ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD, S.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA381/2016
[2016] NZCA 459

BETWEEN	TWA Appellant
AND	HC First Respondent
	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Respondent

Hearing:	10 August 2016 (further submissions received 20 September 2016)
Court:	Winkelmann, Williams and Collins JJ
Counsel:	Appellant in person J A Attfield and D M Tagelagi for First Respondent A M Powell and K G Stone for Second Respondent
Judgment:	28 September 2016 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order of the High Court dismissing the application for a writ of habeas corpus is quashed.

C The application for the writ of habeas corpus is transferred to the Family Court for determination under s 13(2) of the Habeas Corpus Act 2001.

D Under the High Court's parens patriae jurisdiction, the arrangements for the care and custody of S will continue as set out in [16(b)]–[16(d)]

until any further orders are made in the Family Court for the care and guardianship of S.

E **No order is made as to costs.**

F **Order made prohibiting publication of the names of the parties and the child.**

REASONS OF THE COURT

(Given by Winkelmann J)

[1] The appellant, TWA, is S's father. At the time of S's birth, her mother and TWA were both serving prisoners. S was placed in the foster care of HC, the first respondent, and has remained in HC's care until today. The Chief Executive of the Ministry of Social Development, the second respondent, has had legal custody of her for most of this time. S is now nine years old. Her father remains in prison and her mother is now deceased.

[2] In late 2014 Judge Neal in the Family Court made orders intended to provide for long-term care of S on the basis that she will continue in HC's care with TWA having supervised contact with S when S requests it. These orders were made with TWA's consent. However, TWA has brought these proceedings under the Habeas Corpus Act 2001 for a writ of habeas corpus, contending that S is unlawfully detained because the Family Court orders which regulate her care and guardianship are illegal.

[3] TWA candidly admits that lying behind this proceeding is his concern that S should have a relationship with her father. Although he appreciates that it is up to S as to whether she wishes to visit him, her regular visits to him stopped when she was about four years old. He believes that she requires support and counselling to encourage her to continue her contact with him and that she is not receiving this.

[4] In the High Court at Auckland Toogood J found that S was not restrained and her liberty was not in question.[1] Because the application for a writ was founded

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1 *TWA v HC* [2016] NZHC 1765 [HC judgment] at [16].

upon a submitted question of law, the Judge went on to consider whether TWA was entitled to a declaration that the orders were made without jurisdiction. He rejected TWA's arguments.[2] TWA now appeals, challenging both findings.

First issue: is application for writ of habeas corpus an appropriate procedure in this case?

[5] The Judge said that S was not detained for the purposes of the Habeas Corpus Act because S wants to be in the care of HC, and TWA, who has a natural parent's rights of guardianship, is also content for her to be there.[3]

[6] On appeal Ms Attfield, for HC, supports the Judge's reasoning. She says that where TWA, HC and S are all content for S to remain under the care and protection of HC, there is no dispute which could be said to give rise to an involuntary detention.

Discussion

[7] The principal source of the High Court's habeas corpus jurisdiction now comes from the Habeas Corpus Act.[4] Section 6 of the Habeas Corpus Act provides "[a]n application to challenge the legality of a person's detention may be made by an application for a writ of habeas corpus". The Habeas Corpus Act defines "detention" as including "every form of restraint of liberty of the person".

[8] As both TWA and Mr Powell for the Chief Executive submit, the common law remedy of habeas corpus has a long history of use to gain the custody of infants, although that history precedes the late 20th-century development across the Commonwealth of specialist jurisdictions dealing with the care and protection of children.[5]

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2 At [25].
3 At [16].
4 The Habeas Corpus Act 2001 is not the only source as s 7(2) of that Act expressly preserves the High Court's inherent jurisdiction to hear and make an order on an oral application at any time in circumstances of unusual urgency.
5 Judith Farbey and RJ Sharpe *The Law of Habeas Corpus* (3rd ed, Oxford University Press, Oxford, 2011) at 188.

[9] In New Zealand the High Court retains jurisdiction to hear habeas corpus applications in respect of children. Although New Zealand has comprehensive enactments concerning care, guardianship and protection of children, and which confer jurisdiction on the specialist Family Court, there is no requirement that habeas corpus applications be heard by the Family Court. Section 13(1) of the Habeas Corpus Act provides that, when dealing with an application in relation to the detention of a child, the High Court may exercise the powers conferred on the Family Court by the Care of Children Act 2004 (the COCA). Nevertheless, there is recognition of the Family Court's jurisdiction in s 13(2) which provides that, where the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may, on its own initiative or at the request of a party to a proceeding, transfer the application to the Family Court. If the High Court does transfer the application, then the Family Court must treat the application in all aspects as if it were an application to that Court under the COCA.[6]

[10] As this statutory scheme indicates, the specialist jurisdiction of the Family Court and the powers that Court has under the Children, Young Persons, and Their Families Act 1989 (the CYPFA) and the COCA mean that resort to habeas corpus in custody cases will be rare in modern times.[7] Nevertheless, the jurisdiction continues to exist and does not depend upon the physical restraint or the absence of consent on the part of a child. The jurisdiction is described as follows by the learned authors of the text *The Law of Habeas Corpus*:[8]

> That habeas corpus in custody cases differs fundamentally from its use to secure personal liberty has always been recognized. It is seen to involve 'not a question of liberty, but of nurture, control and education'. It 'is being used not for the body, but for the soul of the child'. Accordingly, the courts have consistently held that neither the allegation that the child is under no restraint, nor that the child consents to his situation, will prevent them from acting on habeas corpus.

[11] Counsel for HC, Ms Attfield, argues that S's liberty cannot be at issue when TWA does not contend that care arrangements in respect of her should be changed. It follows, she says, that there is no dispute or withholding of S from TWA such as to enliven the habeas corpus jurisdiction. However, TWA has raised an issue as to the

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6 Habeas Corpus Act, s 13(3).
7 *Jones v Skelton* [2006] NZSC 113, [2007] 2 NZLR 178 at [19].
8 Farbey and Sharpe, above n 5, at 188 (footnotes omitted).

lawfulness of the guardianship and parenting orders. Those orders govern who makes decisions affecting every aspect of S's care. We are satisfied that there is an issue regarding the custody and guardianship arrangements for S sufficient to engage the habeas corpus jurisdiction.

[12] We therefore accept the submissions advanced by the Chief Executive and by TWA that the Judge was wrong when he found that the application for writ must be dismissed on the ground that S was not detained for the purposes of the Habeas Corpus Act. We acknowledge, however, that in the context of parenting and guardianship arrangements for children, the word "detention" seems peculiarly inapt.

Second issue: did Toogood J err in his interpretation of s 120 of the CYPFA?

[13] The relevant factual background is as follows. When S was born, her parents agreed that she should be placed under the parens patriae jurisdiction of the High Court from the date of her birth until more suitable arrangements could be made by the Family Court. Shortly thereafter, the Family Court made an interim custody order in favour of the Ministry of Social Development, which remained in force until September 2012 when a custody order was granted in favour of the Chief Executive under s 101 of the CYPFA. S's parents remained her legal guardians until her mother died in mid-2014, at which point TWA became her sole legal guardian.

[14] It is a jurisdictional precondition to an order under s 101 that the Family Court has issued a declaration under s 67 of the CYPFA that the child is in need of care or protection. Such orders are only made in respect of children who are in need of care and protection because they are vulnerable to abuse or neglect. In the case of S, neither of her parents were able to care for her.[9]

[15] The Chief Executive has placed S with HC who has cared for her, for all practical purposes, for all of S's life. Although HC is not related to S, HC considers S to be her daughter and S is a much loved and cherished member of her family. In early 2014 HC filed an application to discharge the existing s 101 custody order

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9 Children, Young Persons, and Their Families Act 1989 (CYPFA), s 14(1)(f).

which had given the Chief Executive custody of S. Under the Ministry's Home for Life placement policy, HC sought parenting and guardianship orders in respect of S under the COCA. The Ministry supported the applications and HC understood that the applications were also supported by TWA as well as S's maternal grandparents.

[16] In late 2014 Judge Neal held a settlement conference in the Family Court about the applications, which TWA was able to join by audio-visual link. With the consent of all parties, Judge Neal discharged the existing s 101 order, and recorded the making of the following orders in a minute dated 21 October 2014:

(a) an order pursuant to ss 110(1) and 110(2)(b) of the CYPFA appointing the Chief Executive as an additional guardian of S for limited purposes broadly related to social work and financial assistance;

(b) discharging all other orders made under the CYPFA;

(c) a parenting order in favour of HC providing that she is to have the day-to-day care of S, and a further parenting order providing that TWA shall have supervised contact with S when S requests that. Both parenting orders were made under s 48 of the COCA; and

(d) an order under s 27 of the COCA appointing HC as an additional guardian of S.

[17] In the High Court TWA argued that the Family Court orders are invalid and unlawful because they are inconsistent with s 120 of the CYPFA. That section provides:

> **120 Restriction on making of guardianship and parenting orders under Care of Children Act 2004**
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> (1) If a child or young person is subject to an order made under section 78 or section 101 or section 110 of this Act, none of the following may be made under the Care of Children Act 2004:
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> (a) an order in respect of the guardianship of that child or young person; and

(b) an order about the role of providing day-to-day care for that child or young person; and

(c) an order for contact with that child or young person.

(1A) Subsection (1) is subject to subsection (2) and section 117(2).

(2) Nothing in subsection (1) affects the power of a court having jurisdiction under section 31 of the Care of Children Act 2004 to make an order under that section in respect of any child or young person who is subject to an order made under section 78 or section 101.

[18] TWA argues that, because Judge Neal appointed the Chief Executive as an additional guardian under s 110 of the CYPFA, the Judge was prohibited from making the contemporaneous day-to-day care and guardianship orders in favour of HC under the COCA. He therefore argues that the orders under the COCA are unlawful.

The High Court judgment

[19] Toogood J rejected TWA's argument. He said that the use of "is" in s 120(1) indicates the restriction on making COCA orders does not apply unless the qualifying CYPFA order is already in force.[10] Where a combination or suite of complementary orders under the CYPFA and the COCA are made simultaneously, and in the absence of a pre-existing order under the relevant provisions of the CYPFA, the restriction is not engaged.

[20] The Judge saw it as relevant that both the CYPFA and the COCA require that, in the administration and application of the relevant statutory provisions, the welfare and best interests of a child shall be "the first and paramount consideration".[11] He said that when vulnerable children begin a transition to permanent arrangements with foster parents, orders under the COCA can provide more secure placements that avoid the unsettling prospect that guardianship and care under the CYPFA could change at every six or 12-monthly review.[12] In such circumstances, a court may consider it necessary to continue the Chief Executive's

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10 HC judgment, above n 1, at [20].
11 CYPFA, s 6; Care of Children Act 2004 (COCA), s 4(1).
12 HC judgment, above n 1, at [23].

involvement with a child for a period, alongside more permanent COCA orders.[13] To achieve that it is necessary to make a combination of orders under both Acts.

[21] He said it followed that s 127, which permits the variation, substitution or discharge of orders under the Act as circumstances change, should be interpreted and applied in the same manner.[14]

[22] TWA argues that the Judge's interpretation is inconsistent with the plain wording of the statute and, in any event, a minute records that the Judge made the orders under the COCA after he made the guardianship order in respect of the Chief Executive under the CYPFA.

Discussion

[23] The challenged orders are under two quite different statutory regimes. As the long title states, the CYPFA provides a framework for children who are in need of care and protection or who offend against the law. As the Judge observed, the COCA interacts with private law and largely provides for the resolution of disputes between guardians, as well as the appointment of guardians and other parenting roles.[15]

[24] The orders that the Judge said were discharged under the CYPFA included an order that S was in the custody of the Chief Executive. Such orders are only made in respect of children who are in need of care and protection. The effect of a custody order is that it overrides all rights, powers and duties of every other person having custody of the child, except access rights preserved under s 121 of the Act.[16] Any other arrangements affecting custody are overridden for as long as the s 101 order remains in force. This extends to parenting orders under the COCA because custody is defined in the CYPFA as the right to possession and care of a child.[17]

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13 At [23].
14 At [24].
15 HC judgment, above n 1, at [22]. See also *E v G* [2008] NZFLR 337 (FC) at [25].
16 CYPFA, s 104(1)(b).
17 CYPFA, s 2.

[25] The order the Judge made under s 110(2) is also an order only made in respect of children in need of care and protection.[18] It is a jurisdictional prerequisite that there be a declaration under s 67 of the CYPFA to that effect before such an order can be made. Where the appointment is of an additional guardian, as here, that does not suspend all other rights of guardianship.

[26] Where guardianship or custody orders are made under the CYPFA, that Act provides a regime which regulates the rights of children, parents and guardians, and provides processes for parents to participate in decisions affecting the child and to have contact with the child. This is a more state-focused regime than that under the COCA. The point is well made by the learned author of *New Zealand Family Law in the 21st Century*:[19]

> The safe course is to approach "guardianship" and "custody" orders under the [CYPFA] on the basis that they are orders designed to operate in a specific and exceptional statutory environment in which the objective is to meet the child's need for care and protection, a protective and therapeutic jurisdiction with a specialised social work input. That may involve displacement of ordinary parental or family responsibilities or rights under the [COCA] — partially or totally, depending on the circumstances — and their replacement by such remedial measures under the [CYPFA] as are necessary for the effective care and protection of the child and for remedying the situation which created the need for care and protection.

[27] The two jurisdictions — the COCA and the CYPFA — are not mutually exclusive. Where a declaration is made under s 67 of the CYPFA, the Family Court may make less comprehensive orders, for example, that the Chief Executive provide services to a parent or guardian having care of a child.[20] Unless custody or guardianship orders are made under the CYPFA, orders made under the COCA remain unaffected and other COCA orders can be made. Even where a CYPFA custody order (but not a guardianship order) is in place, s 120(2) of the CYPFA protects the ability of a court to make orders under s 31 of the COCA placing a child under the guardianship or wardship of the court. As the learned authors of *Family Law in New Zealand* note:[21]

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18 CYPFA, s 110(1).

19 BD Inglis *New Zealand Family Law in the 21st Century* (Brookers, Wellington, 2007) at 680.

20 CYPFA, s 86.

21 Mark Henaghan and others *Family Law in New Zealand* (17th ed, LexisNexis, Wellington, 2015) at 584 (footnote omitted).

> In this way the Courts do retain supervisory, inherent powers over these children, though usually … the Courts would be reluctant to exercise wardship jurisdiction where the child is subject to orders under the [CYPFA].

[28] When viewed in this context, the purpose of s 120 is clear. It is to ensure that decisions regarding the guardianship and custody of a child, who is subject to the care and protection regime *and* custody or guardianship orders under the CYPFA, are addressed through the decision-making regime in the CYPFA — not that in the COCA. On a plain reading of s 120(1), the effect of the provision is that any orders in respect of guardianship, day-to-day care or contact with the child or young person subject to custody or guardianship orders under the CYPFA, should be dealt with under that legislation.

[29] It is not disputed by HC that a prerequisite to the making of parenting or guardianship orders under the COCA is that the s 101 or 110 orders be discharged. But, in an argument accepted by Toogood J, she contends that s 120 does not prohibit what occurred here — the almost simultaneous removal and reinstatement of orders under the CYPFA, allowing the making of COCA orders in the scintilla of time between that removal and reinstatement.

[30] While the pragmatism of this approach may have some attraction, it is inconsistent with the clear intent of the legislation that parenting and guardianship issues for children subject to custody or guardianship orders under the CYPFA be addressed through the CYPFA regime. It is unlikely, as Mr Powell submits, that Parliament's intention in enacting s 120 of the CYPFA was merely to control the sequence in which orders were made and discharged under either Act. If the Judge's interpretation were correct, then the outcome would be different if the Family Court Judge followed the wrong sequence in announcing the orders. Although not wanting to buy into this line of reasoning, we observe that in the record of the orders the Family Court Judge did follow the wrong sequence, making the s 110 guardianship order before he made the COCA orders.

[31] It seems that what underlies the orders made in the Family Court is the view that, because of the loving and stable care HC is able to provide S on a "home for life" basis, S should begin to transition out of the care and protection regime. While

this transition takes place, HC should continue to receive support from the Chief Executive. This transition can be achieved in a way which does not offend against the prohibition in s 120. If guardianship and custody orders under the CYPFA are revoked at some future time, day-to-day parenting orders can be made under the COCA and the Family Court can make a service order under s 86 of the CYPFA requiring the Chief Executive to provide such services and assistance to HC as is directed.

[32] To conclude, for the reasons we have set out above, we consider that the prohibition in s 120 encompasses parenting and guardianship orders made under the COCA, intended as here, to operate together with custody or guardianship orders made under the CYPFA. The invalidity clearly affects the orders made under the COCA but, since the orders were made to operate together and were interdependent upon each other, we also consider it affects the order made under s 110.

Disposition

[33] Following the hearing, TWA sought and was granted leave to file further submissions addressing what orders should be made in the event we accepted his arguments as to the effect of s 120 of the CYPFA. TWA submits this Court should quash Toogood J's order refusing to issue a writ, issue the writ, and then invoke the parens patriae jurisdiction of the High Court and appoint the Chief Executive the Court's agent. The parties could then apply to the Family Court for further orders.

[34] Mr Powell for the Chief Executive agrees that the appeal should be allowed and that this Court should quash the order of Toogood J refusing to issue a writ. However, he contends that, rather than issue the writ, we should refer the application to the Family Court under ss 14(3) and 13(2) of the Habeas Corpus Act. To address the difficulty created by any invalidity in the orders the Court should, pursuant to the parens patriae jurisdiction, direct that, pending any further orders, the arrangements embodied in the impugned orders would continue but without the s 110 CYPFA order.

[35] TWA argues that this application should not be referred to the Family Court. He says that the Family Court can do nothing because it is bound by the High Court findings that the impugned orders were validly made. He says that the habeas corpus application cannot be divided up; the whole application must be transferred. This Court, having heard the application, must grant the writ of habeas corpus. Although s 14(1A) of the Habeas Corpus Act allows the Court to refuse to issue the writ without requiring the defendant to establish the lawfulness of the detention, in this case it would have to be satisfied that the application for the writ is not the appropriate procedure for considering the allegations.[22] There is nothing in this case to substantiate a finding that the application was not appropriate procedure.

[36] HC has provided updating material to the effect that the Family Court remains seized of various issues affecting S, including a scheduled date for review of the s 110 additional guardianship order.

Analysis

[37] We agree with both TWA and the Chief Executive that the order of Toogood J dismissing the writ of habeas corpus should be quashed. This is on the grounds that the Judge erred in his finding that the writ procedure was unavailable in this circumstance and in his finding as to the effect of s 120. However, we do not accept TWA's submission that in light of those findings it follows that the writ must issue.

[38] Subsections 13(2) and 13(3), invoked by the Chief Executive, provide:

> **13 Powers if person detained is young person**
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> …
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> (2) If the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may, on its own initiative or at the request of a party to the proceeding, transfer the application to a Family Court.
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> (3) An application referred under subsection (2) must be dealt with by the Family Court in all respects as if it were an application to that court under the Care of Children Act 2004.

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22 Habeas Corpus Act, s 14(1A).

[39] These provisions reflect the development in the law of guardianship that, in issues affecting the care and protection of children, the paramount concern is the best interests of the child. Thus s 4 of the COCA provides that, in any proceeding involving the guardianship of or the role of providing day-to-day care for or contact with a child, the welfare and best interests of the child must be the first and paramount consideration.

[40] This focus on the best interests of the child has had an impact upon the law of habeas corpus, described by the learned authors of the text *Habeas Corpus: Australia, New Zealand, the South Pacific*, writing shortly before the enactment of the Habeas Corpus Act:[23]

> … the rise of guardianship laws meant that many of the habeas applications were either treated as simultaneous guardianship applications or were launched together with parallel guardianship proceedings and were usually treated as such. … The linkage between guardianship statutes and habeas corpus will be formalised in New Zealand, if the Habeas Corpus Bill is enacted.

[41] The authors then describe the effect of the relevant draft provisions, which are now enacted in s 13.

[42] It is true that the application in this case has been heard and determined in the High Court and that this appeal has also been heard. But there is nothing in the language of s 13 which limits the availability of the s 13(2) power to some particular point in the procedural history of the application. We say that subject only to the observation that the transfer must, of course, occur before the application has been finally disposed of. We note that s 14(3), which provides that a Judge must determine an application for a writ of habeas corpus, is subject to s 13(2).

[43] S's present care arrangements provide for her guardianship and day-to-day care. If they are removed without some alternative orders in place, protection issues arise for S because TWA remains in prison. This case is clearly one in which the substantive issue in the application is the welfare of a young person under 16.

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[23] David Clark and Gerard McCoy *Habeas Corpus: Australia, New Zealand, the South Pacific* (Federation Press, Sydney, 2000) at 130.

Transfer of this application is the best way of ensuring that orders, which must be made to replace the impugned orders providing for S's ongoing care, are made in her best interests. In light of the provisions of s 14(3), we are not required to issue the writ notwithstanding our finding that the existing orders are invalid. The issue by this Court of a writ of habeas corpus is plainly not the appropriate disposition of this application.

[44] In light of our finding that the existing orders are invalid, it is necessary to make orders providing for S's ongoing care until the Family Court can consider and determine the application. We accept the Chief Executive's submission that this interim period is best addressed through the exercise of the parens patriae jurisdiction, expressly preserved by s 13(2) of the COCA in matters not provided for in that Act.

[45] Although the Family Court orders were invalidly made, the Court was undoubtedly satisfied that the care arrangements reflected in them were in S's best interests. The Chief Executive submits that pursuant to the High Court's parens patriae jurisdiction, we should direct that those arrangements for care and custody continue (without the s 110 CYPFA order) pending further orders of the Family Court providing for S's care and custody. We agree that those are appropriate orders to make in circumstances where there is no evidence that the existing day-to-day care arrangements for S are in any way inadequate or inappropriate. Those orders will provide that HC should continue to provide care and custody for S as if the parenting orders were still in place, that HC should continue to be an additional guardian for S and that TWA should continue to have supervised contact with S when she requests that.

[46] Just before this judgment was to be released, TWA filed an additional memorandum advising that he had notified Child Youth and Family Services (CYFS) of concerns regarding parental alienation and a lack of support from HC for TWA's supervised contact with S. The Chief Executive confirms that CYFS have commenced a child and family assessment. However, he also confirms that this does not indicate any concern for the safety of S. Rather, more information is needed to

address the concerns raised by TWA and this is the method by which CYFS gathers that information.

[47] TWA's concerns regarding parental alienation are best addressed by the Family Court. The additional matters raised by TWA do not cause us to take a different view of what is in the best interests of S as to care and custody arrangements in the interim period before the Family Court has the opportunity to consider TWA's application for a writ.

Result

[48] The appeal is allowed. The order of the High Court dismissing the application for a writ of habeas corpus is quashed.

[49] Pursuant to r 48(4) of the Court of Appeal (Civil) Rules 2005 we make orders:

(a) Under s 13(2) of the Habeas Corpus Act transferring the application for a writ of habeas corpus to the Family Court for determination.

(b) Pursuant to the High Court's parens patriae jurisdiction, directing that, pending any further orders made in the Family Court for the care and custody of S, the arrangements for the care and custody of S continue in the manner contemplated by the orders made in the Family Court and set out in [16(b)]–[16(d)] above.

[50] We make no order as to costs.

[51] We are satisfied it is in the best interests of S that we make an order prohibiting publication of the names and identifying particulars of the parties and of S.

Solicitors:
Tagelagi & Attfield, Manukau for First Respondent
Crown Law Office, Wellington for Second Respondent