NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

THIS JUDGMENT CONTAINS FICTITIOUS NAMES AND MAY BE REPORTED IN THIS FORM. DATES AND OTHER DETAILS HAVE ALSO BEEN OMITTED WHERE APPROPRIATE.

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2018-470-000053
[2018] NZHC 1862

UNDER	the Care of Children Act 2004
IN THE MATTER	of an appeal against a parenting order made in the Family Court
BETWEEN	COLIN NIKAU First Appellant
	ESTHER NIKAU Second Appellant

/contd

Hearing: 2 July 2018

Appearances: Appellants in person
J R Kay for First Respondents
Second Respondents in person
R Paul (Lawyer for Child)

Judgment: 19 July 2018

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Thursday, 19 July 2018 at 4:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

AND	WENDY NIKAU and WINSTON HOHEPA First Respondents NIGEL TATCHELL and BECKY TATCHELL Second Respondents

[1] Rhonda is an eight year old girl born of a Pākehā mother, Ms Esther Nikau, and a Māori father, Mr Colin Nikau. In a decision dated 9 March 2018,[1] Judge SJ Coyle made a parenting order that Rhonda was to be in the shared care of both of her birth parents and her aunt, Ms Wendy Nikau, and uncle, Mr Winston Hohepa (her whāngai parents), only if her birth parents chose to relocate from [Location 1], where they live, to [Original Location], where her whāngai parents live. If Rhonda's birth parents chose not to relocate to [Original Location], then Rhonda was to be in the day-to-day care of her whāngai parents in [Original Location] with her birth parents having care of her one weekend every month and half of the school holidays. He also made an order appointing Ms Wendy Nikau and Mr Hohepa additional guardians of Rhonda.

[2] The issue in this appeal is whether the Judge was wrong to decide that Rhonda should not be in the day-to-day care of her birth parents.

[3] There is no allegation of any neglect or mistreatment of Rhonda by her birth parents. There are, however, allegations of mistreatment of Rhonda by her aunt. The Judge dismissed these and gave primacy to Rhonda's Māori heritage, stating that in [Original Location] her Māori identity would be treasured and thrive in a way that could not from a distance from her whānau, hapū and iwi. Rhonda's father disputes this. He speaks te reo, having been raised by his grandfather and says he is best placed to educate his daughter in all aspects of Māori culture.

Factual background

[4] Ms Esther Nikau and Mr Nikau are the birth parents of Rhonda (d.o.b. [omitted] 2010). They have two other children – Toby (d.o.b. [omitted] 2006) and Mitchell (d.o.b. [omitted] 2008). Ms Wendy Nikau is the paternal aunt of Rhonda and the sister of Mr Nikau. Mr Hohepa is the partner of Ms Wendy Nikau. Ms Wendy Nikau and Mr Hohepa do not have children of their own.

[5] Ms Esther Nikau suffered health issues during her pregnancy. Due to those health issues she and Mr Nikau agreed to place Rhonda in the care of Ms Wendy Nikau

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1 *Nikau v Tatchell* [2018] NZFC 1239.

and Mr Hohepa following her birth, although Ms Esther Nikau alleges she felt pressured by family members to do so. Ms Wendy Nikau and Mr Hohepa undertook to care for Rhonda as their own whāngai child and co-operate with her birth parents in her upbringing. They also agreed to provide financial support and make health, education and well-being decisions for Rhonda. Both parties lived in [Original Location]. Ms Esther Nikau alleges, however, that guardianship issues regarding Rhonda's well-being were not consistently discussed with her and she was sometimes excluded from contact with Rhonda.

[6] In December 2013, when Rhonda was three and a half years old, Rhonda's whāngai parents applied to the Family Court without notice to Rhonda's birth parents for a parenting order on the basis that they were concerned that Ms Esther Nikau would remove Rhonda from their day-to-day care. They also applied for appointment as additional guardians. The catalyst for this appears to have been a wish expressed by Ms Esther Nikau to have Rhonda back.

[7] Without hearing from Rhonda's birth parents, the Family Court made an interim parenting order in favour of Rhonda's whāngai parents. Rhonda's birth parents were to have contact with her only as approved by her lawyer. An interim arrangement provided for Rhonda to be in the care of her birth parents every Tuesday from 2.30 pm to Wednesday 4.00 pm and also every second weekend from Saturday 10.00 am to Sunday 12.00 pm. This was later varied to allow further contact. The court proceedings have led to a deep and longstanding breakdown in the relationship between the parties.

[8] In response to the court proceedings, Ms Esther Nikau filed a cross-application for a parenting order seeking day-to-day care of Rhonda. Counselling was directed and reports filed by Rhonda's lawyer and a psychologist.

[9] In September 2014, a settlement conference was held. Agreement was reached between the parties that there be shared care of Rhonda on the basis that Rhonda would be in the care of her birth parents on a two week cycle from Friday after day care or school to Wednesday 4.30 pm in week one and from Monday after day care or school to Wednesday 4.30 pm in week two, with the school and Christmas holidays being

shared by week. A consent order was made by the Family Court. The application by Ms Wendy Nikau and Mr Hohepa to be appointed additional guardians was discontinued.

[10] In March 2015, Rhonda's birth parents applied to vary the parenting order so that they would have day-to-day care of Rhonda. They alleged that Rhonda's whāngai parents had breached the parenting order and said that they had been encouraged to make the application by a psychologist at Child, Youth and Family (CYF)[2] on the basis that the current arrangements were not meeting Rhonda's psychological needs. Rhonda's whāngai parents filed a notice of response and affidavit opposing the variation of the parenting order and also seeking a direction that Rhonda remain in [Original Location].

[11] In August 2015, Ms Esther Nikau filed a further affidavit responding to the notice of defence and advising that if the parenting order sought was granted, she and Mr Nikau intended to move to a different place. The Family Court directed further reports from social workers and a psychologist.

[12] In November 2016, a CYF social worker undertook a child focused interview with Rhonda. She disclosed smacking, hitting with a fist on the back and smacks on her head by Ms Wendy Nikau. The social worker arranged for Rhonda's maternal grandmother in [Location 1], Ms Becky Tatchell, to care for Rhonda whilst an evidential interview was being completed to protect Rhonda from further physical abuse or influence. In December 2016, an evidential video interview of Rhonda was undertaken in which she disclosed physical abuse by Ms Wendy Nikau. Rhonda was returned to Ms Esther Nikau in [Original Location] following the evidential video interview. The police then became involved.

[13] Later, in December 2016, following concerns about the safety of Rhonda due to threats and intimidation against Ms Esther Nikau, CYF directed that Rhonda was to be placed back into Ms Tatchell's care and she was returned to [Location 1] by Ms Esther Nikau. The social worker confirmed the arrangements with Ms Tatchell in

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[2] Previously a functional unit of the Ministry of Social Development. Oranga Tamariki, Ministry for Children, is now responsible for the wellbeing of children.

an email advising that contact with Ms Esther Nikau on weekends was permissible as was supervised contact with Ms Wendy Nikau. An investigating police officer, however, advised Ms Tatchell that Rhonda was not to have contact with Ms Wendy Nikau until after their investigation was completed.

[14] In late 2016, Ms Tatchell and her husband, Mr Nigel Tatchell, applied to the North Shore Family Court without notice to the other parties for a parenting order and appointment as additional guardians. On the same day, the parenting order of September 2014 made in the Whakatāne Family Court was discharged and an interim parenting order made in the North Shore Family Court providing for Mr and Ms Tatchell to have day-to-day care of Rhonda. The order provided for contact between Rhonda and her birth parents as agreed with Mr and Ms Tatchell. The order did not provide for contact between Rhonda and her whāngai parents.

[15] In January 2017, Rhonda's whāngai parents applied to discharge the parenting order made in the North Shore Family Court in favour of Mr and Ms Tatchell. This was refused by the Court later in January 2017. On the same day, Ms Esther Nikau filed a notice of response to the application filed by Mr and Ms Tatchell in which she agreed that in the interim Rhonda should remain in the care of Mr and Ms Tatchell and she and Mr Nikau would have contact as agreed with Mr and Ms Tatchell. Ms Esther Nikau moved from [Original Location] to [Location 2] with her two older children who she enrolled in the same school as Rhonda in order that she and they could have regular contact with Rhonda. Mr Nikau later joined them in [Location 2]. The family have since moved into Mr and Ms Tatchell's home.

[16] In May 2017, the police advised that they would not pursue a prosecution of assault against Ms Wendy Nikau on the basis of insufficient evidence to support a prosecution and the negative impact on Rhonda. In June 2017, the Whakatāne Family Court varied the interim parenting order made in the North Shore Family Court in December 2016 to provide supervised contact to Rhonda's whāngai parents once a fortnight for three hours, supervised by [Centre name deleted]. In September 2017, a s 132[3] report was issued by Oranga Tamariki (Ministry for Children)[4] which recorded

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3 Care of Children Act 2004, s 132.
4 Oranga Tamariki superseded CYF from 1 April 2017.

a finding of substantiated physical abuse on Rhonda by Ms Wendy Nikau. In November 2017, a third psychologist's report was filed in the Family Court.

[17] A five day hearing was then held in the Whakatāne Family Court between 12 and 16 February 2018 in relation to the application for day-to-day care of Rhonda. Judge SJ Coyle issued a reserved judgment on 9 March 2018. It is against that judgment that Rhonda's birth parents now appeal.

Rhonda's culture heritage

[18] Rhonda's culture heritage is Māori (Whakatōhea te Iwi; Ngāti Ira, Ngāti Kahu ngā Hapū; Ōpeke te Marae) and Pākehā (English, Irish and French). The Judge said it was unclear what it exactly meant to be a Pākehā child in New Zealand, but he suggested it was clear what it was to be Māori, and if a Māori child was to be raised in Te Ao Māori that involved an exposure to that world; to tikanga, to te reo and to opportunities to experience life within Te Ao Māori.

[19] The Judge said the principles of the Treaty of Waitangi required the courts to give particular importance to the preservation and strengthening of whānau relationships and of identity to Māori children over and above those of other cultures. The Judge referred to a wealth of research which showed that urbanisation as a consequence of colonisation for Māori, and indeed many indigenous peoples, has had adverse effects upon their culture and identity. He said just because the majority of Pākehā did not understand the effects of the imposition of that culture upon Māori, that did not give rise to a justification for ignoring and dismissing those impacts based on ignorance.

Whāngai

[20] Whāngai is a Māori customary practice where a child is raised by someone other than their birth parents – usually a relative.[5] Often it means placing a child with their grandparents – but it could also be another family member, or someone unrelated.

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5 Basil Keane "Whāngai – customary fostering and adoption – The custom of whāngai" Te Ara – the Encyclopaedia of New Zealand, http://www.TeAra.govt.nz/en/whangai-customary-fostering-and-adoption/page-1 (accessed 18 July 2018).

It can be a short-term, long-term or permanent arrangement. The practice is similar to both adoption and fostering.

[21] Whāngai is informal. A whāngai placement is arranged directly between the birth parents and the mātua whāngai (the parents who will raise the child). Oranga Tamariki does not need to be involved and the birth parents are still the child's legal guardians. In most cases whāngai takes place at birth, but it can also involve older children. A whāngai child usually knows their birth parents and has an on-going relationship with them. In this case, Ms Wendy Nikau and Mr Hohepa say that Rhonda was placed with them at birth under a whāngai arrangement. Ms Esther Nikau and Mr Nikau dispute that saying that it was a shared care arrangement. Both parties lived in [Original Location] and, in fact, Ms Wendy Nikau and Mr Winston Hohepa stayed with them for three and a half months while they were between rental houses.

[22] The Judge noted that what was in fact agreed between Ms Esther Nikau, Mr Nikau and Ms Wendy Nikau and Mr Hohepa at the time of Rhonda's birth was still in dispute, but nonetheless he accepted it was a whāngai arrangement. However, the Judge made no determination of the terms of the arrangement.

[23] I am of the view that what was agreed more than eight years ago is of limited relevance to an assessment of Rhonda's welfare and best interests now. It is clear, however, that for the first four and a quarter years of her life, Rhonda was primarily in the care of her whāngai parents with considerable involvement from her birth parents. She was then, for a period of two and a quarter years, in the shared care of both parties and since December 2016 has been in the primary care of Mr and Ms Tatchell, although those care arrangements have evolved to allow Rhonda's birth parents much more involvement.

Approach on appeal

[24] Rhonda's birth parents appeal under s 143 of the Care of Children Act 2004 (the Act). The appeal is by way of rehearing. This Court is required to reach its own view of the merits of the case based on the evidence given in the Family Court.

[25] As the Supreme Court stated in *Austin, Nichols & Co Inc v Stichting Lodestar:*[6]

> The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[26] I therefore propose to view the matter afresh, but defer to the findings of Judge Coyle that depended on his assessment of the credibility of the parties. There are also aspects of the case in which the nuances to be taken from the evidence given at the oral hearing are important and I propose to give the Judge's findings in relation to those issues appropriate weight also.

Relevant principles

[27] Section 4(1) of the Act provides that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in proceedings under the Act. Section 4(2) requires any person considering the welfare and best interests of a child in his or her particular circumstances to take the principles in s 5 into account.

[28] The principles set out in s 5 are of crucial importance in this case. Section 5 provides:

> **5 Principles relating to child's welfare and best interests**
>
> The principles relating to a child's welfare and best interests are that—
>
> (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

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6 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened

[29] The first principle is of major significance because of the use of the word "must" – a child's safety must be protected. The other five listed principles all use the word "should". The parents of a child are also recognised as having a greater role in the care of the child than other members of the family or wider community because of the specific reference to their role in three of the other five listed principles:

(b) A child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians.

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

(e) A child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whanau, hapū, or iwi should be preserved and strengthened.

[30] Important also in the present context is the principle contained in s 6 of the Act. This requires the Court to allow any child who is the subject of a care proceeding to be given a reasonable opportunity to express views on matters affecting the child. The Court must take into account any views so expressed.

Discussion

[31] The Judge set out his analysis in ten paragraphs towards the end of his judgment.[7] His conclusion was as follows:[8]

> On the particular facts of this case and the particular welfare and best interests consideration of this child, given Rhonda's background and immersion in Te Ao Māori, and given that she has been raised by these four adults and has a strong attachment to them all, I determine that the preservation of those relationships and the preservation and strengthening of her identity in terms of s 5(e) and (f) are determinative principles in evaluating what is in the best interests and welfare of Rhonda.

[32] With respect to the Judge, I am of the view that he fell into error in finding that s 5(e) and (f) were "determinative" principles in evaluating what was in the best interests and welfare of Rhonda. "Determinative" means serving to decide a dispute by an authoritative or conclusive decision.

[33] The Judge was entitled to accord weight, even considerable weight, to s 5(e) and (f), but in the end those principles need to be balanced along with the other principles in s 5. I am of the view that he did not appropriately balance s 5(e) and (f) along with the other principles in s 5, but wrongly accorded them primacy.

[34] The Judge also fell into error when he relied upon the necessity for attitudinal changes to successfully implement the care arrangements he directed. First, the Judge said he was confident that Rhonda's whāngai parents now understood the serious consequences for Ms Esther Nikau and Rhonda of the past harassment and intimidation of members of the Nikau family and they would ensure that their family would not continue to intimidate Ms Esther Nikau. Secondly, he said he was confident that Ms Esther Nikau would relocate to [Original Location] so that she and Mr Nikau could be part of Rhonda's life, even though Ms Esther Nikau was adamant she would not return to [Original Location].

[35] I do not share the Judge's confidence and do not discern from his judgment a reasonable basis for it. The parties have been wrangling over Rhonda's care for almost five years now. A previous formal shared care arrangement broke down after

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7 At [129]–[139].
8 At [138].

six months. The Judge himself earlier said that he agreed with the submissions of the lawyer of the child that the rift between Ms Wendy Nikau and Ms Esther Nikau was so deep it was unlikely to be repaired.

[36] Having found that the Judge erred in making the orders that he did, I now proceed to make my own assessment.

[37] In terms of s 6, I note Rhonda's view that she wishes to return to [Original Location] with her parents and have the arrangements with her birth parents and her whāngai parents restored "to be the same as it was before". I take her view into account, but am of the opinion that it is not possible. The third psychologist's report records that Rhonda is at risk of developing psychological adjustment problems unless her birth parents and her whāngai parents are able to resolve their differences or learn to encapsulate their conflict. This they have not done. The psychologist also notes research which suggests it is often better to prioritise one solid attachment than to have two troubled attachments.

[38] Turning then to the principles in s 5, the first principle listed in s 5(a) is that the child's safety must be protected. There is no suggestion of any violence from Rhonda's birth parents directed to Rhonda. There have, however, been a number of complaints of violence from Ms Wendy Nikau directed to Rhonda. The Judge dismissed them all, saying Ms Esther Nikau made them up. As to an allegation of assault made by Rhonda to her teacher in mid-2016, the Judge said:

> If this was a stand-alone allegation it may well be that I would have determined that Rhonda had been assaulted by Wendy. But that allegation cannot be seen in isolation from the wider picture of the number of allegations that have previously been made and the very real concerns that those allegations are being motived and influenced by Esther.

[39] As to an allegation of assault in early November 2016, the Judge noted that in an evidential video interview in early December 2016, Rhonda had made disclosures of physical abuse by Ms Wendy Nikau and that Oranga Tamariki recorded an outcome finding of substantiated physical abuse on Rhonda by Ms Wendy Nikau. A Judge does not of course have to accept the findings of Oranga Tamariki, but is entitled, and even duty bound, to make his or her own assessment.

[40] The Judge reviewed the evidential video interview and while he acknowledged on the face of it there were clear disclosures by Rhonda, he said they needed to be seen in the context of the overall interview. The Judge noted the psychologist's opinion that:

> Despite multiple disclosures to various parties Rhonda's lack of specific recall of most of the events and her reluctance to engage in the evidential interview suggest the current disclosures *may* be unreliable. (emphasis added)

[41] The Judge said he accepted the evidence of the psychologist and found that:

> The alleged disclosures that have been made by Rhonda *are* unreliable and as a consequence I make no finding of abuse by Wendy of Rhonda. (emphasis added)

[42] Here I defer to the findings of the Judge which depended on his assessment of the credibility of the parties. I have not had the opportunity to hear the evidence and reach my own conclusion on its reliability.

[43] However, the Judge went on to find that there was other violence from which Rhonda needed to be protected. He noted that the definition of violence includes psychological abuse, such as intimidation and harassment. The Judge referred to evidence that Toby and Mitchell had been present in an [Original Location] supermarket when members of the wider Nikau whānau had deliberately rammed a supermarket trolley into the back of Ms Esther Nikau's legs and made derogatory and threatening comments towards her. The Judge said that was psychologically abusive of Toby and Mitchell and was therefore an act of violence.

[44] The Judge then referred to Facebook postings in evidence, which showed that Ms Esther Nikau had been the subject of the most vitriolic comments. The Judge also accepted that Rhonda's birth parents awoke one morning to find the words "Die you fucken white bitch" spray painted on their house in [Original Location], which later burnt down.

[45] The Judge noted that it was clear from the evidence and from the psychologist's report that Rhonda had become involved in the conflict between her birth parents and her whāngai parents, that she was aware of it and had been adversely affected by it.

The Judge also recorded Mr Nikau's evidence that he had no confidence that his family would moderate their behaviour in the future. The Judge, therefore, concluded that the impact of Rhonda being exposed to further violence or conflict should she return to live in [Original Location] was a significant concern.

[46] Although the Judge did refer in his analysis to the risk of further violence or conflict should Rhonda return to live in [Original Location], he, in effect, dismissed it by saying he was confident Rhonda's whāngai parents would ensure that their family would not continue to intimidate Ms Esther Nikau. I am however of the view that there remains a significant risk, which should not have been dismissed by the Judge.

[47] The second principle listed in s 5(b) is that a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians. During the course of his decision the Judge did pose the question "What weight should be attached to the principle that Esther and Colin should have the primary responsibility for Rhonda's care?" He determined quite correctly that the reference to "parent" in s 5(b) must be a biological parent. He then stated:

> Thus the s 5(b) principle is but one of the s 5 principles that I need to consider, and as with all the principles in the Act it is not automatically determinative, but rather each case needs to be considered on its own merit. The cases to which I have referred indicate is [sic] that ideally children's parents should have the primary responsibility for their care, but that does not rule out on the facts of a particular case, that principle being over-ridden as to do so would be in the best interests and welfare of a particular child.

[48] I am of the view that the use of the word "primarily" in s 5 (b) is significant. Primarily means essentially, mostly, chiefly or principally. In his analysis, however, the Judge did not accord any real weight to this principle. When he was considering the options for Rhonda's care, the Judge did not make any specific reference to s 5(b). In considering the option for Rhonda to be in the day-to-day care of her parents, the Judge focussed on what may happen if Ms Esther Nikau and Mr Nikau's relationship ended. The Judge appeared to have given some significance to difficulties in their relationship, noting Ms Esther Nikau's ambivalence towards it. Mr Nikau was, however, adamant he did not want to separate. In the end, the Judge formed the view that their relationship appeared stable at that time which, in all the circumstances, was an appropriate basis on which to proceed.

[49] The Judge also referred, only briefly, to Rhonda being raised by her birth parents when he stated:

> Remaining living in [Location 2]/[Location 1] area means that Rhonda can continue to attend [Location 1 school], continue to live in a house in which she lives with her brothers and that she can be raised by her birth parents. It also enables her to maintain a relationship on a regular basis with Mr and Mrs Tatchell with whom she has lived for the last 14 months.
>
> Rhonda will live in a household in which she can enjoy a better standard of living in that Colin and Esther are able to earn higher wages in [Location 1] than they are in [Original Location], and a higher standard of living than in Wendy and Winston's household. But a decision as to what is in this child's best interests and welfare requires more than a consideration of financial circumstances. Parents all the time make sacrifices for their children, and while it is important for Colin, in particular, to feel like he can provide for his family, his desire to do so needs to be considered in light of the overall circumstances as to what is in the best interests and welfare of Rhonda. The advantages for Rhonda in being close to and in the shared care of Winston and Wendy, and in [Original Location] where she can best strengthen her Māori identity and culture outweigh the advantages for Rhonda in continuing to live in [Location 2] where her parents will be more financially secure.

[50] The principle in s 5(b) is of importance. In my view, the Judge did not accord it sufficient weight, focussing instead on past difficulties in the birth parents' relationship and the financial sacrifices which he thought were necessary as being in the best interests and welfare of Rhonda.

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

[52] The Judge thought that there would not be any ongoing consultation and co-operation by Ms Esther Nikau with Rhonda's whāngai parents. He commented that if Rhonda was to be in the care of her birth parents he would not grant the application by Rhonda's whāngai parents to be appointed as additional guardians for that reason.

[53] He again noted that the relationship between Ms Esther Nikau and Ms Wendy Nikau was 'extremely toxic' and said he agreed with the evidence that it was unlikely to be repaired in the foreseeable future.

[54] I have no reason to differ from the Judge's assessment. This principle is, therefore, of less significance as it seems that Rhonda's care, development, and upbringing will not be facilitated by ongoing consultation and co-operation, no matter what care arrangements are put in place. In other words, s 5(c) does not point in the direction of one care plan or another. It is neutral.

[55] The fourth principle listed in s 5(d) is that a child should have continuity in his or her care, development, and upbringing.

[56] The Judge thought it significant that Rhonda had not been living with her birth parents for the last 14 months. He said she had been in the care of grandparents in [Location 1]. According to the Judge, this meant that the decision he had reached did not entail removing Rhonda from the care of her birth parents, but instead returning her to the shared care of her birth and whāngai parents. With respect, this is incorrect. The evidence was that Rhonda's birth parents have had daily contact and care of Rhonda with the approval of Mr and Ms Tatchell. This included getting her ready for school each day, picking her up after school, attending after school activities, and having her stay overnight several nights of the week. Rhonda's brothers, Toby and Mitchell, also often stayed overnight with Rhonda at Mr and Ms Tatchell's home. Since the Judge's decision, the family have in fact moved into Mr and Ms Tatchell's six bedroom home, where Rhonda's parents and each of the children have a separate bedroom. This is, however, not a matter I have taken into account, as it occurred after the decision at issue.

[57] Continuity of care is important. Rhonda is doing very well at school. She has made many new friends. She has a particularly good relationship with her teacher whom she adores. She is enjoying her after school [omitted] activities. Rhonda's grandparents have seen Rhonda make real progress in terms of maturity and the development of her personality. They are of the view that frequent contact with her birth parents and brothers has contributed to a positive environment.

[58] Whatever the circumstances were which resulted in Rhonda being placed with her grandparents in [Location 1], the fact is that Rhonda has adjusted well to life in the [Location 2]/[Location 1] area. A return to [Original Location] would mean a

further change in her living situation, which may well disrupt her continued development. I am of the view that this was also not given sufficient weight by the Judge.

[59] The fifth and sixth principles, which the Judge thought were determinative are listed in ss 5(e) and (f). These are that a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened, and that a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[60] Because Ms Esther Nikau is adamant she will not return to live in [Original Location] because of past intimidation and harassment, the parenting order directed by the Judge would diminish Rhonda's relationship with her birth parents who would not have day-to-day care or shared care of her, but would only have contact with her one weekend in every month and half of the school holidays. If Rhonda was to be in the day-to-day care of her birth parents, her relationship with her older brothers, Toby and Mitchell, would be preserved and strengthened as would her relationship with her maternal grandparents. Her brothers and grandparents are a significant part of her family group.

[61] On the other hand, if Rhonda's birth parents have day-to-day care of her, then her relationship to her whāngai parents would be diminished as would Rhonda's relationship with other members of her whānau, hapū or iwi. The Judge described it as follows:

> Living in [Original Location] would mean for Rhonda that she can have a meaningful and significant relationship with Winston and Wendy as opposed to them becoming caregivers that she visits from time to time; it is akin to the difference between listening to Coldplay on Spotify, and attending their concert. One is infinitely more present, and intimate, and tangible than the other. For Rhonda this is important as she is securely attached to them and they have been her parents for the formative years of her life. It is contrary to her best interests and welfare to live in [Location 2] as she will be unable to strengthen this relationship.

[62] While Rhonda's relationship to her whāngai parents would be less likely to be strengthened if she was in the day-to-day care of her birth parents, her relationship to

her birth parents, her brothers and her grandparents, would be more likely to be strengthened.

[63] As to Rhonda's relationship with her whānau, hapū or iwi and preserving and strengthening her identity, Mr Nikau told the Judge that he was capable of strengthening Rhonda's te reo and that he would take Rhonda back to their marae and to tangi. The Judge said, however, that there were aspects of Māori culture which could not be taught objectively from afar, but which need to be lived and breathed and experienced, to be learnt through osmosis so as to become an integral part of a person's life. The Judge was of the opinion that it was only through this process that Rhonda's identity and culture could not only be preserved, but also strengthened.

[64] In his analysis the Judge concluded that, whilst Rhonda could maintain and grow her sense of being Māori in [Location 2], it would not be to the same extent as would occur in [Original Location].

[65] With respect to the Judge, a parenting order that directed that Rhonda should be in the day-to-day care of her parents will not diminish her identity. The Judge did, after all, find that Rhonda could maintain and grow her sense of being Māori in [Location 2]. Her father is committed to te reo and acknowledges a duty to pass on his knowledge of Te Ao Māori to Rhonda. I do accept, however, that Te Ao Māori will be less accessible to Rhonda if she was to remain with her birth parents.

[66] Having made my own assessment of all the s 5 principles, I am of the view that the Judge fell into error in finding that s 5(e) and (f) were determinative. They are important, but so are other principles, in particular s 5(a), which is more significant than the Judge determined. Weighing all the s 5 principles, I consider the balance falls in favour of an order that Rhonda's birth parents retain the day-to-day care of her with regular contact with her whāngai parents, which could increase by agreement if relationships improve. However, as things stand, Rhonda should remain where she is with the formal parenting order being transferred from her grandparents to her birth parents.

Result

[67] I quash the Judge's decision dated 9 March 2018 and make a final parenting order in relation to Rhonda Nikau (d.o.b. [omitted] 2010) as follows:

(a) Rhonda is to be in the day-to-day care of her birth parents, Ms Esther Nikau and Mr Nikau at all times, except when is in the care of Ms Wendy Nikau and Mr Hohepa as per (b) below.

(b) Rhonda is to be in the care of her whāngai parents, Ms Wendy Nikau and Mr Hohepa, one weekend every month [details omitted], and one week during each school term holiday and half the Christmas holidays by arrangement.

(c) Rhonda is also to have three phone calls to her aunt and uncle per week, preferably by Skype or other visual means.

[68] I make no order appointing Ms Wendy Nikau and Mr Hohepa as additional guardians of Rhonda. I agree with the Judge that such an order is not appropriate if Rhonda is in the day-to-day care of her parents.

Woolford J

Solicitors: Eastbay Law Limited (J R Kay), Whakatane (for First Respondents)
R Paul Limited, Whakatane (Lawyer for Child)

Copy to: Appellants