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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2021-441-75
CIV-2021-441-76
[2022] NZHC 2934

IN THE MATTER OF	The Oranga Tamariki Act 1989
BETWEEN	MOANA's MOTHER Appellant
AND	MR and MRS SMITH First Respondents
AND	CHIEF EXECUTIVE OF ORANGA TAMARIKI MINISTRY FOR CHILDREN Second Respondent
AND	MRS and MS TAIPA Third Respondents

Hearing:	23-25 May 2022; further evidence 27, 30, 31 May and 1 June 2022 (received on 27 June 2022)
Appearances:	J Mason and N Thrupp for Appellant R C Laurenson, R S Stannard and A E Gordon for First Respondents R Schmidt-McCleave and C McKay for Second Respondent B R Arapere and A Chesnutt for Third Respondent S L Hayward and L McLennan as Counsel for the Child
Judgment:	9 November 2022

JUDGMENT OF CULL J

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Para No.

[1] This is an appeal by the mother of a seven-year old Māori child, "Moana,"[1] who was placed in the custody of a non-Māori couple, "the Smiths", by the Family Court on 9 September 2021.[2] She challenges the correctness of the Family Court decision in light of the legislative direction of the Oranga Tamariki Act 1989 (the OT Act). She says the OT Act requires that Moana, a Māori child should be placed in the

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1 Moana, her mother, her caregivers and the extended whanau are all assumed names and were used by the media in the publication of this case. The names are adopted to protect the privacy and confidentiality of the persons involved.

2 *Chief Executive of Oranga Tamariki v [Moana's mother and Moana]* [2021] NZFC 9089 [Family Court decision].

care of a Māori family, "the Taipas," who are connected to her iwi and have Moana's younger brother presently in their care.

[2] The Chief Executive for Oranga Tamariki and the Taipas both sought to be heard in support of Moana's mother's appeal. The Smiths and Counsel for the Child support the Family Court's decision.

Background

[3] Moana is the daughter of the appellant. Because of difficulties faced by her mother, Moana and two of her siblings have been placed in care. Her elder brother, aged nine, lives with caregivers in the Hawkes Bay and her youngest brother, aged three, lives with the Taipas in Lower Hutt. Moana also has two older sisters, one of whom has children of her own.

[4] Moana traces her whakapapa to Ngāti Kahungunu through her mother. The identity of her father is unknown.

[5] Throughout 2017, the Chief Executive made various attempts to address care and protection concerns for Moana and her older brother, who were in their mother's care at that time. They were uplifted from her care on several occasions but were subsequently returned to her care when Oranga Tamariki (OT) considered it was safe to do so. However, it became evident that Moana and her brother would ultimately need to be removed from their mother's care. The Family Court decision records that OT made inquiries about a possible placement of the children with whānau and two members of the whānau indicated a willingness to take Moana into their care. However, they subsequently withdrew that offer. Although the children's mother informed social workers she had whānau living in Hawkes Bay, OT reported that she did not have a positive relationship with her extended whānau, that her close family were not able to look after the children, and no further inquiries were made about her whānau or iwi relationships.

[6] On 23 January 2018, the Chief Executive sought declarations and interim custody orders under the former Children, Young Persons and Their Families Act 1989 for both Moana and her brother. Interim custody was granted to the Chief Executive

and a s 101 custody order was made on 30 July 2018 in his favour. At that time, a review plan under s 135 of that Act was made and it was considered there was a realistic possibility of Moana and her brother being returned to the care of their mother. They were duly returned on 15 May 2018, but the return was short-lived.

[7] On 17 September 2018, the Chief Executive placed Moana with Mr and Mrs Smith, who had been asked whether they would care for Moana on a long-term basis. They accepted. Her older brother was placed with other caregivers in the Hawkes Bay. By November 2018, the statutory review of the s 135 plan reported that it was no longer a goal that the children be returned to their mother's care but that Moana had been placed with the Smiths, where she was doing "very well" and was reported to be "extremely happy" with her caregivers. The plan at that time indicated that the placements for her and her older brother would "go to permanency."

[8] At the time of the review, OT was aware that the children's mother was pregnant and that the unborn child would likely be removed from her care upon birth. On 1 January 2019, Moana's younger brother was born and placed into the care of a non-whānau caregiver the following day. Following a Family Court declaration granting a s 101 custody order to the Chief Executive and a s 110 additional guardianship order, Moana's younger brother was placed into the care of the Taipas on 18 October 2019. The Taipas have Ngāti Kahungunu whakapapa links to Moana's mother through marriage. Moana's younger brother has remained in the Taipas care since that time and lives in a papakāinga with other families and whānau.

[9] On 17 October 2019, the Smiths applied to discharge the s 101 order in favour of the Chief Executive and sought parenting orders for the day-to-day care of Moana under the Care of Children Act 2004 (COCA). Their applications were prompted by OT's "sudden decision to transition Moana to new caregivers in Wellington" namely, the Taipas. The Smiths applications were opposed by the Chief Executive and following a hearing, the Family Court placed a condition on the existing custody order that Moana's placement with Mr and Mrs Smith would not be changed, pending the determination of their applications.

[10] On 17 July 2020, the Taipas also applied to discharge Moana's s 101 custody order seeking parenting orders for the day-to-day care of Moana under s 48 of COCA, as well as an additional guardianship order for all purposes under s 27 of COCA.

[11] On 12 January 2021, the Chief Executive urgently applied under the OT Act, on a without notice basis, to discharge the placement condition on the custody order. This was sought on the basis of an alleged disclosure made by Moana about the Smiths to social workers on her return from access with her siblings. The urgent application was declined by Judge Harrison, the Duty Judge, who ordered a Pickwick hearing of the application on 21 January 2021. At the hearing, the application was again declined by Judge Harrison, who directed the application be set down to proceed on notice, together with the substantive OT and COCA applications filed by the parties.

[12] The substantive applications can be summarised as follows:

(a) the Smiths and the Taipas respectively filed applications under s 125 of the OT Act to discharge the s 101 custody order in favour of the Chief Executive;

(b) the Smiths and the Taipas also respectively filed applications under COCA:

(i) for a parenting order under s 48 granting to them respectively the day-to-day care of Moana; and

(ii) to be appointed as additional guardians of Moana under s 27 for day-to-day care of Moana; and

(c) the Chief Executive applied under s 125 of the OT Act to discharge the placement condition on the s 101 custody order to remove Moana from the care of the Smiths.

[13] Following an eight-day hearing, Judge Callinicos discharged the Chief Executive's custody order in favour of the Smiths. Mr Smith and Mrs Taipa were appointed as additional guardians of Moana in addition to her mother, and access

orders were made in favour of Moana's mother and the Taipas on specific terms and conditions.[3]

[14] The Judge additionally ordered the Chief Executive to prepare and file a s 128 plan under the OT Act to support a s 9 support order or a s 86 services order, proving full and specific details of all services or resources (including financial services or resources) that would ensure the appropriate care, protection and control provided to, or exercised over Moana. The Judge included examples of what the services should include, such as providing assistance and financial resources to support all access between Moana and her whānau, the logistics of Moana's access to her mother, her siblings and the Taipas, transportation services and costs to support the access arrangements, appropriate cultural services/education to support the Smiths development of cultural competence, health care support, and the costs of Moana's cultural or education needs unable to be met by education providers.

[15] Since the Family Court decision, a s 128 plan has been finalised by the Family Court to implement and support the custody, access and support orders, currently under appeal.

Approach on appeal

[16] The appeal is brought under s 341 of the OT Act and is a general appeal by way of rehearing.[4] As a general appeal, the Court must consider the merits of the case afresh, including assessing facts and making value judgments. The weight to be given to the reasoning of the Court below is a matter for this Court's assessment.[5]

[17] In *M v Chief Executive of Oranga Tamariki* it was reinforced that appellants must identify the errors in the judgment under appeal and persuade this Court to reach a different view.[6] The powers of this Court on appeal include making a decision this Court believes should be made or directing the Family Court to rehear the proceeding or consider or determine any matters.[7] The normal caution also prevails for this Court

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3 The terms and conditions are canvassed in this judgment under Family Court Orders at [172].
4 District Courts Act 2016, s 127.
5 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31]–[32].
6 *M v Chief Executive of Oranga Tamariki* [2019] NZHC 717 at [45]–[48].
7 District Courts Act 2016, s 128.

to have regard to the Family Court's ability and advantage of assessing the witnesses' credibility. This Court can take into account that the Family Court is a specialist jurisdiction with expertise in its particular area.[8]

[18] Although the applications before the Family Court were brought under COCA and the OT Act, the Family Court decision decided that Moana is a child in need of care and protection and made no COCA orders. For that reason, the COCA applications and the provisions of COCA are not engaged in this appeal.

Grounds of appeal

[19] Moana's mother appeals the Family Court decision on the following five grounds:

(1) The Judge failed to consider and/or misapplied the statutory cultural provisions of the OT Act, making the Family Court decision non-compliant with Māori tikanga and Treaty obligations.

(2) The Judge mischaracterised the evidence of the psychologist by over-stating the risks of an alternative placement to the Smiths.

(3) The Judge overlooked the adverse evidence about the Smiths and placed a disproportionate blame on the social workers of OT.

(4) The decision was biased because the evidence of the OT social workers was rejected by the Judge, who considered their evidence to be tainted.

(5) The Judge erred in refusing to recuse himself because there was a real possibility he would not bring an impartial mind to the resolution of the issues he was required to decide and this gave rise to a "real possibility of impartiality".

[20] Moana's mother asks that the Family Court decision be overturned and that a further s 101 custody order be made again in favour of the Chief Executive with

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8 *SLB v Ministry for Children, Oranga Tamariki* [2020] NZHC 1129 at [29].

conditions. The conditions she seeks are that Moana is placed in the day-to-day care of the Taipas and appropriate access is given to Moana's mother, Moana's siblings, and to the Smiths.

[21] Ms Mason has framed the main issue as whether it is in Moana's best interests to remain with the Smiths "the non-kin placement" or should she be transitioned to live with the Taipas and her younger brother, "the whanaungatunga"?

[22] Ms Mason confirmed that there is no appeal against the decision that Moana is in need of care and protection. The focus of her appeal is on Moana's placement with her current caregivers. The appeal notice and submissions are silent on the guardianship orders. The Chief Executive submits that despite the appellant's lack of specific reference to the guardianship orders, in seeking to overturn the Family Court decision, it follows that the guardianship orders must also be under challenge. I deal with the Family Court orders later in this judgment.[9]

Structure of this judgment

[23] In this judgment I will deal with the grounds of appeal and the issues as follows:

i. The factual findings

ii. The statutory framework of the OT Act

iii. The application of the OT Act's principles

iv. The psychological evidence

v. Rejection of social worker evidence

vi. Bias and recusal

vii. The Family Court orders

viii. The partnership approach

ix. Result

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9 At [180] – [181] of this judgment.

The factual findings

[24] The following factual findings are summarised from the Family Court decision and inform the judgment on appeal. They are in summary:[10]

(a) Moana was in a poor state of health when OT became involved.

(b) There is no prospect of Moana being able to return safely to the care of her mother.

(c) Her mother was isolated from her whānau and any supports it may have offered. She has little meaningful connection to her whānau or "cultural components".

(d) Evidence before the Family Court showed that even a modest search for Moana's whānau would have disclosed many people who could have been approached to build cultural networks for Moana, her siblings and her mother. It was known that Moana had links to a local marae, yet no inquiries were made through that close connection.

(e) OT failed to make adequate inquiries of Moana's mother into whether there were suitable safe placements for Moana or her siblings within whānau, hapū or iwi.

(f) A direct consequence of these failures, including after three to four placements failed, was that the Chief Executive approached the Smiths for a pragmatic solution. Moana went into the Smiths care on 17 September 2018 on the basis that it could be a long-term placement, which then became one which was intended to be permanent.

(g) From the date of placement until 28 June 2019, Moana's placement with the Smiths was portrayed to them as being permanent. OT were approached by the Smiths for assistance in advancing Moana's cultural needs and to search for whānau but this request was not met in any meaningful way.

(h) Moana was traumatised by her experiences and by disruption to her developing attachments from her previous placements before the Smiths. In addition to her poor physical condition, she may also have been the victim of sexual molestation, as she was afraid of males.

(i) From the time of her placement with the Smiths her medical, emotional and nutritional needs were and have been consistently met. She also found love, stability, devotion and freedom from family violence and substance abuse.

(j) There was no evidence before the Family Court to support the allegation that the Smiths did not support whānau access or undermined it. Mrs Smith "had gone to significant lengths to equip herself with more knowledge of te reo and cultural aspects of Ngāti Kahungunu", making repeated requests of OT for information on Moana's whakapapa. Although the requests were passed on, nothing was

[10] Family Court decision, above n 2, at [296].

forthcoming. There was no basis for the assertions by OT social workers that the Smiths were attempting to "strip Moana of her whakapapa," obstruct access to the whānau or disrespect her mana. The evidence did not indicate a high risk that Moana will suffer psychological harm by way of alienation against her whānau, mother and support systems if she is left in the care of the Smiths for longer than the "transitional period." The Judge rejected the appellant's closing submissions to this effect.

(k) The evidence does not support a conclusion that the Smiths have been psychologically or emotionally abusive to Moana. The psychologist did not see any evidence of alienating behaviours.

(l) Both sets of caregivers can provide Moana with high quality parenting, love, stability and security.

(m) The Smiths cannot, without appropriate supports, adequately meet Moana's cultural needs. With adequate supports to them and Moana, she could develop an increasing cultural connection and the Smiths have full capacity and willingness to embrace and support cultural needs.

(n) There is no doubt that the Taipas are possessed of all the skills and attributes to meet Moana's cultural needs.

(o) Moana has a secure attachment to Mrs Smith and close to a secure attachment with Mr Smith. It is probable she has positive attachments to their parents, whom she views as grandparents.

(p) She has at best a developing attachment with the Taipas and to her younger brother.

(q) She has an extremely strong attachment with her older brother and attachments to her sisters and her sister's child.

(r) Moana has a strong attachment to her mother, although this has and can be a source of trauma as well as a protective device dependent on her mother's life events.

(s) All of Moana's established secure attachments are the people who live in Hawkes Bay. At the time of the hearing, no secure attachments have been established with people in Wellington but are currently developing and are likely in time to become secure and positive.

[25] Mr Walker, the cultural and tikanga Māori expert called by the Chief Executive, made enquiries which showed that Moana likely has a large number of whānau or hapū through the locally based marae. The Judge considered that Moana would have less opportunity to maintain and strengthen her significant whānau links in Hawkes Bay by removing her to Wellington with only one whānau member there, who is her younger brother. He observed that in the event that Moana is moved to

Wellington, inevitably she would also develop attachments to the Taipas, who would form part of her wider whānau.

[26] However, the Judge considered that the Chief Executive's wish to remove Moana from the Smiths to the care of the Taipas to live alongside her younger brother would place Moana at a considerable geographical distance from the great majority of her known family group and whānau. That includes her mother, her older brother, two sisters and a nephew, all of whom live in Hawkes Bay. The Judge concluded "by a significant margin" that Moana's well-being and best interests could only be met by her remaining in Hawkes Bay, with a strategy in place to increase integration with the Taipas and to provide the Smiths with proper support of Moana's cultural connections and needs.[11]

The statutory framework of the OT Act

[27] The need to incorporate a Māori perspective into the care and protection of children was recognised and actioned in the 1980s.[12] In 1985, a ministerial advisory committee was appointed by the then Minister of Social Welfare to investigate and report on the operations of the Department of Social Welfare from a Māori perspective.[13] The committee found that the department had "profoundly misunderstood the place of the child in Māori society and the relationship of Māori children with whānau, hapū, and iwi structures".[14] It recommended changes to the Children and Young Persons Act 1974. This led to the introduction of the Children, Young Persons, and Their Families Act 1989. The Act introduced several tikanga Māori principles including participation of whānau, hapū and iwi in decision making for a child and strengthening a child's relationship with wider kin groups.

[28] A further review was undertaken in 2015 and in its report, the Expert Advisory Panel found that the system was unable to fulfil the needs of vulnerable children and young people. This led to the establishment of a new Ministry for Children, Oranga Tamariki–Ministry for Children. Legislative reform closely followed, including

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11 Family Court decision, above n 2, at [322].

12 See Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at [3.4] for a detailed backdrop to these amendments in detail.

13 At [3.4].

14 At [3.4].

amendments to the Children, Young Persons and Their Families Act 1989, which became the Oranga Tamariki Act. I refer to this legislative change as "the 2019 amendments."

[29] Of relevance to this appeal, the 2019 amendments reflected a significant strengthening of the policy shift to address the needs of Māori children. The major changes introduced incorporating statutory definitions of tikanga Māori, mana tamaiti (tamariki) and related concepts, promoting the well-being of Māori children through a practical commitment to the principles of the Treaty of Waitangi, most notably by the imposition of a duty to do so on the Chief Executive,[15] and adding guiding principles for those making decisions under the Act.

[30] As the focus of this appeal centres on cultural appropriateness, particularly with regard to tikanga Māori compliance under the OT Act, it is relevant to set out the introduced statutory definitions to the OT Act and the amended provisions.

Tikanga definitions

[31] There are a number of definitions within the OT Act that are important to understanding the nature of the appeal and its context. The first is the definition of mana tamaiti, which is defined 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

[32] Tikanga Māori, which was a large focus of the appellant's submissions, is defined under the OT Act to mean Māori customary law and practices. The other definitions of relevance to this appeal relate to cultural and family kinship ties. Those definitions are:

> **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—

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15 Oranga Tamariki Act 1989, s 7AA(1).

(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

[33] Also of relevance is how the Act defines "well-being":

> **well-being**, in relation to a child or young person, includes the welfare of that person.

Purposes of the OT Act

[34] Under s 4 of the OT Act, the overriding purposes of the Act are to promote the well-being of children and their families, whānau, hapū, iwi, and family groups. The most significant changes to achieving those purposes are by:

(a) establishing, promoting, or co-ordinating services affirming mana tamaiti (tamariki);[16]

(b) assisting families and kinship groups from the earliest opportunity to meet the needs of their children including the need for a safe, stable and loving home;[17]

(c) ensuring that children have a safe, stable, and loving home from the earliest opportunity;[18]

(d) providing a practical commitment to the principles of the Treaty of Waitangi;[19]

(e) recognising mana tamaiti (tamariki) whakapapa and the practice of whanaungatanga for children who come to the attention of the Department;[20]

(f) maintaining and strengthening the relationship between children and their–

(i) family, whānau, hapū, iwi, and family groups; and

(ii) siblings.

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16 Oranga Tamariki Act 1989, s 4(1)(a)(i).
17 Section 4(1)(d).
18 Section 4(1)(e).
19 Section 4(1)(f).
20 Section 4(1)(g).

[35] Section 4A(1) provides that the well-being and best interests of the child are the first and paramount consideration, having regard to the principles set out in ss 5 and 13 of the Act.

Section 5 principles

[36] Section 5 of the OT Act contains the principles to be applied by the Court when exercising any powers under the Act. In 2019, the recognition of mana tamaiti (tamariki), a child's whakapapa and the whanaungatanga responsibility of the child's kin group were incorporated into s 5, reflecting the strong policy directive that wherever possible, the relationship between the child and their kin group should be maintained and strengthened. The principles are of particular importance in this appeal as they provide mandatory guidance to the OT Ministry and the Courts alike. I set them out as follows:

> **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:

…

(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.

[37] The Act specifies that s 5(1) is subject to s 4A, which requires that the well-being and best interests of the child is the first and paramount consideration.[21]

[38] In addition to the s 5 principles, s 13 requires every Court to adopt, as the first and paramount consideration, the well-being and best interests of the child. Section 13(2) was replaced in 2019, reflecting the same legislative policy and intent to recognise a child's kinship group. Because of its importance to this appeal, I set out the relevant provisions below:

13 Principles

…

[21] Oranga Tamariki Act 1989, s 5(2).

(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:

……

(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:

….

[39] Thus, s 13(2) places a specific requirement on "the court or person" determining a child's well-being and best interests to be guided by these principles as well as those in s 5. They are steps which should be followed where either a child's family or whānau needs support or where a child is to be removed from their family's care.

The application of the OT Act's principles

[40] The principal plank of the appellant's appeal is that Moana's cultural needs and cultural interests should be "heavily weighted" in the assessment of what is in her best interests. Drawing on the legislative framework and the 2019 amendments to the OT Act, Ms Mason submits that although Moana's welfare and best interests are the paramount consideration, as a Māori child, considerations in relation to the Treaty and tikanga Māori should be intertwined with what is in her welfare and best interests.

[41] The Judge acknowledged the 2019 amendments and concluded that the ultimate determination required an holistic analysis with Moana at the centre of the decision-making. The parties took no issue with an holistic approach being taken. However, Moana's mother, the Chief Executive and the Taipas all submit that the Judge erred in his assessment of the principles of the Act and the required child-centric approach by treating Moana as an individual and not as mana tamaiti and made contradictory statements about the Act's principles.

[42] Ms Mason submits further that placing Moana in the non-kin placement does not meet Moana's cultural needs and is not Treaty compliant. Where a placement option can provide a safe, stable, and a loving home, she submits, preference should be given now to a whaunangatanga placement, as required under the OT Act and "the mana tamaiti principle". Expanding on that submission, Ms Mason says that the Judge was wrong to state that "no particular principle has been legislatively mandated to trump another" and points to s 13(2)(i)(iii)(A), which provides:

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

[43] On that basis, Ms Mason submits Moana should be placed with the Taipas "as a matter of preference". She points to the evidence which shows they are more than able to meet Moana's needs, provide a safe, stable and loving home for her, and she could grow up with her younger brother in a community full of whānau, immersed in te ao Māori. Thus, she submits, the Judge's decision directly contradicts the interpretation of the child's best interests as directed by Parliament by placing Moana in the non-kin placement, which does not meet Moana's cultural needs.

Do some principles trump others?

[44] I deal first with the challenge that the Judge made contradictory statements about the 2019 amendments to the purpose and principles of the OT Act.[22] The first passage says that no particular principle trumps another:

> [57] While the recent amendments have reframed and strengthened many cultural considerations, the ultimate determination requires an holistic analysis, in which [Moana] must be at the centre of the decision making. *No particular principle has been legislatively mandated to trump another.*
>
> (emphasis added).

[45] Later in the judgment, the Judge said that the well-being and best interests of a child must trump the interests of the family, whānau and kinship groups, where they are in conflict: [23]

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22 The Judge recorded that notwithstanding that the proceedings commenced in 2018, prior to the 2019 amendments coming into effect, those amendments were to be applied in determining this case and there was no argument by the parties to the contrary.

23 Family Court decision, above n 2, at [243] (footnotes omitted).

> At the same time as Parliament introduced a range of cultural and tikanga considerations into the Oranga Tamariki Act on 1 July 2019, it also prefaced those considerations by stating that "the child or young person must be at the centre of decision making". That child-centric mandate was not present in any previous versions of the statute since enactment in 1989. This new focus has the effect that notwithstanding the eight principles that follow s 5(1)(b), the ultimate decision must place the child at the centre. Those express words "at the centre of decision making" was not found in the previous statute. It is a significant legislative reminder that the emphasis demands a child-centric approach. *The impact of that child-centricity must be that what is required to meet the well-being and best interests of a subject child must trump the interests of a family, family group, whānau, hapū or iwi where those latter views are in conflict with the former*. To determine otherwise would render those words redundant.
>
> (emphasis added).

[46] When applying the s 5 principles, the Judge reverted to saying that the holistic approach is to be followed rather than one where certain principles should trump others. The Judge weighed the evidence in relation to the steps taken to address harm,[24] the need for a safe, stable and loving home,[25] mana tamaiti, whakapapa and whanaungatanga,[26] timeframes,[27] and the holistic approach.[28] He described the holistic approach as a whole integrated system approach:[29]

> The very concept of holism incorporates the notion that the treatment of any subject should be approached as a whole integrated system.

[47] The question then is whether the Judge's description of legislative directives trumping or not trumping others has led him to misdirect himself in applying the principles under the OT Act to his ultimate assessment of the facts here.

Analysis

[48] It is inescapable that the emphasis of the original policy underlying the OT Act is on the requirement to consider a Māori child within a kin matrix.[30] I consider the legislative provisions are clear. The purpose and principles in ss 4, 5 and 13 need no gloss. They are directional and guide decision-makers logically through the steps

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24 Oranga Tamariki Act, s 5(1)(b)(ii).
25 Section 5(1)(b)(iii).
26 Section 5(1)(b)(iv).
27 Section 5(1)(b)(v).
28 Section 5(1)(b)(vi).
29 Family Court decision, above n 2, at [314(m)].
30 Williams J has written extra-judicially on this subject: see Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" [2013] WkoLawRw 2; (2013) 21 Waikato Law Review 1.

to be taken, whether a child needs removal or the whānau require more support to meet the child's needs.

[49] The overarching focus is the well-being and best interests of the child. Section 4A reinforces that this is "the first and paramount consideration" having regard to the guiding principles set out in ss 5 and 13. Under s 5, the well-being of a child *must be* at the centre of decision-making that affects that child and they must be treated with dignity and respect at all times and protected from harm.[31] Similarly under s 13, the first and paramount consideration for the Court when exercising certain powers under the Act is the well-being and best interests of the relevant child or young person.

[50] Guidance is given in s 5 to the matters to be addressed including the impact of harm on the child, the steps to be taken to enable her recovery from that harm, and the child's need for a safe, stable, and loving home from the earliest opportunity. Decisions must be made in a timeframe appropriate to the age and development of the child. An holistic approach is to be adopted.

[51] The principles reinforce that the child is to be viewed as a whole person, including their development potential, their educational and health needs, their whakapapa and cultural identity, gender identity, disability and age. The principle of mana tamaiti (tamariki) should be protected. This requires a recognition of the child's whakapapa and the whanaungataunga responsibilities of the child's kin group with the primary responsibility for care and nurturing of the well-being and development of the child resting with the family and/or kinship group. The child's place within their community should also be recognised, particularly how a decision will affect the stability of a child and their connections to community and other contacts.

[52] Relevantly, s 13(2)(f) of the OT Act places a requirement on OT that when a child is identified as being at risk of removal, planning should commence *early* including arrangements for alternative care if required. Once OT have confirmed there is a serious risk and removal of a child from her family is necessary, the assessment must involve a child's needs and strengthening of the child's kinship connection. Preference is to be given to placement with either the child's family or the wider

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31 Oranga Tamariki Act 1989, s 5(1)(b)(i).

kinship group, where they are able to meet the child's needs for a safe, stable and loving home.

[53] However, if families cannot meet the needs of the child to provide a safe, stable and loving home, the obligation is on OT to ensure such a home is provided *from the earliest opportunity*.[32] The wording of the statute makes it clear that such placement is done "early"[33] and "promptly".[34] The reason for prompt action is reflected in the requirement that the child should be placed where the child can develop a sense of belonging and attachment.

[54] Each of the guiding principles, therefore, has importance and together they guide an holistic assessment of a child's best interests and well-being. That assessment is an inclusive, not exclusive, combination of the articulated principles as set out above. Thus, the need to ensure a child has a safe, stable and loving family home from the earliest opportunity must be considered alongside her developmental potential, her educational and health needs, her whakapapa and cultural identity and the need for attachment and belonging.

[55] A Māori child's safety and her well-being, therefore, must be assessed with a te aō Māori lens by giving preference to her kinship and whānau connections. The preference is a placement with whānau, hapū or iwi, provided the other factors of a safe, stable and loving family home can be met from the earliest opportunity. The child should be placed with her siblings if that is practicable.[35]

[56] Of equal importance, the child should be placed, where she can develop a sense of belonging and attachment.[36] The legislative imperative in the guiding principles must be followed in their entirety. If a placement cannot be made in the ideal setting of safety and stability within a kinship group, which should always be the preference, then there must be strenuous efforts made to maintain the connection of the child, if

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32 Oranga Tamariki Act 1989, s 4(1)(e)(i).
33 Section 13(2)(a).
34 Section 5(1)(v).
35 Section 13(2)(i)(iii)(D).
36 Section 13(2)(i)(iii)(E).

placed outside of the child's kinship group, with the child's whānau, hapū, iwi and whakapapa connections.

[57] The legislation reinforces in my view, that no one element trumps another. As the cases illustrate, the principles in ss 5 and 13 are all matters which must be considered in each case but ultimately it will be an assessment of the individual circumstances as each case presents.[37]

Was there error in applying the principles to these facts

[58] Turning then to the facts in this case, the timing of the placement of Moana with the Smiths was a key factor in the Family Court decision. Moana's earlier background is instructive.

[59] First, Moana was the subject of several placements from a very early age. Moana was placed with the Smiths, after three to four unsuccessful placements. This was done prior to the legislated amendments in 2019 but was done where there was serious risk of further harm to her. The placement was made by OT without adequate inquiries of Moana's kinship connections. Moana was aged three years at the time of her placement with the Smiths. By the time of the Family Court hearing, she was aged six and had formed significant attachments to them over the three-year period.

[60] Second, Moana had formed attachments with both her mother and with her older brother. Moana also has two older sisters, one of whom is living with her mother and has children of her own. They all reside in the Hawkes Bay, where Moana has lived all her life.

[61] Third, although Moana is of Ngāti Kahungunu descent and her marae is based in Hawkes Bay, she had had no connection with her marae or her wider family group. The Taipas are the known kinship links, by marriage, and they live in Wellington, caring for Moana's younger brother. The Judge specifically recorded the views of

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[37] *B* (CA204/97) *v Department of Social Welfare* (1998) 16 FRNZ 522 CA at 525; *VY v MY* [2019] NZFC 2812, *G v Director General of Social Welfare* [2000] NZFLR 1 at 11; *Chief Executive of Oranga Tamariki – Ministry for Children v MahemaI* [2021] NZFC 8742; *Chief Executive of Oranga Tamariki v BH* [2021] NZFC 210.

Moana's iwi. She is a tamariki of Ngāti Kahungunu. Evidence was obtained from Mr Tomoana, who is the paramount chief of Ngāti Kahungunu. Mr Walker, the tikanga Māori expert confirmed Mr Tomoana's view that descendants of Ngāti Kahungunu should not be placed in non-kin care and that tamariki should be cared for by people of Ngāti Kahungunu.[38] The Judge said further:

> [239] In his letter produced by [the Taipas], Mr Tomoana opined his view that Oranga Tamariki had negated their obligation under the statute to engage the participation of whānau, hapū or iwi and failed to canvass the whānau more widely in the first instance and explore amongst them people willing and able to care for [Moana]. The evidence supports Mr Tomoana's perception. The evidence also supports his view that little effort was invested in doing the right thing for [Moana] and that this disadvantaged [Moana's] whānau whānui. I would add that these failings by Oranga Tamariki to adequately perform the duties upon it also disadvantaged [Moana's] mother, the [Smiths], the [Taipas] and this Court.

[62] The appellant and the Chief Executive submit that the Judge did not correctly identify and apply the entwined nature of Moana's well-being and that of her kinship group, as required by the OT Act. However, I note that in making those submissions, the Chief Executive and the appellant's Counsel have omitted from their legislative overview the legislative references to timing. The requirement on OT, that Moana should be placed in a safe, stable and loving home *from the earliest opportunity* where she could develop a sense of belonging and attachment is not mentioned. Although they submit that Moana can form such attachments if she were to be placed with the Taipas now, this overlooks the important consideration that Moana's placement had to be made early and promptly.

[63] At the time Moana was placed with the Smiths, she had suffered harm from several failed placement attempts and was at serious risk of further harm. Her baby teeth had to be pulled out, as they had rotted. Mrs Hayward describes Moana as having had a combination of no teeth and teeth with metal pieces over them. Moana also required surgery, as she was born with a club foot.

[64] The need to place Moana in a safe placement was a matter of priority in September 2018. The placement met her immediate physical health needs, gave her development potential, and provided a stable family setting where she could develop

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[38] Family Court decision, above n 2, at [238].

a sense of belonging and attachment. Her kinship connections had not been located at that time.

[65] I consider therefore, that the *timing* of the placement of Moana with the Smiths in 2018 was necessary in the circumstances. The fact that OT had not made adequate inquiries about her kinship group has been the subject of strong and justified criticism, not only by the Judge but also by Mr Tomoana. Plainly, preparation for a placement of a Māori child in the future needs to be accompanied by adequate enquiries and research into the child's wider family and kinship group. Unfortunately, this was not done here. There is no dispute among the parties that at the time of Moana's placement with the Smiths, preference should have been given to placing her with a member of her wider family or kin group, who could have met her needs at that time. Instead, she was placed in a safe, stable and loving home at the "earliest opportunity," as s 5(1)(e) requires, albeit it was a non-kinship placement.

[66] It seems trite to caution that when applying the legislative principles under the Act, each case must be assessed on its own facts, but a number of decisions illustrate why. In *Chief Executive of Oranga Tamariki v Downs,* the child was three to four years old at the time of the decision to place her back in her mother's care.[39] In *VY v MY,* a child aged three years old was returned to his great aunt immediately because he was familiar with his child-care centre and knew the applicants well.[40] This was not the case here.

[67] This case had numerous complex factors, which had to be assessed to determine the best interests and well-being of Moana. This included Moana's age, her family background and her development.

[68] Dealing then with the appellant's submission, in the context of this appeal, four years after Moana's placement with the Smiths, it does not follow that s 13(2)(i)(iii)(A) of the Act "mandates" that Moana should be placed with the Taipas "as a matter of preference" now. The factors in this case require to be carefully assessed as the Act provides. This Court is now dealing with a seven-year old child

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39 *Chief Executive of Oranga Tamariki-Ministry for Children v Downs* [2021] NZFC 6441.
40 *VY* v *MY* [2019] NZFC 2812.

who has grown up in the Hawkes Bay, has attended school for some years and formed friendships. She has a bond with her older brother, who was placed with her in two or more of the previous unsuccessful placements and is also in care in Hawkes Bay. Moana has formed strong attachments to her non-kin caregivers over a period of four years, which I canvass further in the psychological evidence.

[69] I therefore reject the appellant's submission that Moana should now be placed with a kin group, away from her remaining family group of her mother, her three siblings and the wider community of Hawkes Bay where she has spent most of her life. This would in effect be a reverse uplift, with its attendant consequences. I consider it is significant that the Minister of Children placed an immediate halt on all so-called "reverse uplifts" following the 2019 amendments and expressed his serious concerns about the practice.[41] I deal with this further in relation to the psychological evidence.

[70] I also reject the submission that the Judge treated Moana as an individual and not as mana tamaiti (tamariki), belonging to a whānau, hapū, iwi or family group. In fact, the Judge did consider Moana's place within her family/whānau.[42] The Judge acknowledged the range of important principles involved under s 5(1)(c), namely, that the primary care and nurturing of any child should be the primary responsibility of that family group.[43] He considered how Moana's whakapapa connections will be impacted by any decision of the Court, which must recognise and respect her sense of belonging and whanaungatanga responsibilities of her whānau. He observed it requires the maintenance and strengthening of her relationships and the involvement of her family, whānau, hapū, iwi and family group decisions for her. He specifically noted that endeavours must be made to obtain the support of the family group to the exercise of any powers under the Act.

[71] Of most relevance to Moana, he considered that a key component of the assessment of which option best met her well-being and interests was to ensure that

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41 Family Court decision, above n 2 at [219].
42 Oranga Tamariki Act 1989, s 5(1)(c).
43 Family Court decision, above n 2 at [314(p)].

her future care pathway enables an integration of all these vital familial links for her. He expressed it as follows:[44]

> There are huge benefits available to [Moana] from the various individual parties; her mother offers love and bloodlinks, [the Smiths] offer love, stability, care and competence in parenting. [The Taipas] offer strong and competent links to whakapapa and whanaungatanga.

[72] The Judge referred to the Act's requirement in s 5(d)(ii) that a child's placement should have supports and networks for the child and her kin group. He then proposed a potential solution of a co-operative partnership among the individual parties to provide Moana with a network and supports to further her connection with her family and kin group. I deal further with the partnership approach at the end of this judgment.

Conclusion

[73] Accordingly, I find there has been no error or misdirection in the Judge's application of the statutory principles of the OT Act to the facts in this case. He conducted an appropriate holistic assessment of complex factors in this case in reaching his determination. The Judge was correct in stating that no one principle under the OT Act trumps another. However, I accept that the Judge's description of the 2019 legislative directives at [243], may have given rise to the potential perception that the well-being and best interests of the child must be assessed separately from the family or kinship group, where the views are in conflict.

[74] For clarification, the child's well-being and best interests is the over-arching and paramount consideration and that must be assessed holistically, applying the guiding principles under ss 5 and 13. Preference should be given to placements of children within their family or kinship group, where they are able to meet the child's needs for a safe, stable and loving home from the *earliest* opportunity. This is especially the case for a placement of a child who is at risk of serious harm. The placement must occur promptly and from the earliest opportunity to ensure that the child has security and stability in a safe, stable and loving home where the child can develop a sense of belonging and attachment.

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[44] Family Court decision, above n 2, at [314(q)].

[75] Where the preferred placement of a child with the kinship group or whānau cannot occur from the earliest opportunity, then the child's well-being and best interests will need to be met outside of the kinship matrix. This impresses upon OT the responsibility of ensuring that appropriate inquiries about a child's kinship connections are made once the risk of serious harm to a child has been identified, as s 13(2)(f) directs. In this case the early inquiry and planning was not done, so the preferred placement option was not available.

[76] This ground of appeal is not upheld.

The psychological evidence

[77] Ms Mason alleges that the Judge mischaracterised the evidence of the psychologist, Mr Dwyer, in order to justify the "non-kin placement". In doing so, she submits, the Judge relied on the potential negative effects of removing Moana from the Smiths and ignored "completely the risks of harm [from] Moana's cultural needs not being met". This then led, she contends, to an unbalanced framing of the core issue, which the Judge identified as follows:[45]

> Having distilled down this voluminous evidence to these core findings, the issue becomes sharply focused on one question. Should this Court engage a course of action which carries such an unquantifiable risk of harm where a mid-point and safer option might exist?

[78] In doing so, Ms Mason alleges the Judge disregarded the Treaty and tikanga considerations by referring to the cultural evidence and the option of placing Moana with the Taipas as "merely 'ideological'." It was not seriously considered as an option.

[79] The Chief Executive submits further, that in incorrectly identifying the entwined nature of Moana's well-being and that of her kinship group as required by the OT Act, the Judge separated Moana's best interests and well-being from her kinship group. This led him to weigh the risks of a change of placement and attachment against the evidence of her "cultural needs". Thus, the reliance by the Judge on Mr Dwyer's evidence, who accepted that his training and background was more in attachment than cultural matters, influenced the Judge's approach. Counsel

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45 Family Court decision, above n 2, at [297].

for the Taipas, Ms Arapere submits that Mr Dwyer's evidence on attachment was more nuanced than the Judge accepted.

Mr Dwyer's evidence

[80] The starting point is the evidence of Mr Dwyer. The Family Court commissioned Mr Dwyer to provide a s 178 psychological report on the care arrangements for the three children, Moana and her two brothers. Mr Dwyer wrote his first report dated 6 April 2020 and a further updated report of 22 February 2021.

[81] In his first report, Mr Dwyer canvassed his interviews with each of the children. He observed Moana and her interactions with her mother in the presence of Mr and Mrs Smith. He concluded that all three children were all relatively settled in their current placements, each being with their respective caregivers and "any move would therefore be significantly unsettling and disruptive for each child". He explained:

> Should a decision be made to move any of the children on the basis that their full range of needs and best interests would be better met elsewhere in the medium to long term, then the potentially unsettling and detrimental effect of a change of placement is in my opinion likely to be counteracted by a longer term outcome that is more in line with their needs. Clearly the decisions that need to be made in respect of the children's future placements are not only crucially important but also need to be made as soon as possible.

[82] Observing that it was highly desirable that siblings be placed as close as possible to each other because the sibling relationships are "enormously important", Mr Dwyer acknowledged the matter had now become increasingly complex for moves to be contemplated for the children. The complexity arose because of the relationships they have each developed with their caregivers and the risk of disrupting their healthy development should they be moved.

[83] He recorded that because Moana and her older brother have each developed an attachment to their mother "both children have a right as well as a need to have regular contact occur between them and their mother as frequently as possible". He urged that sibling contact occurs as frequently as practicable. Contact between the children and other whānau members, other than those named in the report, did not need to occur any more than four to six times annually.

[84] Importantly, in assessing the impact on Moana and her older brother if they were removed from their current placements, Mr Dwyer said this:[46]

> …if [older brother] and [Moana] are to be moved from their current placements, and the bonds they are currently developing with their caregivers and family members are broken, it would be troublesome, unsettling and disruptive for both children in respect of their healthy development. So, any move of either or both children would need to be based upon a clear reason why they would benefit in the longer term from such a move being made in the near future.
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> I suggest that the overriding reason for change in either or both placements to be made in either [older brother's] or [Moana's] case would be whether their placements sufficiently support their whanau connections and address their cultural needs as are reflected in their ethnic background. I suggest, key questions that must be asked are, "Will either child's whānau connections be undermined?" and, "Are the children being appropriately supported as Māori persons?" If the answer to either of these questions is unfavourable, I suggest there is a real risk that the children could grow up to be troubled and confused teenagers.

[85] I note that Mr Dwyer considered that optimal contact between the siblings and the whānau would occur if the children lived in the same home and were therefore able to see and interact with each other every day. He said further that if the children were not living in the same home, arguably the children should at least be living in the same town to enable frequent and regular contact to occur.

[86] In his updating report, Mr Dwyer reported on his further interviews with Moana, the Smiths, Moana's mother, and the Taipas. Based on those interviews and his observations, Mr Dwyer formed the view that Moana had formed closer attachments to the Smiths:[47]

> …Moana has now formed a closer attachment with [Mr Smith] than was evident at the time of my earlier assessment. In addition, I believe [Moana] has formed a significantly closer attachment, than was evident at the time of my earlier assessment, with [Mrs Smith] and this attachment in particular has now become relatively strong and secure.

[87] Mr Dwyer reiterated that if the Court decided that Moana was to remain in her current placement with the Smiths, it would be beneficial if the development and maintenance of her relationships with her siblings, her mother and her wider whānau was also explored. He suggested that her relationships with her siblings could be seen as hugely important in the long term, as they are likely to endure longer than relationships with her mother and the caregivers.

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46 Mr Dwyer's report, 6 April 2020, at [76] and [77].
47 Mr Dwyer's report, 22 February 2021, at [79].

[88] Considering the alternative option, if the Court decided that Moana is to relocate to live with the Taipas and her younger brother, Mr Dwyer expressed his concern at the risk that "she will be distressed at being moved yet again from a placement" and said:[48]

> In my opinion, the risk of such a move to her healthy psychological development is that her development could be significantly disrupted and she may well experience a sense of abandonment especially in the light of changes of her placement that have already occurred.

[89] Mr Dwyer concluded his second report by emphasising the importance of Moana's attachment needs. He said this:[49]

> Whatever placement is ordered for [Moana], it is important that her attachment needs, her sense of belonging, her physical, health, emotional, material, intellectual, development, educational, cultural and recreational needs are addressed in order to enable her to develop a healthy and positive sense of self-esteem, a sense of identity as a Maori person and she is supported to realise her aspirations in a realistic manner. In addition, it is vitally important that [Moana's] connections with whanau are preserved and she is able to learn and develop a connection with her whakapapa and reflect that knowledge and sense of connection in her day-to-day life. If necessary, support should in my view be provided for [Moana's] caregivers, whoever they are, in order to help them to address her full range of needs and to enable her to realise her potential.

[90] Mr Dwyer gave evidence and was cross-examined. He was asked by Counsel for the Taipas, Ms Lints, that if Moana was living under the same roof as a sibling, whether it would have a mitigating effect on the potential disruption of Moana being moved into that placement. Mr Dwyer responded as follows:

> I think that the disruption or breaking of an attachment that has strengthened with her caregivers could be extremely disruptive to her and could have significant long-lasting implications in terms of her mental health, intellectual development, development of resilience, ability to form intimate relationships, the whole range of things could happen. So there is a risk of that. In the longer term, if she was placed with the [Taipas] then I think there's a good possibility of attachments development with them and also with their members of wider whānau, as is common in Māori whānau situations. So, in the long run, I think that would balance out, but the disruption in the meantime is potentially quite risky to the child's healthy development.

[91] When asked whether there was a possibility that it may not be risky, Mr Dwyer maintained his view that it was risky. He responded:

> I think there's a possibility that there may – a risk is more of a predictive thing and when you say "is there a possibility it may not", so in other words, it may not be risky or it may be more easily mitigated, that's possible, but I'm thinking that it's risky and

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48 At [88].
49 At [121].

> the decision to move the child would need to be, for that reason that it is determined far better in the long run in that placement, because at the moment there's an attachment that has strengthened and become more secure with [Mrs Smith] and it's well on the way down that track with [Mr Smith].

[92] When Ms Lints pressed Mr Dwyer as to some mitigating factors in managing any disruption and unsettlement to Moana by moving her to the Taipas, Mr Dwyer saw the transition process occurring over a period of time. He answered in this way:

> The transition process over a period of time. The team partnership approach between caregivers. Holiday contact and other – extended holiday contact and other contact. And a way of making contact sort of more whānau-inclusive as well. And there's two other siblings that I am aware of that [Moana] has, that we haven't mentioned, and I haven't seen her with them, but if that was going to be possible for her to have contact with them, for them to be part of that formula, that potentially could be helpful, too.

[93] Mr Dwyer was then asked a series of questions as to his observations about a positive relationship between Moana and the Taipas and whether there is already an attachment in place. Mr Dwyer explained that the optimal or critical period during which attachments develop is the first, from birth or even before birth, until about three to three and a half years. He indicated:

> There always is the potential for multiple attachments even when there is disruption, but the issue with that disruption is that it could be related to trauma for the child and so that has to be dealt with very carefully and with great support from caregivers. The damage that could've been caused through breaking of attachments, early attachments or disrupting needs to be managed as well. But the child still has the capacity to develop a range of attachments.

[94] Ms Mason also cross-examined Mr Dwyer about Moana's ability to form other attachments, other than to her own mother and Mrs Smith. Mr Dwyer confirmed that Moana had more than two. He reiterated that he believed she was well on the way to forming a long-term secure attachment with Mr Smith and had attachments with her brothers. She also had attachments with four grandparents, who were the parents respectively of Mr and Mrs Smith.

[95] As to whether it would be difficult to form attachments to the Taipas, Mr Dwyer said:

> Hopefully it shouldn't be too difficult but then she's also been quite traumatised by being uplifted from her mother on … three occasions or possibly four. So that hasn't been such a protective factor and possibly a source of trauma. That makes her a little bit fragile and vulnerable and we have to be very careful about that.

[96] When then asked whether another mitigating factor would be her whakapapa and whanaungatanga connection, if Moana goes to a kin group, Mr Dwyer said:

> That's a positive factor and it's really not for me to determine what should outweigh whether attachment should outweigh te ao Māori or whanaungatanga. That's a very difficult matter to rank in terms of importance and in terms of significance in making a placement or making a change or not making a change.

[97] To the proposition that Moana could be moved to a papakāinga where the Taipas live and whether that would be a positive aspect, Mr Dwyer said:

> It could well be. Yeah, I think the papakāinga does offer a very cogent experience within te ao Māori, but it isn't – I mean, I think that the child does need to have predictability, security, and continuity. So those factors are important as well.

[98] Mr Laurenson, then Counsel for the Smiths, cross-examined Mr Dwyer on effect on Moana of the multiple uplifts and removal from her mother and the placements back with her. Mr Dwyer confirmed that he thought it was "highly likely" that as a result of those removals and replacements, Moana suffered trauma, was afraid of males, and for a period of time was scared of Mr Smith for that reason.

[99] Mr Dwyer confirmed that the matters that led him to believe Moana had suffered trauma was the unpredictability of being moved, having had an attachment with her mother being disrupted or broken, and not having her mother available to her when she wanted. Further, not being with her siblings and not having the ability to interact freely with immediate whanāu members were factors that too led to Mr Dwyer's assessment that she had suffered trauma. Other possibilities, although not confirmed, might have been her witnessing violence or seeing others distressed. Those matters also could result in trauma.

[100] Mr Dwyer was asked whether Moana may suffer further trauma if she is removed from Mr and Mrs Smith. Mr Dwyer affirmed that there was the possibility of her suffering further trauma and described it thus:

> I think, yes, if she was moved, there is the possibility of her suffering further trauma and then having her development, healthy development affected and maybe having her regress development-wise, so that the gains that have been made to date could be lost temporarily or for some time, for longer, so that could affect her in the long-term in terms of being able to successfully enter into intimate relationships of her own, low self-esteem could be – could occur, distrust of others, mood disorders such as depression, anxiety, could happen. Her social skill development could be adversely affected. Immaturity which is sort of picking up on that point about regression. And

> you know, bed-wetting, could be something that came back or continued. There could be some cognitive issues in terms of affecting, impairing, healthy intellectual development. So, those are, those are some of the things that could intrude into her life.

[101] He was then asked whether this could have an impact on her teenage years or in an employment environment, Mr Dwyer said:

> Potentially, it could impact on a work environment like in terms of problem-solving skills, ability to deal with conflict, and because it might be scary for her to having the base of trauma, traumatic experiences, and then having to deal with conflict and being freaked out by that. Having the stress response unnecessarily. Or not being able to turn the stress response into a positive and motivating thing. So, those are things that can occur.

[102] About the prospect of not being able to maintain healthy relationships at an intimate level or to have the tools to make proper decisions in the future, Mr Dwyer expanded further:

> … I talked about that in terms of breaking an attachment could affect that because, because one of the things that a secure attachment can promote is in the person is their ability to have their own intimate relationships a bit later on in their lives. So … a secure attachment is a platform for her own, or a template, for her own development later on. It doesn't have to be just one attachment, either, it could be more than one attachment that helps in that way with her development and her ability to have her own long-term intimate relationships.

[103] Mr Dwyer was taxed further about the risk of further trauma in moving her away from her current caregivers. Mr Dwyer cautioned that risk is more of a predictive thing, as it may be mitigated or may not, but it is a risk. He was then pressed about the likely future risk for Moana, given the trauma she has already suffered. Mr Dwyer's answers and the cross-examination are as follows:

> Q. But given the trauma she has already suffered and the risk that she could suffer further trauma, should we even be saying why run the risk for [Moana]?
>
> A. Well, that can't be ignored but it's not for me to be saying that can't be – it can't be ignored but it's not for me to be saying what needs to happen.
>
> Q. I appreciate that and thank you, but you can agree that the risks are significant and could be very far reaching?
>
> A. Yes, indeed.
>
> Q. If there was going to be a decision to, or for any sort of transition given the risks, given the trauma she's already suffered, any transition in any form would you agree would need to be very considered and very well planned?
>
> A. Indeed and over a period of time.
>
> Q. Because one of the realities for little [Moana] is that, and I'll put this to you, you might not agree with me, is that since about May of 2019 she hasn't really had

the benefit of any proper planning for her because we've been in this log jam. Do you have any comment on that?

A. It might even be before that. I think that her placement with her caregivers might've been made at the time as a pragmatic approach then they understood that it was a permanent thing and then it wasn't and there's been real difficulties around that in terms of certainty for the child. Whether she's been aware of that, because I think her level of intellectual development has left her struggling with some of the information that she's been aware of. So she may not have understood all of what was going on, but she probably did. She probably was aware of things that were going on as well so that would've been quite confusing in itself and just made things more difficult for her.

The partnership evidence

[104] Mr Dwyer was called by Counsel for the Child. Mrs Hayward canvassed two matters with him in examination-in-chief. The first was whether Mr Dwyer had seen signs of the caregivers trying to alienate others. He confirmed there were no obvious signs of alienation that he saw. He did however see signs of negativity towards social workers by the Smiths but he believed that was more to do with the conflict that existed between them. He found both caregivers at all times to be polite and co-operative and easy to deal with.

[105] The second matter which Mrs Hayward asked Mr Dwyer to comment on was the evidence given by Mrs Taipa that even if Moana was not placed in the care of her and her daughter, that "they would be in support of the current caregivers". Mr Dwyer said he thought that was reflective of the type of people the Taipas were, which prompted his thinking that there was a potential for a team or partnership approach between the Smiths and the Taipas "in terms of best meeting the needs and best interests of [Moana]". It also reflected for him the same comment which was made in a recent interview with the Taipas, when they had expressed "a similar sentiment" to him.

[106] Mr Dwyer was expressly asked to elaborate on this under cross-examination. He saw a lot of merit in a joint approach or a partnership approach between the Smiths and the Taipas, because "they have a vested interest in terms of looking at what's best for the child and that's why they are here today". He saw that each of the caregivers "have their own unique attributes, skill sets and relationships and attachments to bring into such an arrangement". Importantly he said the following:

> So I think – and from a cultural perspective, I see the word "partnership" as being highly relevant.

[107] He then explained why:

> … it would have the potential to enable her to be able to predict what's going to happen, to have certainty rather than disruption, to have happiness and security rather than trauma. To have a team of adults working together in partnership and being able to have that partnership and the respective skills of the people modelled to her and being part of her everyday experience, to be able to see a problem being solved in front of her and to be part of that would be something that would be very significant in her future development.

The Judge's risk assessment

[108] The principal challenge to the Judge's assessment of the psychological evidence is that the Judge based his decision on "an exaggerated risk not evident in Mr Dwyer's testimony" and ignored the risk of harm from Moana's cultural needs not being met. Thus, Ms Mason says, the Judge mischaracterised Mr Dwyer's psychological evidence.

[109] Ms Mason points to the terminology used by Mr Dwyer that the risks to Moana of attachment disruption and harm in moving her from the Smiths were "mere possibilities, not definite outcomes." The phrases such as "so there is a risk of that", the transition "*could* be hugely disruptive", "*could* be "extremely disruptive' …", "*potentially* quite risky to the child's healthy development", "*could* cause her to suffer further trauma" were quoted in support of her submission. (Emphases added).

[110] The passage relied on is Mr Dwyer's evidence that there *could* be negative consequences if Moana's placement did not meet her cultural needs: [50]

> …if a placement undermined the cultural or whānau connections then this *could* in turn cause a real risk that children grow into confused and troubled teenagers. In the teen years a person *might* then develop a resentment, depression or other mental health issues …
>
> (emphasis added)

[111] Yet, when referring to Moana's cultural risks, Ms Mason relies on Mr Dwyer's same terminology to submit that the Judge only referred to it in passing in his

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[50] Family Court decision, above n 2, at [286(v)] (footnotes omitted).

analysis.[51] On the basis of Ms Mason's earlier submission at [108], it appears the complaint is that the Judge did not treat the cultural risks as a "definite outcome" but rather as "a mere possibility" as Ms Mason earlier phrased it.

[112] I consider the Judge's references to Mr Dwyer's evidence are reflective of the way in which the psychologist gave his evidence. Mr Dwyer repeatedly reminded Counsel during his cross-examination that he was not there to make the final decision but to provide the Court with sufficient information to assess the risks to Moana, as the evidence passages demonstrate. He acknowledged, as noted above, that risk is predictive and may be mitigated but is nevertheless a risk. Mr Dwyer's use of "could" reinforced that actual risk can never be stated definitively but it can be predicted as a future potential, with degrees of likelihood.

[113] In canvassing the key aspects of Mr Dwyer's reports and his oral evidence, the Judge carefully adopts the same language. To do otherwise would have been to exaggerate the evidence given by Mr Dwyer. The language used is also consistent with the terminology in the assessment of risk.

[114] I cannot therefore uphold Ms Mason's submission. Nor do I accept that the Judge referred to the evidence on cultural risk "only in passing". The Judge set out key aspects of Mr Dwyer's evidence,[52] including his evidence that if a placement undermined the cultural or whānau connections then this *could* in turn cause a real risk that children grow into confused and trouble teenagers. The key aspects summarised by the Judge were consistent with what Mr Dwyer had said, including that Mr Dwyer had made it clear he could not determine whether the concepts of whakapapa and whanaungatanga would outweigh attachment. The Judge drew upon the key parts of Mr Dwyer's evidence for his ultimate assessment, including the suggested partnership approach.

[115] Further, I do not accept the interpretation which Ms Mason places on Mr Dwyer's evidence. The risk identified by Mr Dwyer is when the placement caregivers *undermine* the cultural or whānau connections of the child then "*this could in turn*

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51 Family Court decision, above n 2, at [286(v)].
52 At [286(a)–(z)(cc)].

cause a real risk that children grow into confused and troubled teenagers" (emphasis added).[53]

[116] Ms Mason's submission is that unless the placement of Moana is with her kinship group, then she is at risk of her cultural needs not being met. Mr Dwyer's evidence was that where caregivers undermine a child's cultural whānau connections, then the risk could be real. It is not a statement, as Ms Mason would interpret it, to mean a new placement now must meet Moana's cultural needs over every other consideration. It is not a natural reading of Mr Dwyer's evidence and nor does it fit with the evidence he gave.

[117] I deal then with the issue of the "tension" between Moana's cultural needs and the attachment risks arising from a change in placement. The Chief Executive argues that the Judge, in giving the "core reasons" for his decision, was likely influenced by Mr Dwyer's evidence, who did not have training or expertise in cultural matters. The Chief Executive submits that Mr Dwyer was not able to assist on a proposition that "a placement with kin in accordance with concepts of whakapapa and whanaungatanga would lessen risks to disruptions in attachments". Thus it is argued that the evidence of tikanga might have been able to resolve the "apparent tension" between Moana's cultural needs and her attachment risks by properly applying Mr Walker's expert evidence of tikanga.

[118] The Judge recorded a number of core reasons for his decision but of relevance to this submission, the Chief Executive highlights four out of the nine reasons given by the Judge.[54]

> (f) There is a real risk of long term harm to her wider but vital emotional, mental and psychological needs by effecting a change in placement.
>
> (g) I am not satisfied that it is in her well-being and best interests to take that risk.
>
> (h) Her connections to whānau and cultural components have already been impacted by the earlier decisions and failings of Oranga Tamariki in searching for safe whānau connections at the outset.
>
> (i) The deficits that [Moana] has suffered in terms of whānau or cultural connections must be accepted as an unfortunate consequence of all that has occurred. But, the solution to those failings is not to remove her from a safe

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53 Family Court decision, above 2, at [286(v)].
54 At [323(f), (g), (h) and (i)].

> haven. Instead, the solutions are to be found by applying the statutory principles and providing [the Smiths], [Moana's mother] and the [Taipas] with adequate supports to build those connections, while retaining the stability of the status quo.

[119] The Chief Executive's challenge is that Mr Walker's evidence referred to the potential impacts on Moana's spiritual well-being where a child's connection to their whakapapa is not strong. He submits that if the tikanga evidence was insufficient to resolve the tension, that could have been acknowledged. Instead, he argues, the decision records the evidence as supporting the tension. He points to the passage in the decision where the Judge says:[55]

> The point where the appropriate cultural perspectives of Mr Walker and those of a Court may be at risk of parting is where the Court is bound by statute to consider factors beyond solely cultural or tikanga perspectives.

[120] It is accepted by the Chief Executive that the Family Court did not have sufficient evidence on "the extent to which a child raised by tauiwi might still be able to develop an increasing connection with their Māori culture" through initiatives such as "cultural learnings and education, establishment of connections with a hapū marae".[56] The responsibility for such needs, he says, falls on a child's whānau, hapū or iwi.

[121] Whether there was a deficit of adequate cultural transition risks or insufficient tikanga evidence adduced at the hearing, the Judge received expert psychological and tikanga evidence, and he considered both.

[122] The problem facing the Judge and this Court is that the "horse had bolted," when Moana was uplifted for the third or fourth time from her mother and placed with the Smiths, that being the safest option in September 2018. This is illustrative of the importance of early planning and inquiry of kinship connections by OT for a child who has been identified as being at risk of removal.

[123] The Judge recorded that the most ideal outcome for Moana is that she would know both her parents and live with them and all her siblings in a safe, stable and nurturing environment. He classified this as ideal, but neither realistic nor achievable.

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55 Family Court decision, above n 2, at [235].
56 At [232(o)].

The problem in achieving the ideal, the Judge said, was that the Ministry elected to place Moana with the Smiths after failing to make adequate inquiries as to a whānau or kinship option. Now Moana is placed with the Smiths with whom she has formed strong attachments. The Taipas emerged as a kinship connection to Ngāti Kahungunu in 2019 and as an ideal placement for Moana's brother, with whom they have formed a strong attachment. At the time of the Family Court hearing in 2021 however, Moana had been cared for in a stable and supportive environment with the Smiths for nigh on three years. At this appeal hearing, Moana had lived with the Smiths for four years.

[124] The Judge then looked to the next best option, which he framed as follows:[57]

> … what might be ideal must retract to the next best option, to live either in proximity to whānau, hapū or iwi, or in a whānau like situation, connected to mother, siblings and cultural connections, but also having her vital daily needs and emotional, education, psychological welfare protected.

[125] Given Moana's background and earlier trauma, together with her immediate physical and emotional needs, the evidence from Mr Dwyer as adopted by the Judge, was one of damage control or curtailment of further risk. I consider that this was an available and logical finding open to the Judge on the evidence.

[126] It was therefore appropriate for the Judge to examine carefully the evidence of Mr Dwyer on the potential future risks to Moana's emotional and psychological development, if she were uplifted to another placement in 2021, albeit to a safe, supportive and culturally connected placement. Mr Dwyer's evidence on the risks of a further uplift and placement with other caregivers was therefore critical evidence.

Impacts of reverse uplifts

[127] At the resumed Family Court hearing in July 2021, the Judge inquired of the most senior OT social worker why OT was still seeking to reverse its placement of Moana with the Smiths, given that the Minister for Children had made various public statements, placing an immediate halt on all so-called "reverse uplifts". The Minister had expressed his serious concerns about the practice. The social worker, however, had not received an official briefing on the issue and understood that any change of

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57 Family Court decision, above n 2, at [326].

placement had to be supported by a solid rationale for the decision-making. No details were given about the assessment of Moana's situation in light of that.

[128] At the appeal hearing, Mrs Hayward drew my attention to the significant concerns expressed by a senior academic about the dangers of "ideologically-driven uplifts". Dr Nicola Atwool, a University of Otago Associate Professor of Social and Community Work, has authored a number of articles on implications for children in care in relation to attachment and resilience,[58] and in a news media article said:[59]

> Māori children placed with non-Māori caregivers are being uplifted and placed with whānau that they do not know and in some instances live a long way from where the child has been living, making any sort of gradual transition impossible.
>
> In these instances, section 7AA, a legislation change brought in last year that requires decision-makers to consider the importance of a child's mana, culture and whakapapa, is cited as justifying this action. Again, the practice is ideologically-driven and is neither child-centred nor trauma informed.
>
> Uplift is traumatic for children. It involves the forced removal of a child or group of children from all that is familiar to them at an age when they cannot comprehend what is going on. Forced removal should only occur in the most dangerous situations where risk is imminent…

[129] Dr Atwool also records that currently, there is a legacy of practice that has continued to ignore the importance of cultural connection, which has meant that Māori children have been living with non-Māori caregivers for substantive periods of their lives. She observes:

> This is their world. *Removal is traumatic*, all the more so because they have experienced previous disruption and trauma.
>
> What is needed is engagement with carers, the children in their care and whānau to ensure the development of pathways forward that meet all of the childrens' needs. *Demonising caregivers is no more acceptable than demonising birth parents.*
>
> (emphasis added)

[130] The sentiment is applicable here. The importance of connection to Moana's whānau and kinship groups is important. It has been recognised by the Judge in his decision. However, it is another matter to suggest, as the appellant and the Chief

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58 Nicola Atwool "Attachment in the developing child" (2002) 6(2) Childrenz Issues at 21; Nicola Atwool "Attachment and Resilience: Implications for Children in Care" (2006) 12(4) Child Care and Practice 315; Nicola Atwool "Birth Family Contact for Children in Care: How Much? How Often? Who With?" (2013) 19(2) Child Care and Practice 181.

59 Nicola Atwool "The collateral damage of ideologically-driven uplifts" *Newsroom* (online ed. New Zealand, 27 November 2020).

Executive contend, that the recent legislative amendments *require* an immediate change of placement for Moana or a transitional placement in the short term.

[131] Counsel for the Taipas recognised the importance of maintaining safe and nurturing attachments and stressed that they did not seek a reverse uplift. Mrs Taipa, described by the Judge as impressive and insightful, did not agree with Ms Mason's suggestion that if Moana remained with the Smiths her whānau connections would be undermined. The Judge records Mrs Taipas response as follows:[60]

> Not necessarily if the access was still going and they were fully involved in that and open to the mother and other whānau members…I couldn't say that it would be undermined because … that is not fair, if I use that word, that wouldn't be fair to them to make that judgment…

[132] The Judge noted that Mrs Taipa accepted that a lot depends upon the relationship with the whānau. Further, Mrs Taipa could not rule out the possibility that with appropriate supports, the Smiths might be able to support Moana as a Māori person.

[133] The history of this case has led to a distinct polarisation of views. Those polarising submissions, urging that the Treaty and tikanga Māori obligations must be construed strictly to require immediate action, is unfortunate in my view. The Judge aptly referred to the evidence of the senior social worker, who acknowledged that OT could have done a better job by trying to find Moana's whānau and if that had been done, then the dispute may never have reached Court.

[134] However, kinship links were not found or explored at the time Moana needed to be put in placement and that had to occur with some urgency. Without prior inquiry or research into Moana's whānau links, OT had to ensure Moana was safe from harm as a priority at the time of her uplift. As a result, Moana had stabilised and formed strong attachments to her non-kin caregivers in the intervening three years.

[135] The Taipas approach in this appeal, as in the Family Court, is impressive. They do not seek an immediate uplift. They have reiterated that they are willing to work co-operatively to ensure Moana's cultural and kinship are supported and strengthened.

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60 Family Court decision, above n 2, at [253(i)].

Their approach acknowledges Moana's current placement and the stability issues associated with it.

Conclusion

[136] I find that the Judge has not mischaracterised Mr Dwyer's evidence. Mr Dwyer's evidence carefully addressed the risk of further trauma if Moana's attachment to the Smiths was disrupted. He also did not accept that Moana's whānau connections would be undermined if she stayed with the Smiths but with an important proviso. Access to Moana's whānau must be continued and supported by them. The tikanga evidence from Mr Walker, careful and considered as it was, could not address the attachment and trauma risk to Moana of a change of placement. It was not part of his brief nor his expertise. I find his evidence, nevertheless, was carefully considered by the Judge.

[137] This ground of appeal fails.

Rejection of social worker evidence

[138] Ms Mason submits that the Family Court judgment was legally flawed because the Judge discounted a large part of the evidence and/or rejected the evidence of the OT social workers. Thus, the evidence, which portrayed the Smiths in a negative light, was not considered, she submits.

[139] Ms Mason traverses nine "issues of safety for Moana" whilst she was in the care of the Smiths. These included assertions that the Smiths raised their voices and made threatening remarks to OT social workers, or each other, in the presence of Moana. They removed toys and gifts bought for Moana by social workers, the Taipas and her whānau. Allegations were made that the Smiths are controlling, manipulating and forced Moana to lie. Social workers made observations of Moana's physical symptoms typical of a child suffering abuse. Ms Mason submits that the majority of the evidence was discarded because it was coloured by the Judge's strong criticism of one of the OT social workers. This led the Judge, she submits, to dismiss the evidence of every other OT social worker and reject the majority of the social work evidence, leading to an inevitable finding that Moana should remain in the "non-kin placement".

The Family Court's assessment

[140] The Judge canvassed the evidence of the social workers over 154 paragraphs in the judgment.[61] The evidence of each of the eight social workers was summarised and assessed by the Judge for reliability and consistency.

[141] It is correct that the Judge found the quality of the evidence of the most junior social worker "particularly concerning". Unfortunately, this case was the first case that the young graduate social worker had been allocated and she was the third social worker to be appointed to Moana's case. The Judge noted that her inexperience might explain some of her actions but was highly critical of the lack of transparency and integrity in her dealings with people, within and outside the OT Ministry, in her affidavits, and statutory reports to the Court. This culminated in divergent assessments made by the junior social worker on the Smiths care of Moana. The social worker's reviews, plans and reports in November 2018 and again in May 2019 contained "very positive reports as to the care" given by the Smiths to Moana. They also detailed how the social worker was unable to locate Moana's whānau for access. Yet, in May 2019, she was reporting adversely on the Smiths care to her supervisor, Moana's permanent care social worker.

[142] The Judge found the permanent care social worker to be a generally reliable witness, in terms of the consistency of her evidence. She had accepted the word of the younger social worker without inquiry. She accepted her juniors' reports that the Smiths would not support whānau access and considered that to be the biggest barrier to their having permanent care of Moana. However, the statutory documents, namely the review documents, were "diametrically opposed" to what the junior social worker had told the permanent care worker.

[143] The Judge summarises the diametrically opposite evidence as demonstrating the two worlds at play:[62]

> …on one hand the Ministry was indicating to the caregivers, the child's lawyer and the Court that this was to be a permanent placement yet, on the other, were taking active steps to end it.

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61 Family Court decision, above n 2, at [69]–[227].
62 Family Court decision, above n 2, at [85].

[144] The Judge described that as "duplicity in action", which served as a catalyst for everything that occurred thereafter. This was an available finding to the Judge on the evidence. It was accepted by the young social worker under cross-examination that OT was not being fair to everyone, primarily the Smiths. Another social worker, whom the Judge described as a "fair-minded witness," was the tenth or eleventh person in OT who had worked with the Smiths. The Judge recorded that she accepted that the Smiths had received mixed messages from the OT social workers throughout the long history of the case.[63]

[145] In addition to the divergent views about the Smiths by OT social workers, there was the unfortunate incident concerning the recorded interview by two social workers during a return from an access visit to Wellington. Moana had been in Wellington for an access visit to the Taipas and under questioning by the social worker in the car, gave both negative and positive comments about the Smiths. The recording was done by one social worker surreptitiously to show that Moana was being psychologically abused by the Smiths. In the later part of the recording, Moana said she had told the Smiths she wanted to live with her two brothers. The social worker then asked Moana if she would like her to try and make that happen.

[146] The Judge was highly critical of the social worker's actions for a range of reasons, not least of which was that they were being used as a means to achieve what the social work team wished to happen. The Judge was particularly concerned that social workers were undertaking a direct interview with a five-year-old child, calling it "highly inappropriate." Sharing the concerns of Judge Harrison, he concluded "that the recording was a device used to expedite achievement of what the social work team was desirous of doing,"[64] namely to effect a change in placement and usurp the purpose of the substantive hearing.

[147] In my view, there can be no criticism of the Judge's views of these actions and indeed, Counsel for the Chief Executive accepted that the conduct of OT was not ideal or acceptable. I am in agreement with the Judge that no child, particularly if they are

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63 At [169].
64 Family Court decision, above n 2, at [157].

the subject of a dispute in any custodial proceeding, should be subjected to such unprofessional and non-clinical questioning for evidential purposes in that proceeding.

[148] Ms Mason's submission that the Judge had a "total disregard for the voluminous social worker evidence in this case" is unsustainable. The Judge's review of the social worker evidence was extensive, canvassing the time of critical decisions, the documentation for those decisions, the allegations that were made by various social workers about the Smiths, and the evidence elicited under cross-examination of those witnesses. The Judge has noted those witnesses who were credible and reliable and contrasted their evidence with others, whom he found were not. That is a part of judicial function in accepting or rejecting evidence in reaching a decision.

[149] To explain the potential change in attitude by the social workers towards the Smiths, Ms Mason invites an alternative "narrative" to explain what had occurred in 2019. Because there was a lot of media attention on OT's activities in relation to their treatment of Māori children and in the knowledge that the 2019 OT Act amendments were about to come into force, Ms Mason submits that the social workers and staff were under significant pressure to act in accordance with the new 2019 amendments.

[150] The alternative narrative may provide a background explanation for the actions of the social workers. However, it does not excuse them. In fact, the alternative narrative lends support to the Judge's findings. Rather than disputing that these events happened, it gives a reason why they did.

[151] Turning finally to the "negative evidence" which portrayed the Smiths in a negative light, the Judge traversed the evidence and the allegations made by the most junior social worker about the Smiths and the alleged direction to her from her seniors to edit her statutory review documents. He did not accept her evidence. Those reasons do not need to be canvassed further in this judgment. They are clearly set out by the Judge, including significant evidence from the most senior OT social worker, whom the Judge found to be reliable, considered, and consistent in his evidence.[65] The Judge then listed the deficiencies in OT's process over Moana's placement.

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[65] Family Court decision, above n 2, at [206].

[152] Where the Judge rejected evidence from the social workers, he gave reasons for doing so. For example, when assessing the evidence of the social worker who questioned Moana on her return from the access visit to her brother and recorded the negative comment about Mr Smith, the Judge noted that the social worker asking the questions had never met Mr Smith, yet her notes "disclosed a significant prejudice against him".[66] Another social worker was noted to have conceded she would not have "done it that way" with regard to the inappropriate interviewing of Moana, yet she did not intervene at the time.[67]

[153] I therefore do not uphold Ms Mason's submission that the negative evidence was not considered and nor do I uphold the submission that the Judge discounted a large part of the evidence of the social workers. In my view, the Judge performed the role of a judicial fact-finder, accepting evidence which was reliable and consistent, and rejecting evidence that was not, together with reasons. His findings were open to him on the evidence and there is no basis for appellate intervention. This ground of appeal is not upheld.

Bias and recusal

[154] Aligned with the previous ground of appeal, Ms Mason raises two further related grounds of appeal. First, she submits that bias had arisen from the difficult relationship that had developed between the Judge and the Napier OT office, which in turn, she says, clouded his judgment. She submits specifically that "the entire focus of the hearing and in the Decision, of raking over historical OT conduct, so as to apportion blame to them had little to do with what was in [Moana's] best interests and more to do with the difficult relationship between the Napier OT office and the Judge". Second, she submits that the Judge should have recused himself prior to the adjourned hearing in July and thereby did not bring an impartial mind to his determination. I treat both claims as allegations of apparent bias.

[155] The allegations of apparent bias overlaps with the previous ground of appeal concerning the OT social work evidence and I therefore deal with these claims briefly.

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66 At [182].
67 At [183].

[156] No issue was taken with the specific findings of the Judge in relation to each of the OT social worker's evidence. The contention by Ms Mason is a generalised one, that the Judge had a difficult relationship with the Napier OT office and he discounted the OT evidence as a result. I cannot accept this submission. As noted, the Judge's reasons for rejecting some of the evidence but accepting others is the function of a judicial fact-finder and the basis for his reasons is clearly set out.

[157] The second claim is that the Judge's decision not to recuse himself was an error because of his views and attitude towards OT. This claim overlaps with the two previous grounds of appeal.

[158] The Family Court hearing commenced on 23 March and three days later was adjourned to 26 July to enable production by the Chief Executive of documents which had not previously been produced and any further evidence and document discovery.[68]

[159] On 21 July, five days before the hearing was resumed, the Judge issued a Minute of Disclosure to the parties of memoranda and correspondence within the judiciary and the then Chief Executive concerning media articles about judicial conduct, the complaint by the Judge to the Law Society, and the concerns expressed by the Chief Executive about the Judge's interventions in the evidence of three social workers in this case.

[160] The Judge invited the parties to consider whether they wished to make an application for recusal. All parties responded and the only party wishing to make an application for the Judge's recusal was Moana's mother. Following receipt of submissions, the Judge issued a decision[69] canvassing the authorities on recusal[70] and determined that he should not be disqualified from presiding over the remainder of the proceeding.

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68 *Chief Executive of Oranga Tamariki v [the Smiths],* 5 July 2021 at [1].

69 *Chief Executive Oranga Tamariki v [Others]* [2021] NZFC 6655.

70 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337.

[161] The Chief Executive and the Taipas abide the decision of this Court and take no position in relation to the claim of bias and/or recusal. The Smiths submit the appellant's claims of bias evidence and the recusal decision are without merit.

[162] Having reviewed the Judge's Disclosure Minute and his reserved decision on recusal, I consider his disclosure of the communications and his recusal decision were appropriate and done in accordance with the Supreme Court's guidance.[71] The observations of the Supreme Court in *Siemer* are relevant:[72]

> … there are strong institutional safeguards within the system. Following appointment, judges take an oath committing them to independence and impartiality in their judicial service … Judges are also accustomed, on a daily basis, to putting aside their views of litigants appearing before them that are not relevant to the issues … Their commitment to proper exercise of the judicial function and their experience in discharging that commitment equip judges to administer justice impartially, without being distracted by extraneous events such as the reactions of the parties to what they decide or do. This is so even where there has previously been an expression of strong concern by the litigant over what the judge has done such as by lodging a complaint or seeking recusal of the judge.

[163] Such guidance has been followed in proceedings where a complaint about the Judge has been made to the Judicial Conduct Commissioner and recusal was not justified.[73] There are other prevailing considerations, which support the Judge declining to recuse himself and answer Ms Mason's submissions.

[164] First, the Judge was approached by his Head of Bench regarding an aspect of conduct with witnesses, following the Chief Executive's meeting with the Chief District Court Judge. There was no meeting or discussion between the sitting Judge and the Chief Executive and nor was there a discussion on aspects of the evidence in private with the Judge.

[165] Second, the Judge had already heard three days of evidence and adjourned the hearing to enable the calling of further social work witnesses for the purpose of giving an opportunity for such witnesses to answer matters that had arisen during the first part of the hearing. This action mitigates against a finding that the Judge would not

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71 See *Siemer v Heron* [2012] 1 NZLR 293.
72 At [14].
73 *Lowe v Auckland Family Court and Way* [2017] NZHC 209 at [30].

bring an impartial mind to the resolution of the questions raised in the first part of that hearing.

[166] Third, to replace a Judge midway through a complex hearing would have required an adjournment and a different Judge to rehear all the evidence. Substantial delays would have ensued.

[167] Fourth, the High Court Recusal Guidelines require that Judges should not accede too readily to suggestions of bias,[74] or disqualify themselves in response to litigants' suggestions that there is an appearance of lack of impartiality. As McGrath J observed in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd:*[75]

> If a practice were to emerge in New Zealand of judges disqualifying themselves without having good reason, litigants may be encouraged to raise objections which are based solely on their desire to have their case determined by a different judge who they think is more likely to decide in their favour. Such a development would soon raise legitimate questions concerning breach of the rights of other parties.

[168] The foundation for claims of bias and/or apparent bias is Ms Mason's submission that the "fears of the [appellant] about a reaction against OT were clearly made out" when the Judge reached his decision by rejecting all of the OT social worker evidence. She points to the word "fail" and its "derivatives" which are repeated through the judgment in respect of OT and its social workers' actions to submit that her concerns about the Judge's bias "were entirely made out."

[169] These claims, although strong in rhetoric, do not withstand scrutiny. I have already canvassed the Judge's assessment of the social work evidence. In addition to the acknowledgement and acceptance of OT deficiencies by other OT witnesses and OT Counsel in this hearing, there is some further support for the Judge's findings. Judge Harrison expressed similar concerns at the Pickwick "without notice uplift hearing,"[76] which occurred two months before the March substantive Family Court hearing.

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74 Justice G J Venning "High Court recusal guidelines" (12 June 2017) Courts of New Zealand <courtsofnz.govt.nz> at [1.5.1].

75 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd,* above n 74, at [88] (footnotes omitted).

76 *Chief Executive of Oranga Tamariki v [Moana's mother]* [2021] NZFC 664.

[170] On 13 January 2021, OT filed a without notice application to vary its s 101 custody order by the removal of the specific condition that placed Moana with her current caregivers, the Smiths, pending the Court's determination of the applications. These were scheduled for the full hearing in March. The application was made on the basis of the direct questioning of Moana on an access visit, to which I have referred above,[77] where a social worker questioned Moana and recorded her answers on her placement preference and the social worker's offer to implement her preference.

[171] Judge Harrison declined OT's application, finding that there was no cogent or strong evidence to merit the prompt removal of the custody condition of placement. The Judge said:[78]

> What I do find is that the conflict, which is inherent in this litigation is putting [Moana] at risk. I find there is clear evidence from the social worker telling [Moana] that she will try to find a way so that [she] can live with her mother and her brothers. I find that to be entirely unprofessional, grossly inappropriate and psychologically abusive. Yet, this [is] a [person] that she has continued to meet on three further occasions at school to develop the safety plan, again, in the absence of any investigation being undertaken to warrant a safety plan.

[172] This appeal hearing, at my direction, did not repeat or review the various social workers' evidence on events which occurred prior to the Family Court hearing. The relevance in referring to Judge Harrison's decision is to show that Judge Callinicos' concerns are consistent on one of the relevant interactions of social workers with Moana. It serves to provide another judicial perspective on certain of the actions of one of the social workers, forming part of the wider range of issues and allegations before Judge Callinicos.

[173] I find that the claims of bias and/or apparent bias do not meet the requisite legal threshold and I dismiss those grounds of appeal.

The Family Court orders

[174] Having dismissed the grounds of appeal, I turn now to consider whether the orders made by Judge Callinicos should remain extant. I set out the criteria the Judge adopted in setting aside the custody order in favour of the Chief Executive.

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77 Above at [143].

78 *Chief Executive of Oranga Tamariki v [Moana's mother],* above n 76, at [55].

[175] The Judge commenced his consideration of whether the existing s 101 custody order[79] in favour of the Chief Executive should be discharged or varied, by reviewing the legal criteria adopted in *MEM v SBN and Chief Executive of the Ministry of Development.*[80] The Court noted in *MEM* that it has an unfettered and wide discretion to discharge a custody order under s 127 and in the absence of guiding factors, adopted a three-tier test to determine whether to discharge the custody orders under the OT Act. The three-tier test was:

> (i) Consider the original care and protection concerns
>
> (ii) Consider the child's current situation, including the presence or absence of care and protection concerns, and
>
> (iii) Assess the consequences for the child if protective orders are no longer in place.

[176] The application of the above test was also relevant to the Judge's ultimate decision that the COCA applications were inappropriate in this case and that protective orders should remain.[81] No issue was taken by the parties to the Judge's application of this test.

[177] The Judge considered that through no cause or fault of her own or that of the Smiths, Moana has found her way into their "capable care." He saw that she now has an opportunity to explore her te ao Māori dimension. The Judge considered that she "deserves a safe and stable pathway to ensure she grasps the tools of both cultures: not merely one of them".[82]

[178] He made orders to implement a partnership approach among the individual parties, observing the retrenched position of the parties and the tension that has ensued. He recorded this as follows:[83]

> (r) A particular tragedy of this case is that these varying contributions and positive attributes of the individual parties was not harnessed, for all the reasons I have detailed.

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79 Oranga Tamariki Act 1989, s 127.
80 *MEM v SBN and Chief Executive of the Ministry of Development* FAM 2001-019-000230, 22 June 2009, at [18].
81 Family Court decision, above n 2, at [185]–[186].
82 At [333].
83 At [314(r) and (s)].

(s) In order for [Moana] to be afforded the best future chances in life will best be achieved by initiatives to bring these positive aspects together, to develop a platform for co-operation and the provision of adequate and appropriate supports, delivered in an honest manner and with integrity. The principle in s 5(1)(d)(ii) supports the creation of such networks.

[179] To further the platform for co-operation and the provision of adequate and appropriate supports, the Judge made guardianship, custody and access orders and directed the Chief Executive to prepare a s 128 plan, to support a s 91 Support Order or a s 86 Services Order as directed.

Guardianship Orders

[180] The Judge determined that the well-being and best interests of Moana was likely met by orders which built upon the *status quo*, to bolster and improve it with an expectation that the Chief Executive provides supports and services to the Smiths and Moana's whānau, hapū and iwi, to pursue more cultural connectiveness for Moana. To do this, the Judge considered that there must be "a goal of building a workable partnership between the two houses for the sake of this child".[84] He considered the Chief Executive had duties under both the former legislation and the OT Act and should carry them out.

[181] I consider the guardianship orders aptly reflect the 2019 amendments to ensure that Moana stays connected to her family, her kinship group and her caregivers to whom she is attached.

Custody and access orders

[182] The Judge then discharged the existing custody order in favour of the Chief Executive, granted the custody of Moana to the Smiths on terms and conditions, and appointed Mr Smith and Mrs Taipa as guardians of Moana in addition to her mother the natural guardian. In doing so, the Judge expected that the performance of guardianship responsibilities by Mr Smith and Mrs Taipa would be carried out co-operatively and would be limited to essential matters concerning Moana's health or education only and that such decisions respect the role of Moana's mother. There

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84 Family Court decision, above n 2, at [331].

should be no attempt, for example, to alter Moana's names from those provided to her by her mother.

[183] The role of Moana's mother, whānau and cultural connections to her iwi were reinforced by the terms and conditions placed on the s 101 custody order in favour of the Smiths. Those conditions were:[85]

(i) Moana is to reside in the Hawkes Bay region and shall not be removed from New Zealand except by written consent of all guardians or order of the Court.

(ii) The Smiths will partake in supporting Moana's cultural connections and access to whānau in accordance with the s 128 plan to support a Support Order made under s 91 and a Services Order under s 86 of the OT Act.

(iii) Neither Mr or Mrs Smith is to be present during Moana's access with her mother or other members of her whānau.

[184] The Judge made access orders in favour of Moana's mother, with supervision either by the Chief Executive or by the Taipas and the times, frequency and changeover of such access shall be done in accordance with a s 128 plan to be approved by the Court. In the interim, he stipulated times during school terms for Moana to have access with the Taipas in Wellington as agreed.

[185] Similarly, the Judge made access orders in favour of the Taipas with access occurring for a minimum of one week in each of the school term holidays and for two separate weeks during the summer school holidays and other dates, times of access and manner of changeover, also to be in accordance with a s 128 plan.

[186] I consider these orders and their conditions are appropriate and need no amendment.

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85 At [339(b)(i)-(iii)].

COCA applications

[187] In dealing with the COCA applications, the Judge had regard to the nature of orders made under the COCA Act. He decided that if COCA orders were made, there would be no jurisdiction to continue the involvement of the Chief Executive and the Court could not make a lower intervention care and protection order such as a Services or Support Order.[86] The Judge also expressed a concern that despite the signs during the hearing of the caregivers being able to build a partnership with the Taipas to advance a joint approach to Moana's care, "that was a short-lived aspiration".[87] He noted that all parties retrenched to their positional approach and for that reason a framework of care and protection orders was required to sit "as an umbrella over these parties and Oranga Tamariki" to ensure the care and protection concerns would be addressed.[88]

[188] For that reason, the Judge decided that "a movement to the COCA would not address these concerns",[89] which he saw were likely to continue for some time yet until the conflict dissipates and a "workable relationship is established between what may be rightly described as the factions".[90] In reaching his conclusion, the Judge relied on the authorities, which determined that where the dominant circumstances remain ones of care and protection, the appropriate course to address such concerns is the care and protection mechanisms of the OT Act.[91]

[189] No issue was taken with the Judge's approach to the COCA applications, as the parties accepted that Moana was in need of care and protection.

The partnership approach

[190] In reviewing both the Court's orders and the evidence of Mr Dwyer, I consider the Judge has accepted and adopted Mr Dwyer's evidence, when he urged that a partnership between the Taipas and the Smiths would provide the best for Moana's

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86 Family Court decision, above n 2, at [302(b)].
87 At [302(e)].
88 At [302(e)].
89 Family Court decision, above n 2, at [303].
90 At [303].
91 At [303]; citing *WAH v WTW and others* [2010] NZCA 577, at [44]; *B v Family Court and CEMSD* HC Wanganui CIV-2008-483-32, 2 June 2009 at [85] per Mallon J.

health. However, the Judge's partnership approach has been strongly criticised both by the appellant and the Chief Executive as not being practicable, given the tensions between the parties.

[191] Further, they submit, the partnership idea does not address Moana's cultural and kinship needs, as envisaged by the OT Act. I have considerable difficulty in upholding these submissions. The Judge has applied the statutory provisions in a careful assessment of the circumstances of this case, as I have addressed under the first two grounds of appeal. The Judge has not only followed the legislative direction, particularly the kinship principle in s 5(1)(d)(ii), but also accepted the evidence of the psychologist expert and the tikanga expert in coming to his conclusion. There was, in my view, a considerable effort made by the Judge to direct a plan, by which Moana would receive the best of both worlds and I consider this approach was appropriate in this case.

[192] What is troubling, however, are the reported positions of the individual parties. I agree with the Judge's description of the tragedy in this case. The positive attributes of the parties have not been harnessed to work together in a co-operative way, given the history in this matter. It is the ongoing tension among the parties that needs to be resolved for the benefit, well-being and best interests of Moana.

[193] The parties filed updating evidence in this Court on the s 128 plan, which is a practical implementation of the Family Court's custody access orders and the Support Order directions. I canvass this below.

Updating evidence

[194] Following the hearing, each party filed affidavits and memoranda on the approved s 128 plan and s 91 Support Order together with updating matters following the Family Court's decision in September 2021. There are conflicting accounts of what has occurred since the Family Court hearing and the Court's approval of the s 128 plan. It makes for unsettling reading.

[195] There was a reported delay of three months since the Family Court hearing, before Moana's mother had access to Moana. It appears that one of the barriers to the

access occurring was the Smiths legal advice that the Family Court orders could not be complied with until the s 128 plan was in place. Similarly, the Taipas were hesitant to engage in contact with Moana in the way envisaged in the decision. These observations have been made by an OT social worker from the Napier Office, who perceives that there is a lack of priority being accorded to Moana's kinship contact by the Smiths.

[196] The Smiths in turn refute these observations, including the OT social worker's view that the Smiths had not organised any sibling access between Moana and her older brother, over and above that which OT have arranged and facilitated. The Smiths say they have arranged and facilitated three access visits following the Family Court hearing, having been arranged with Moana's brother's caregivers by telephone. The Smiths envisage additional access between Moana and her older brother directly with his caregiver in the future as they remain committed to arranging this as often as practically possible.

[197] Moana's mother confirmed that she had several access visits with Moana since July 2021 but was unable to have any visits with Moana for over three months after the Family Court hearing, because the Smiths refused to let that happen until the s 128 plan had been approved. She reports that Moana tells her she wants to come home to be with her. She does not believe Moana is settled where she is and that when she sees her younger brother and the Taipas, Moana is excited to see them. More recently, Moana's mother has travelled with both Moana and her older brother to visit the Taipas and it was a great experience. She considers because they are all Māori and all whānau, that makes them naturally quite comfortable with each other. She indicated she is prepared to move to Lower Hutt, if Moana and her older brother can be transferred there.

[198] Mrs Taipa filed an updating affidavit, which confirmed the tensions between the Smiths and the Taipas. They too understood that the Smiths would not agree to access by the Smiths until the Taipas made their position clear to this Court on this appeal and "the Court plan is in place and signed off by the Judge". Clearly, Mrs Taipas affidavit indicates that tensions have arisen when arrangements have not been confirmed by the Court or the functional role of OT had been clarified for providing

support by food or money for the access meeting held on 24 April 2022. Of importance, Mrs Taipa confirmed that she and her daughter would work together with Mr and Mrs Smith for the sake of Moana and her younger brother. She expresses her concern however, that the Smiths do not trust them, making them feel as though they were under the microscope. The insistence of supervision during that access visit by Mrs Smith was also seen as insulting.

[199] The OT Social Work supervisor has expressed his concern that important relationships and experiences which will assist Moana's identity are not happening because Moana's needs are not being put at the forefront by other parties. Thus, the prioritisation of Moana's birthright of knowing her heritage and cultural identity is not occurring.

[200] Mr Smith agrees that Moana's knowledge of the heritage and identity has not progressed since the Family Court hearing and the Smiths have attempted to rectify this by making inquiries of OT with regard to Moana's pepeha and whakapapa on multiple occasions. He lists the things they are doing to promote and support her connection to her culture including speaking of English and te Reo at home, reading books in te Reo and Moana's attendance at her monthly whānau meetings at her kura.

[201] These aspirations and actions while very laudable require input from Moana's cultural connections, to enable her to make a cultural connection to her iwi. The Smiths need to take advice from the Taipas about Moana's connection to Ngāti Kahungunu and the protocols that are required for her to be welcomed into the marae. I accept the submission that it is not a matter of simply asking OT to arrange this. That is the significance of having the Taipas connection to Moana in her life. There are tikanga Māori protocols to be followed in relation to Moana's connection to the marae and the Smiths will need to understand and follow the protocols surrounding that introduction and ultimate welcome.

[202] As between the Smiths and the Taipas, putting the legal battles aside, there should now be a move to work in co-operation and develop a neutral sense of trust, as the Judge urged. Moana is a child placed in the Smiths care and in fulfilling that role, as the Act dictates, they must allow Moana's mother and her whānau to continue to be

involved in the decisions that affect Moana's future life. Equally, the Taipas, as they have indicated to the Court, are to work together with Mr and Mrs Smith for the sake of Moana and her brothers. They should have adequate resources to meet the expenses of doing so. I note that they have personally met the transport costs for access visits to date.

[203] The co-operative partnership plan envisaged by the Judge should and could work, provided all parties co-operate. The parties need to put aside all legal battles and move on to provide the best holistic care for Moana.

[204] The role of OT is one that should be of oversight, encouraging both the Smiths and the Taipas to develop their own lines of communication and sense of trust. There is an important imperative to progress Moana's birthright of knowing her cultural identity, but it must be done with the parties working co-operatively together. While OT should provide adequate resourcing to meet travel and access related expenses, the way forward now is to encourage the Taipas and the Smiths to work together, to achieve the best outcome overall for Moana.

[205] I endorse the submission and plea from Moana's Counsel, Mrs Hayward. She said:

> 14. … The best thing that can happen for [Moana's mother] and all her children (and grandchildren) is to simply have the two additional guardians [Mr Smith] and [Ms Taipa] meet with the social worker and [Moana's mother], along with her support person, … and me, as continuing counsel for two of the children, to all try to work together to consolidate all plans. This needs to also include transport arrangements.
>
> 15. The best interests of [Moana] will be met by the whanau working together. The plan for her is new; I am optimistically hopeful that matters will settle down after the decision is released and everyone will consider [Moana] first.

[206] The oversight of the s 128 plan by the Family Court should ensure that the plan, as approved and directed by the Court and agreed by the parties, is implemented with all parties working co-operatively in the best interests of Moana.

[207] In dismissing this appeal and upholding the Family Court orders, I reiterate that each case must be determined on its facts. No one size fits all. The facts and circumstances surrounding Moana were determinative of the outcome of this case.

Result

[208] The appeal is dismissed.

Cull J

Solicitors:
Phoenix Law Limited, Wellington, for Appellant
Govett Quilliam, New Plymouth, for First Respondents
Crown Law Office, Wellington, for Second Respondent
Dixon and Co, Auckland, for Third Respondent
Susan Hayward, Napier, Counsel for the Child