NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004 AND SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980, ANY REPORT OF THIS PROCEEDING MUST NOT INCLUDE ANY NAME OR PARTICULARS LIKELY TO LEAD TO THE IDENTIFICATION OF BABY W.
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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2237

IN THE MATTER	of an application pursuant to s 31 of the Care of Children Act 2004 to place a child under the guardianship of the Court
BETWEEN	TE WHATU ORA, HEALTH NEW ZEALAND, TE TOKA TUMAI Applicant
AND	C and S Respondents

Hearing: On the papers

Appearances: P N White and S C Tune for the Applicant
S J Grey for the Respondents

Date of Minute: 8 December 2022

MINUTE OF GAULT J

Solicitors / Counsel:
Mr P N White, Barrister, Auckland (paul@quaychambers.co.nz)
Ms S C Tune, Legal Services, Te Toka Tumai, Auckland (STune@adhb.govt.nz)
Ms S J Grey, Solicitor, Nelson (suegreylawyer@gmail.com)
Copy to:
Ms K Murfitt, Solicitor, Auckland (kirsten@kmlaw.co.nz)

[1] This afternoon just before 5:00 pm, a memorandum of counsel for the applicant was referred to me. The memorandum advised that health staff at Te Toka Tumai have endeavoured to take steps to prepare Baby W for surgery (scheduled for tomorrow morning), including taking blood tests, performing a chest x-ray and performing an anaesthetic assessment. Counsel understands that the parents prevented this occurring, and advised health staff that "you touch our child and we will press criminal charges against you". The communications between counsel and the hospital notes attached to the memorandum indicate that the parents no longer agree to Baby W's surgery.

[2] The memorandum also indicates that Te Toka Tumai have sought the assistance of Police and counsel has sought to engage with counsel for the respondents (Baby W's parents). The memorandum urgently seeks clarification from the Court that the Police are entitled to use reasonable force to remove Baby W from the parents and/or remove the parents in order to facilitate the steps necessary prior to Baby W's surgery, including taking him to surgery when it occurs.

[3] I issued a minute before 5:30 pm seeking any response from the parents to be filed within one hour, and indicated I would then deal with the applicant's request for clarification by further minute.

[4] Very soon after my minute, counsel for the respondents, Ms Grey, emailed the registry a brief report from two US experts seeking the opportunity to appear before the Court and/or discuss these issues with the Starship hospital surgeon, cardiologist and NZ blood bank. Ms Grey submitted there is no immediate risk for Baby W, and that time can and should be taken to ensure that all options are properly considered. She referred to allowing time for the parents' concerns, which she said are supported by new information and new expert evidence, to be addressed. She also seeks to be heard to get clarity over the scope of the orders, and the balance between protecting the mother's ongoing ability to feed and bond with her baby to help him continue to thrive, and the rushed timing of this proposed operation before alternatives have been property explored.

[5] The brief report of the two US experts attached to the email states (in full):[1]

> **Dr. John Kupferschmid MD San Antonio, Texas**
> **Dr. Kirk Milhoan MD, PHD, FACC, FAAP Maui, HI**
>
> Dr. John Kupferschmid MD who is a pediatric cardiac surgeon and Dr. Kirk Milhoan MD, PhD, FACC, FAAP pediatric cardiologist have reviewed Baby [W's] echo and latest vitals and closely observed him virtually over a zoom call.
>
> We believe, that this is not an urgent situation and that the surgery should be delayed by a week to further evaluate other options and sort out a legal option to explore a therapeutic modality that will respect the parent's [sic] wishes and not compromise the child's care. We believe that directed donor blood is a reasonable option for this family.
>
> We would like to offer a video conference call to have a consultation with the judge to discuss the second opinions offered here.
>
> Warm Regards,
> Dr. Milhoan
> Dr. Kupferschmid

[6] Soon after sending that email to the registry, Ms Grey responded to my minute with a further email to the registry. She stated that the respondents understood that they were acting in the best interests of Baby W and in compliance with the orders made, the conduct proposed is extremely serious, the clear evidence is that doctors are acting in ignorance of the risks, uncertainties and alternatives. She said this is because they are still relying on preliminary views before they acknowledged that mRNA and spike protein and possibly other contaminants from the PfizerVax are in the blood of vaccinated patients. Ms Grey submitted the use of police to uplift a baby whose health is stable and who is gaining weight is extreme overreach, especially as other expert cardiologists who have considered the evidence have different views. She said it is particularly concerning as the baby is breastfed and thriving contrary to earlier medical advice.

[7] Ms Grey sent another email this evening, stating that the applicant's proposal of using police uplift of a frail but thriving baby from his breastfeeding mother, when the baby is stable, holding his twin brother's hand and there is no imminent risk to the

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1 The report attaches their detailed CVs.

baby surely raises some very serious international law issues including UN Convention on the Care of the Child and the UN Convention on People with Disabilities, as well as the NZ Bill of Rights Act and the Human Rights Act. Ms Grey submitted there is no urgency. She seeks for the matter to be addressed in a lawful, responsible and fair way, stating that her clients did not appeal because of the narrow way the orders were worded, submitting it is unreasonable and unfair to extend them in the way proposed.

[8] Ms Grey is effectively seeking to re-open my judgment delivered yesterday (following the hearing on Tuesday) based on the further medical opinion set out above. The orders yesterday placed Baby W under the guardianship of the Court. Dr Finucane and Dr Magee were appointed as agents of the Court for the purpose of consenting to surgery to address obstruction of Baby W's outflow tract of his right ventricle and all medical issues related to that surgery. While my orders reserved leave to the parties to apply to the Court for a review of these orders should this be warranted, that does not extend to re-opening the substantive case in the manner sought. Even treating Ms Grey's emails as an application to recall my judgment, there would be no proper basis to recall. In relation to that judgment, my role now must be limited to making any further ancillary orders that are required to give effect to my judgment.

[9] It was previously common ground that Baby W needed surgery – the issue was in relation to consent to blood transfusion. Now that the parents evidently do not consent to the surgery or pre-operative checks, it is clearly necessary to make consequential ancillary orders to enable the surgery to proceed. Baby W urgently requires surgery and, as I concluded in my judgment, an order enabling the surgery to proceed using NZBS blood products without further delay is in Baby W's best interests.

[10] I said in my judgment that it should not be necessary to make more explicit ancillary orders, but given the position being taken by the parents today, such ancillary orders are now required.

[11] Therefore, I extend the appointment of Dr Finucane and Dr Magee as agents of the Court for the purpose of enabling Baby W's surgery to proceed, including enabling the necessary pre-operative procedures. The respondents are not to obstruct health staff in this regard.

Gault J