023] NZFC 7246.
[21] *Ibid,* at [71].
[22] *Ibid,* at [76].
[23] For example, see *MR v Chief Executive & GE* [2017] NZHC 757 at [54]; *Border v Tokoroa* [2014] NZFC 10947 at [36] – there is an irony in identifying the latter judgment as I was the presiding Judge.

matters such as the reasons for making the original special guardianship order; the purpose of making a special guardianship order set out in s 113A(1AA)(1); whether the special guardian/s replaced or is in addition to the existing guardians in terms of s113A(1AA)(1)(b); whether any relevant information or evidence was not available when the special guardianship order was made; what other orders were made when the special guardianship order was made; what are the changes in circumstances; whether the change is likely to be significant enough for the original Judge to have reached a different conclusion; how is the well-being and best interests of the child likely to be impacted; and any other relevant matters.

[43] In my view the standard of proving whether there has been a "significant change in circumstances" is simply based on the balance of probabilities, rather than attaching a "high threshold," because of s 197.[24]

[44] In the circumstances of this case I find that:

(a) When Judge Cook made the special guardianship order in 2019 she did so taking into account, among other things, a "long history;"[25] [Anne] had been with the caregivers since 8 days old; Mr [Regal]'s "abusive harassing behaviour;"[26] the parents' access was supervised and sporadic; and the s 178 report highlighted Mr [Regal]'s shortcomings including [Anne]'s lack of attachment to him, Mr [Regal] was dismissive of Oranga Tamariki concerns, his strong religious beliefs influenced his views about Oranga Tamariki influence, he needed to accept Oranga Tamariki's concerns, he needed to engage with professionals and accept their advice.

(b) The purpose of making the special guardianship order was to provide [Anne] with a "long-term, safe, nurturing, stable, and secure

[24] Pankhurst J noted in *Q v Chief Executive of the Ministry of Social Development* [2013] NZHC 2109 at [16] that "the Act is the simple balance of probabilities, neither more no less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts."
[25] Paragraph [4] of Judge Cook's judgment dated 5 August 2019.
[26] Paragraph [5] of Judge Cook's judgment dated 5 August 2019.

environment that enhances [[Anne]'s] interests."[27] I agree with the submission of lawyer for child that it was particularly important for [Anne]'s well-being and best interests to be safe, stable and secure. The proposal to increase access from what is happening at the moment to bi-monthly access is a big jump and there is a risk of further litigation if monthly access is pursued.

(c) It is not clear from the 2019 judgment whether the special guardianship order was made to replace [Anne]'s guardians or be in addition to the parents but I assume it was intended to be in addition because of the nature of the s110 order.

(d) As far as I can tell, Judge Cook had all the relevant information or evidence at the time she made the special guardianship order.

(e) In addition to the special guardianship orders, Judge Cook confirmed restraining orders against Mr [Regal] on the condition that Mr [Regal] may have supervised access four times a year.

(f) The changes in circumstances are that [Anne] has been in the care of Mr & Mrs [Davis] for 4 ½ years and is secure in their care; Mr [Regal] has been separated from his wife since March 2020; he is in regular employment; he has had supervised contact since then; he has completed parenting programmes; and has attended counselling through his church.

(g) Judge Cook is unlikely to have reached a different conclusion faced with the evidence Mr [Regal] has filed to date. There is no evidence to demonstrate what insights and skills Mr [Regal] has developed as a result of attending parenting programmes. No assessment is able to be made in respect of counselling through the church. I agree with lawyer for child's submission that the "supervisor's reports suggest [Mr [Regal]] continues to struggle with appropriate behaviour in [Anne]'s

[27] Section 113A(1AA)(1)(a).

presence."[28] While Mr [Regal] says he has developed a relationship with [Anne], the access reports suggest [Anne] remains reserved in the company of Mr [Regal]. There have been two supervised access visits in each of the last two years rather than four visits per year provided by the 2019 orders. To this extent Mr [Regal] is not utilising the available sessions but is seeking a three fold increase in the number of sessions.

(h) It is not in [Anne]'s well-being and best interests to increase the number and nature of supervised access sessions having regard to the matters outlined above. While there has been a change in Mr [Regal]'s circumstances since 2019 they are not particularly relevant to [Anne]'s well-being and best interests for the reasons outlined above. There is a lack of evidence into the insights developed by Mr [Regal] and there is no evidence of his engagement with professionals as recommended by the Court appointed psychologist. This is the second time Mr [Regal] has applied for leave and he is no further ahead in satisfying the Court that leave should be granted.

[45] For those reasons I am not satisfied on the balance of probabilities the leave can be granted.

[46] Since reserving this judgment, Mr [Regal]'s counsel has filed a r 88 Family Court Rules 2002 application for a declaration that he no longer act as counsel. I am satisfied the grounds are made out and that is appropriate to make the declaration.

ORDERS & DIRECTIONS

[47] The following orders and directions are made:

(a) Leave to apply for a variation of the 2019 special guardianship application is declined.

(b) The application to vary the 2019 special guardianship is dismissed.

[28] Paragraph 9 of lawyer for child's memorandum dated 5 October 2024.

(c) Lawyer for child's appointment is terminated with the Court's thanks and is to take effect within 28 days.

(d) A r88 Family Court Rules 2002 declaration is made that Mr Senior no longer acts for Mr [Regal].

(e) For publication purposes [Anne] is to be identified as Anne, Mr & Mrs [Regal] are to be identified as Mr & Mrs Regal, and Mr & Mrs [Davis] are to be identified as Mr & Mrs Davis. This case is to be referred to as *Regal v Chief Executive of Oranga Tamariki, Davis & Regal.*

Dated at Tauranga on 25 November 2024 at 1pm

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L de Jong
Family Court Judge