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

IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2019-292-000468
[2020] NZYC 117

IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2006-027-000291

NEW ZEALAND POLICE/ORANGA TAMARIKI
Prosecutor/Applicant
v
[LV]
Young Person

Hearing:	27 February 2020
Appearances:	Sergeant Devane for the Prosecutor in the Youth Court Mr Boon for the Applicant in the Family Court Mr Snelgar Youth Advocate in the Youth Court Ms Cassidy Lawyer for the young person in the Family Court Ms Griffiths Lay Advocate
Judgment:	27 February 2020

DECISION OF JUDGE A J FITZGERALD
[Youth Court disposition and Family Court plan approval]

[L]

[1] [L] has given me permission to begin this decision with her pepeha:

Ko [iwi deleted] te iwi
Ko [mountain deleted] te maunga
Ko [river deleted] te awa
Ko Te Arawa te Waka
Ko [ancestral house deleted] te Whare Tupuna
Ko [Marae deleted] or [Marae deleted] te Marae

Ko [father's name deleted] toku papa
Ko [mother's name deleted] toku mama
Ko [young person's name deleted] taku ingoa

[2] [L] has a strong sense of being a kōhine (an adolescent Māori woman) and clear, distinct knowledge of what that means to her which is of profound importance to her well-being and best interests.

[3] Her [whakapapa deleted] has a direct link to Hongi Hika, a rangatira in Ngāpuhi. According to both of [L]'s parents, she comes from a whānau line of Māori healers and orators who are esteemed within their hapū and on their Marae.

[4] [L] is proud of her whakapapa, interested in tikanga Māori and feels more confident expressing herself in te reo Māori rather than English. She also has an especially strong connection to te ao wairua (the spiritual realm). [Spiritual connections deleted].

[5] Reports refer to [L] helping others with their te reo and often leading the karakia. The cultural advisor who co-authored the forensic report was particularly impressed

with [L], describing her as "clever" and "awesome to engage with." She is also described as being strong in the context of her pride in her culture.

[6] [L]'s interests do not end there. Various reports refer to her participation in sport, art, music (particularly [type of music deleted]) and cooking. Her goals include becoming [occupation deleted] and going overseas to see the world. In the short-term she would like to do yoga and Zumba, go to [a leadership camp] and spend time with her mentor doing fun things.

[7] That is just a brief glimpse of who [L] is, where she belongs, and some of her hopes and dreams for the future. I will return to these important issues later.

The crossover list

[8] [L] is here today at the Manukau Youth Court in the crossover list. I have both her Youth Court and her Family Court care and protection files before me.

[9] My job in relation to her Youth Court case is to decide what orders to make to resolve the 13 charges she has admitted for offending that all occurred during 2019 when she was 14 years old. I have just told her, and everyone else present, that all 13 charges will be discharged under s 282 of the Oranga Tamariki Act ("the Act") and [L] knows that means she will leave here today with no record of having committed those offences; she understands that the s 282 order makes it seem as if the charges had never been brought to Court in the first place.

[10] In relation to her Family Court case my job is to decide if the latest plan to address her need for care and protection is adequate. For reasons I will explain later the plan before me is not adequate and I will be making directions regarding the future conduct of those proceedings to try and ensure proper compliance with the Act.

[11] Young people like [L], who are caught up in both the youth justice and care and protection systems, are often referred to as "crossover kids". A subset of that group are those, like [L], who have dual status; that is, charges before the Youth Court as well as

care and protection proceedings before the Family Court which signifies high level care and protection concerns.

[12] It is the young people with dual status that the crossover lists cater for in various ways including co-ordinating what is going on for them in both proceedings and trying to ensure that plans made for them in both proceedings are in harmony with each other.

[13] It is impossible to separate out [L]'s youth justice issues from her care and protection ones as is the case with all young people with dual status. Such issues are very much intertwined and to make proper sense of the decisions I have made today, it is essential to provide some background information to explain how [L] ended up here in the crossover list.

Background

[14] [L] is the [one of the younger siblings] of [over 10] children. She also has [multiple] half siblings. Apparently, her mother [sibling details deleted].

[15] In [month deleted] 2006, when [L] was 14 months old, she and all her siblings were uplifted by Child Youth and Family (now known as Oranga Tamariki) due to their extensive exposure to neglect, physical and emotional abuse, sexual abuse of some siblings, parental substance abuse and family violence.

[16] Initially the children were all placed together with Ngāpuhi Iwi caregivers in [location deleted] but were then removed in [month deleted] 2006 and placed, in separate groupings of siblings, with non-kin caregivers in [location A].

[17] In 2008 [L] and [some] of her siblings were sent to live with whānau in Australia. Unfortunately, that placement broke down because the carers struggled to cope with the children's behaviour.

[18] Not long after returning to New Zealand, [L] was separated from the siblings she had been with because she was considered difficult to manage. After being briefly with

some caregivers in [location A] she was sent to a residence in [location B] isolating her geographically, at the far end of the country, from all of her whānau.

[19] Between 2006 and 2019 [L] had about 29 different placements, mostly with non-kin caregivers, most of which broke down. In one of the placements [L] disclosed being the victim of sexual abuse but there are differing accounts on file as to why the investigation of that did not progress.

[20] Records note the abusive nature of various placements for [L] and her siblings. Most tragically of all, [L]'s [sibling] committed suicide in [year deleted] after disclosing sexual abuse by one of the "caregivers" with whom [the sibling] was placed. [L's sibling] was 12 years old at that time.

[21] For much of the past ten years, [L] has been kept apart from her siblings and had very limited contact with them. Although care and protection plans provided for her to have monthly contact with siblings, that often did not happen. There are reports on file from her former lawyer in the Family Court raising strong concerns about that when, for example, there had been no contact between siblings for about 8 months. [L] has also had very limited contact with her parents throughout her life.

[22] There was also a lot of instability in her schooling. [L] attended eight different schools since she was first enrolled in school in New Zealand in [year deleted] when she was [age deleted]. That is eight different schools in four and a half years. In a report from an educational psychologist, the comment is made that such constant changing, at such a young age, will have made things extremely difficult for [L], both academically and socially.

[23] [L]'s education experience has not been a happy one. On those occasions when she was able to establish positive relationships with staff, she made good progress and at those times she took great pride in her achievements. However, more often she became angry and frustrated when, for example, she was unable to express herself as well as she wanted.

[24] As a result of her challenging behaviours [L] has undergone numerous assessments and various diagnoses have been made including PTSD and Reactive Attachment Disorder.

[25] Observations made in reports I have read include:

(a) [L]'s history includes "significant" exposure to methamphetamine in utero as well as the neglect and trauma she has suffered over many years;

(b) Her behaviour and responses are what you would expect from someone who has experienced serious ongoing trauma;

(c) The constant changes in care arrangements have impacted [L]'s ability to form proper attachments and to trust people. The constant upheaval in her life has affected her relationships with her whānau and multiple caregivers and her sense of belonging to people and place. This fundamentally important basic human need has not been met for her.

(d) Her ability to understand and regulate her emotions and her perception of herself have been badly affected by the way she has been treated. Frustration and sadness often express themselves as anger (and anger is a constant theme of concern in the reports about behavioural problems).

(e) It is likely that [L] had to try and make sense of, and cope with, a chaotic, untrustworthy, traumatising world from a very young age with minimal guidance and support. Her world is an environment where the tough survive and it is her against the world.

(f) [L] has a lot to be angry about and her anger appears directed at her life experiences that have been traumatising, invalidating, disempowering and possibly dehumanising with an absence of purpose and identity. She summed it up in her own words when she said she had been "passed around so much" and "I have been hurt all my life". The impression is that she may have felt more like an object than a person and that her

fighting spirit reflects her struggle to assert her identity and take some power for herself. However, she has lacked the support to begin to evaluate a cogent sense of self and the skill to manage her anger more appropriately.

(g) Unable to appropriately manage stressful situations, she is very easily triggered and, without the skills needed to regulate her emotions, aggression has become her automatic default response. When in this mode she becomes extremely difficult to assist. And yet [L] can show a more vulnerable, co-operative, honest and engaging side to herself.

(h) [L] has a strong sense of being Māori and clear, distinct knowledge of what that means to her. However, she appears disconnected from her whānau having been "passed around so much" and this is likely to have created internal conflict for her. Her strong desire to be with her whānau and have meaningful contact with her siblings has never been met.

[26] By the time [L] was 11 years old she was already well known to Youth Aid Police. Between [month deleted] 2016 (when she was 11) and 2019 (when she was 14 and old enough to charge with offending and brought before the Youth Court), there were more than 50 recorded incidents in relation to alleged offending of much the same type as the charges she now faces.

[27] That was the background to [L] being old enough to be charged with the offences that brought her before the Youth Court in 2019. I now turn to the Youth Court proceedings.

YOUTH COURT PROCEEDINGS

Charges

[28] The 13 offences [L] has admitted are;

(a) Assault (under the Summary Offences Act) on 9 January. The victim was a social worker with Oranga Tamariki. [L] punched her in the head twice because she was annoyed with her for sharing private information.

(b) Unlawfully getting into a stolen car and aggravated robbery on [date deleted] February. [L] was one of [multiple]young people who were in a car that had earlier been stolen. They drove to a petrol station in [location deleted] and [they all] went inside. One [young person] jumped the counter and punched one of the victims in the face, causing him to fall backwards. Other staff members managed to secure themselves in safe areas while the young people stole cigarettes and left in the stolen car. The victim did not suffer any injury as a result of being punched.

(c) On [date deleted] March, attempting to unlawfully taking a [car] from the carpark at [a mall]. The summary refers to two cars having windows broken and the ignition covers pulled but those involved then walking away afterwards.

(d) Unlawful use of a motor vehicle between [dates deleted] August for which I have no summary.

(e) On [date deleted] August, burglary of a petrol station in [street deleted]. [L] and the others who entered, damaged the entrance way, found the till empty, and then left in a car parked on the forecourt.

(f) On [the following day, date deleted] August, two charges of unlawful use of cars, theft of clothes from [a clothing store] and aggravated robbery. The aggravated robbery was of [a liquor store]. [L] and another young person, dressed in the clothing they had stolen from [the clothing store] and with their faces concealed, entered the store. The other young person had a kitchen knife which was thrust at the victim and cigarettes were demanded. [L] ripped out the till and ran back to the car. The other young person removed three trays of cigarettes before running back to the car too and they then left.

(g) On 8 and 9 October, unlawful taking of a motor vehicle, failing to stop for the lights and siren of a police car and reckless driving. The car was taken from a carpark at [a mall] between 5.00 pm and 6.00 pm on 8 October. The police saw [L] driving it the next day. When they signalled

her to stop, using the lights and siren, she sped off reaching speeds of approximately 160 kilometres per hour along State Highway 1. At times she crossed the centre line, drove around a traffic island on the wrong side and drove through roadworks and over several road cones. She continued for about 27 kilometres north and only stopped when the car's engine seized.

Remand status history

[29] [L] first appeared in the Youth Court on 11 March 2019 and was granted bail. For reasons that are unclear from the information on file, she was remanded in custody at [residence and location deleted] from 24 April until 6 May, when she was readmitted to bail which continued until 29 August when she was again remanded in custody until 18 September. Bail was granted again that day and continued until she was remanded in custody on 9 October 2019.

[30] [L] remained in custody at [residence deleted], the secure Youth Justice residence in [location deleted], until eventually being granted bail on 13 February 2020; a period of just over four months.

[31] In the first opposition to bail form filed by the police in April 2019 (and all subsequent ones) it is pointed out that the risk of [L] absconding is high because she has had 218 missing person occurrences previously. Of course, most if not all of those will have been before she was 14 years old, when she was running away from placements where she was very unhappy, so as to be with her whānau which is where she has always wanted to be. Before turning 14, that pattern of behaviour was a concerning feature of her care and protection status. After turning 14, it became a basis for opposing bail or, when on bail, for the police exercising powers of arrest and detention.

[32] Other concerns in a similar category referred to in the opposition to bail forms are [L]'s use of methamphetamine (which is almost certainly one way for her to self-medicate for her unmet trauma needs) and also her defiance and lack of respect for

authority which are at least partly the result of the appalling way she has been treated by those who have had authority over her throughout her life.

Family Group Conferences ("FGCs")

[33] There have been six Youth Justice FGCs in relation to [L]'s offending, some of which have also considered care and protection issues although the outcomes of all are very brief.

[34] [L]'s father and [sibling A] were at most of the conferences and her mother and [sibling B] at the most recent one. There was no representation of hapū or iwi at any FGC but they were not invited. Otherwise it was only professional people present.

[35] No FGC plan was ever devised. [L] never got the opportunity most young people do to complete a FGC plan because she was on remand in secure custody. The interests of victims were never addressed. No plan with such things as apologies, and perhaps other ways of making peace for the harm done, was ever devised.

(a) The first FGC, on 12 April 2019, considered only two charges and resulted in a non-agreement because [L] left the room.

(b) The second, on 1 May 2019, simply records "no agreement as to custody." Nothing substantive was considered.

(c) The third, on 11 September, records an agreement about [L] being granted bail to live with her [sibling, B], in [suburb deleted].

(d) The fourth, on 17 October 2019, simply records again "no agreement as to custody" and that "[L] could not stay in the room the entire conference".

(e) The fifth, on 14 January 2020, simply records "no agreement as to disposition."

(f) The sixth, on 11 February 2020, again records "no agreement as to disposition" and includes the outline of a care and protection plan prepared on the basis of [L] living with her [sibling, B]. The formal care and protection plan has since been filed and I will be talking about that later.

The issue for disposition

[36] There was agreement about all of the charges [L] faces, other than the two aggravated robbery charges, being discharged under s 282. Mr Snelgar submits that the same order be made for the aggravated robbery charges as well. Sergeant Devane submits that the order in relation to those two charges be a notation under s 283(a).

[37] Mr Snelgar advanced five grounds for the making of the s 282 order on the aggravated robbery charges;

(a) [L]'s age, (14 years old at the time of all of the offending);

(b) The time that has elapsed since the aggravated robberies (10 February 2019 and 22 August 2019);

(c) The time spent in custody on remand (more than four months);

(d) [L]'s background (which I have summarised);

(e) The need to look at ways to improve outcomes for young Māori to reduce the concerning disparities between them and other young people.

[38] Sergeant Devane explained that the police position with regard to the aggravated robbery charges is based on the seriousness of that offending which needs to be marked in some way. Having said that, he acknowledged that [L]'s involvement in the first robbery was as a follower but pointed out that she was more involved in the second which is concerning.

[39] He also quite rightly points out that the interests of victims here have not been given proper attention, which is true and I will return to that shortly.

[40] The agreement about a s 282 order being made on the bulk of the charges was reached because of the time [L] has spent locked up on remand in a secure residence which was slightly more than the most restrictive order available in the Youth Court, being six month's supervision with residence (if [L] was granted early release).

[41] It was also agreed that if [L] had been provided with a suitable place to stay in the community she would have had the opportunity to complete a FGC plan monitored at the Rangatahi Court. It was also agreed that if she had completed such a plan satisfactorily she would have had all of her charges discharged under s 282. There is no dispute about that at all.

Oranga Tamariki Act 1989

[42] My decisions today are made, primarily, by reference to the Act.

[43] Profoundly important changes to the Act came into force on 1 July 2019 but you would not know that when you look at what has happened to [L] since that date. As her case illustrates, profoundly important changes are required to what happens in practice too and that has not happened here.

[44] Part 1 of the Act contains important purposes, as well as principles to guide all of those who exercise any power under the Act. There are also important duties on the Chief Executive of Oranga Tamariki. I will begin shortly by referring to the parts of sections 4, 4A, 5, 7 and 7AA of the Act that are most relevant to [L]'s situation.

[45] As required by the Act, I will also consider the UN Convention on the Rights of the Child ("the CRC") and the Treaty of Waitangi – but I will do that separately.

[46] I begin with the Act. Section 4 sets out the purposes which are to promote the well-being of [L] and her whānau, hapū and iwi by complying with a detailed and carefully defined list of duties and obligations which include the following:

(a) Establishing, promoting or co-ordinating services that are designed to affirm mana tamaiti, are centred on a young person's rights, promote their best interests, advance their well-being, address their needs, and provide for their participation in decision making that affects them.

(b) Advance positive long-term health, educational, social, economic or other outcomes;

(c) Are culturally appropriate and competently provided.

(d) Assist whānau, hapū and iwi to both prevent young people from suffering harm, abuse neglect, ill treatment and also from offending or reoffending.

(e) Ensure young people who need care to have a safe, stable and loving home from the earliest opportunity and support to address their needs.

(f) A practical commitment to the Treaty of Waitangi is required as well as recognising mana tamaiti, whakapapa and the practice of whanaungatanga.

(g) Maintaining and strengthening the relationship between children and their siblings and whānau, hapū and iwi.

(h) In relation to young people who offend, promoting their rights and best interests, acknowledging their needs, preventing reoffending, recognising the rights and interests of victims and holding the young person accountable.

[47] None of those things have happened in this case, or if any have, it has certainly not happened adequately. There has been no affirmation of [L]'s mana; it has been trampled on, her rights have been breached as I will soon explain, her well-being and best interests have been disregarded, her needs ignored, and she has not been able to participate in decision making in any meaningful way.

[48] Nothing positive has yet happened regarding long-term health, educational, social or economic options for her and what little has happened here has been culturally inappropriate and incompetently provided.

[49] No real assistance has been provided to whānau. For years it has been known they are dysfunctional which makes it all the more essential to involve hapū and iwi but they did not even get an invitation to any of the six FGCs that considered such things as where [L] will live and, potentially, what could be done to ensure her well-being and best interests were served, her needs met and the underlying causes of the offending addressed.

[50] Efforts to ensure [L] had a safe, stable and loving home to live in never happened, let alone at the earliest opportunity; she sat locked up in residence for more than four months before simply being put back with a [sibling] she had lived with previously, whose own life story is much the same as [L]'s.

[51] As I will explain in more detail soon, there has been absolutely no commitment whatsoever to the Treaty of Waitangi and no recognition of mana tamaiti, whakapapa nor the practice of whanaungatanga.

[52] Very little, if anything, has been done to maintain or strengthen relationships between [L] and all of her whānau but absolutely nothing has been done to try and establish relationships to hapū or iwi. Those words do not even appear in any of the reports or plans I have read.

[53] It is not only [L] who has been prejudiced by what has and has not happened here. As far as I can tell nothing has been done to ensure that the victims' rights and interests have been recognised. The FGC records are mostly just one or two sentence statements of non-agreement about custody and disposition. No plans were ever made to try and address the interests of any of the victims. No victims attended FGCs although the views of a few were made known at some. There is almost nothing on the court file, including in the social work report provided for today, about victims.

[54] Under s 4A, [L]'s well-being and best interests are the first and paramount considerations in all matters regarding her care and protection and are a primary

consideration in relation to her youth justice issues. The four primary considerations in relation to her youth justice matters are:

(1) Her well-being and best interests.

(2) Public interest which includes public safety,

(3) Interests of victims,

(4) [L] being accountable for her behaviour.

[55] [L]'s well-being and best interests have clearly not been a priority in the way she has been treated and in the management of her case. It is not in the public interest, including public safety, to keep treating vulnerable young people like [L] the way she has been. It only increases the risk of re-offending which, of course, is contrary to the public interest. As indicated, the interests of any victims here have not been well-served.

[56] Last but certainly not least, the means by which [L] has been held accountable here (locking her up in a secure residence for more than 4 months), runs completely against the purposes I have mentioned and also the principles of the Act which are set out in s 5, including:

(a) [L]'s well-being must be at the centre of decision making and in particular:

(i) Her rights under the CRC must be respected and upheld and she must be treated with dignity and respect at all times and protected from harm;

(ii) Her need for a safe, stable and loving home should be addressed;

(iii) Again, mana tamaiti and [L]'s well-being should be protected by recognising her whakapapa and the whanaungatanga responsibilities of whānau, hapū and iwi,

(iv) Decisions should be implemented promptly and in a time frame appropriate to her age and development;

(v) A holistic approach should be taken which means seeing [L] as a whole person which includes, but is not limited to, developmental potential, educational and health needs, whakapapa, cultural identity and age.

[57] Now is not the time to set out in detail and analyse the definitions of the te reo Māori words and phrases used in these sections, but it is worth mentioning that mana tamaiti is defined as meaning, "the intrinsic value and inherent dignity derived from a young person's whakapapa (genealogy) and their belonging to a whānau, hapū and iwi in accordance with tikanga Māori."

[58] The principle of mana tamaiti is of great importance and significance in the Act. It appears 14 times and is first in the s 4 purposes and therefore relevant to the overall interpretation of the Act. It is included in the s 5 principles as well and so must be considered when exercising a general power and when determining the well-being and best interests of young people.

[59] As well as drawing attention to those important features of the Act, learned analysis of the new provisions of the Act[1] has noted that the definition of tikanga Māori in the Act is alarmingly thin, that is, it simply says it means "Māori customary laws and practices", but that its essence is reflected wherever the words mana tamaiti appear because it is included in that definition. It is also pointed out that all of the te reo Māori terms and concepts are inextricably linked to each other and revolve particularly around the term mana tamaiti and expressly appear side by side in the same five provisions of the Act.

[60] In [L]'s case however, none of these important terms and concepts have been recognised or applied. In fact, they are not even mentioned in the reports, plans or other documents I have been given in both the Youth Court and the Family Court proceedings.

[1] Eru Ruanui Tia Kapa-Kingi "Ka Mate, Ka Ora Rānei? Oranga Tamariki Act Not Enough to Address Māori Overrepresentation in State Custory and out of Home Placements – A Way Forward Through Crown–Māori Partnership" (LLB (Hons) Dissertation, Victoria University of Wellington, 2018).

The same goes for the words hapū and iwi. The disregard for [L]'s mana, whakapapa, and the fact she belongs both to hapū and iwi as well as whānau, is shocking.

[61] I can perhaps understand that not happening before 1 July 2019 but since 1 July 2019 I do not think there can be any justification at all for overlooking such essential matters.

[62] Aside from the disregard for [L]'s mana and well-being there has been no protection whatsoever nor proper recognition of her whakapapa nor the whanaungatanga responsibilities of hapū and iwi in particular.

[63] [L]'s awful treatment over the years has also shown no regard for protecting or giving proper recognition to her whānau relationships. She was separated at a very young age from her parents and siblings and has been allowed very little contact with them since.

[64] Of course, that was part of the background to the amendments to the Act coming into force, and the new provisions do not have retrospective effect. However, I think that should have seen urgent, pro-active steps being taken to ensure there was good and faithful compliance with the new provisions of the Act. We cannot turn back the clock but we can certainly change what happens for [L] in future.

[65] Decisions have not been implemented within appropriate time frames and a very narrow approach has been taken to how she is seen as a person. As report writers have mentioned previously, in many respects [L] has been treated more like an object; than a person, much of the time.

[66] Of special significance in this case are the duties on the chief executive of OT under s 7 of the Act and also the chief executive's duties in relation to this nation's founding document, the Treaty of Waitangi. I say special significance because the chief executive uplifted [L] when she was 14 months old, took legal custody of her and has also been a legal guardian ever since. Because of that status, the chief executive should have taken active, protective steps sooner and not just let her sit, locked up on remand, for more than four months. I will return to that in the context of the Treaty in a moment.

[67] The duties imposed on the chief executive under s 7 require that she take such positive and prompt action and steps to best ensure the purposes of the Act are attained in a manner that is consistent with the principles in sections 4A and 5.

[68] There has been a failure here to meet that duty.

[69] The duties in s 7AA are imposed so as to recognise and provide a practical commitment to the principles of the Treaty of Waitangi. The chief executive is to ensure;

(a) That the policies and practices of OT that impact on the well-being of young people have the objective of reducing disparities by setting measurable outcomes for Māori young people.

(b) Policies, practices and services must have regard to mana tamaiti and the whakapapa of Maori young people and the whanaungatanga responsibilities of whanau, hapū and iwi.

(c) Expectations and targets are set to improve outcomes for Māori young people and this is to be achieved by the department developing strategic partnerships with iwi and Māori organisations, including iwi authorities.

[70] There is no sign at all of that happening here.

[71] Finally in this section, there are then the nine youth justice principles in s 208 of the Act. These include imposing the least restrictive sanction appropriate in the circumstances, which I have done. The causes underlying the offending should have been addressed, which has not occurred but that can be looked at in the Family Court proceedings. There should have been consideration for the victim's interests, which sadly cannot be done adequately for the reasons already explained.

The CRC

[72] It is important to emphasise here, that when New Zealand ratified the CRC in 1993, that amounted to a promise that every single child in New Zealand was entitled to the protection of every single right provided in every single one of the 54 articles, without qualification or compromise.

[73] Most children in New Zealand are lucky enough to enjoy having all of those rights respected and upheld. Those with a background like [L] do not. The rights of dual status crossover kids are regularly and routinely breached. Although in theory their rights are enforceable, that never happens. Although in theory there should be accountability for the breaching of their rights, that never happens either.

[74] The preamble to the CRC includes recognition that children, by virtue of their age, are entitled to certain safeguards and protection including legal protection. Some of the articles that are relevant in [L]'s case include:

(1) Article 2 which requires a focus on ensuring that particular groups of young people, including indigenous people, are not discriminated against:

(2) Article 3 which requires that a young person's best interests be a primary consideration;

(3) Article 37(b) which states that custody shall be used only as a measure as a last resort and for the shortest appropriate period of time;

(4) Article 40 which provides that sanctions and outcomes should be consistent with the promotion of a young person's sense of dignity and worth and also provides that a variety of disposition shall be available to ensure a young person is dealt with in a manner appropriate to his or her well being and proportionate to their circumstances and the offence;

(5) Article 40(2)(b) provides for the right to have the matter determined without delay.

[75] In [L]'s case, all of these rights have been breached to some extent. The fact that Māori children and young people have been discriminated against historically is reflected in the new provisions of the Act about addressing the resulting disparities.

[76] As mentioned already, [L]'s best interests have clearly not been treated as a primary consideration. Her time in secure custody was not for the shortest appropriate period and it dragged on only because of her care and protection status, not because of her youth justice status. Any other 14-year old facing such charges, but with at least a

reasonable home in the community, would have been out on bail within days or weeks, not months. That treatment was completely inconsistent with [L]'s sense of dignity and worth.

UN general comment no 24 (2019)

[77] It is also important to point out that on 18 September 2019 the UN issued its latest general comment, no. 24, (2019) on children's rights in the child justice system. This is the first general comment on child justice issued by the UN since 2007 and so it provides very important and current guidance on the approach to be taken by member nations, such as ours, to child justice issues.

[78] There is a strong emphasis on avoiding criminalising the behaviour of children and also an emphasis on diverting them wherever possible from criminal law processes.

[79] In the introduction it is pointed out, amongst other things, that children differ from adults in their physical and psychological make up, which constitutes the basis for lesser culpability and for a separate system with a differentiated individualized approach. It says that exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults. The commentary goes on to say that children accused of having infringed the criminal law need to be treated in a manner consistent with their sense of dignity and worth and that the evidence shows the prevalence of crime committed by children decreases after the adoption of systems in line with those principals.

[80] One of the strong themes of the general comment is an emphasis on increasing efforts to divert children from criminal justice processes. In the Objectives and Scope section for example:

(a) Paragraph 6(c)(ii) refers to promoting key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with key knowledge about children's development, and in particular scaling up the diversion of children away from formal justice processes and also the use of non-custodial measures to ensure detention is used as a measure of last resort.

(b) Paragraph (7) encourages the use of non-stigmatising language relating to children who have infringed criminal law.

(c) Paragraphs (8) and (13) both provide that measures for referring children away from the judicial system should be considered at any time prior to, or during the relevant proceedings.

(d) Paragraph (15) says "diversion involves the referral of matters away from the formal criminal justice system, usually to programs or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective."

(e) Then, and importantly, paragraph (16) says "diversion should be the preferred manner of dealing the children in the majority of cases. State parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate."

(f) Paragraph (72) emphasises that we should continually explore the possibilities of avoiding the court process or conviction through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact…and be available throughout the proceedings.

[81] I will refer to the significance of these guiding comments in [L]'s case, when I explain the reasons for my decision shortly.

The Treaty of Waitangi

[82] Treaty principles that I believe are relevant here are:

(a) The principle of active protection; Although I realise there are differing views on this point, I believe that under article 1 of the Treaty, Māori ceded to the Crown kāwanatanga (the right to govern) in exchange for the Crown guaranteeing to Maori tinorangatiratanga under article 2. The principle of active protection flows from that exchange. It includes the

promotion of Māori well-being. It also includes Māori having full authority and control over Taonga (valuable possessions) and there is no more precious taonga than tamariki (children). Importantly, the relationship between tamariki is a taonga too. The obligation to protect Māori interests is heightened in the knowledge of past historical wrongs done by the Crown such as those suffered by [L], plus the inter-generational disadvantage suffered by Māori reflected in the requirement in the Act to address the resulting disparity.

(b) The principle of partnership is obvious; The Treaty created a relationship in the nature of a partnership in which the Crown would cooperate with Māori in fields of common interest, with surely none being more important than the well-being of children. There was also a relationship of citizenship in which the Crown assured equal rights and standards to all Māori. Surely partnership also means enabling the Māori voice to be heard and perspectives to influence the type of care, protection and support provided for children.

(c) The principle of equity. Article 3 of the Treaty has commonly been regarded as having the most direct relevance to the provision of social services to Māori and is therefore important here. The fact that there are disparities between Māori and non-Māori across a range of spheres, including over-representation in state care and in all of the negative Youth Court statistics, is a reason this principle is of great significance.

(d) The principle of options. This complements the principles of active protection and equity and assures Māori of the right to choose their social and cultural paths. This principal requires, as a minimum, respect for the most important facets of tikanga Māori.

[83] Two duties arising from those principles are:

(a) The duty of good faith, The Treaty created an enduring relationship of a fiduciary nature, in the form of a partnership with each party accepting a positive duty to act in good faith, reasonably and honourably towards

each other. Partnership and reciprocity are founded on good faith and respect. It requires both parties to act reasonably towards each other involving co-operation, compromise and the will to achieve mutual benefit.

(b) The duty of consultation. Consultation is a duty of government common to the observance of the four Treaty principles I have referred to. The active protection of rangatiratanga, and of all Māori people in general, requires the Crown to inform itself adequately so as to exercise its powers of sovereignty fairly and effectively. Partnership cannot proceed in ignorance of the views and wishes of Māori.

[84] The chief executive, essentially as the representative of the Crown in the current context, had clear and important duties with regard to the four principles I have mentioned that have clearly not been met in relation to [L]. In the context of the well-being and best interests of a vulnerable young kōhine, the all-important duties of good faith and consultation have been ignored. There was no invitation to hapū and iwi to be involved in discussions at FGCs about such things as the custody, care, protection, well-being or best interests of [L]. That needs to start happening.

[85] The consequences of what has happened here, in relation to the breaches of the Act's provisions, breaches of [L]'s rights under the CRC, and the breaches of Treaty principles and duties, are relevant to the decisions I have made today.

[86] That is not least of all because if there had been full and proper compliance with the Act, with the CRC, and with the Treaty obligations, [L] would not be in this position.

[87] I return now to the disposition issue.

Factors to be taken into account on sentencing

[88] Making an order under s 282 of the Act can be made after an enquiry into the circumstances of the case.

[89] Before any of the orders under s 283 of the Act can be made, I am required to consider the factors set out in s 284 of the Act. Therefore, given that the police are seeking the order under s 283(a) of the Act, I need to consider those factors.

[90] I have already summarised the charges [L] has admitted. The aggravated robbery charges are the most serious. They are reasonably serious offences of their type but certainly not as serious as many regularly seen in Youth Courts across metropolitan Auckland and elsewhere. As Sergeant Devane acknowledged, in the first of those robberies [L] was one of the followers, not a leader. In the second she did not have the knife but took the till and ran.

[91] Most of the other offences are not very serious and, on their own, would probably have been dealt with by police alternative action. The reckless driving charge is very concerning in terms of public safety. If there had been a FGC plan, [L] may have had the opportunity to attend, for example, the very effective (in terms of reducing the risks of re-offending) "The Right Track" programme, which would have been good for her and the community.

[92] There is nothing more I need say about [L]'s personal history and characteristics or her social circumstances.

[93] People do comment critically about what they see as a lack of remorse and sympathy for victims from [L], but I think the way she presents needs to be understood in terms of her past. Apologising meaningfully does not come easily to those who have never had such things taught or modelled for them. Making an apology is not just a box to tick and often requires time, help and preparation so as to be done properly. It is no wonder to me that [L] comes across sometimes as an angry young woman who could not care less. However, I do not judge her that way. If I had been through what she has, I think I would present in much the same way.

[94] I am not aware of any measures taken or proposed to be taken by [L] or her whānau to make reparation or apologies. Nor am I aware of the effect of the offending on victims for reasons I have explained already.

[95] [L] has no previous Youth Court offending history. I have talked about the FGC decisions already.

[96] The causes underlying of offending are apparent from what I have said and will now have to be addressed in the Family Court care and protection proceedings.

Disposition

[97] [L] is doubly disadvantaged by what has happened here.

[98] She has served the equivalent of the most restrictive order available in the Youth Court which is not the sentence she would have been facing if she had not been kept locked up in the residence. As a 14-year-old first time offender she would have been given the opportunity to complete a FGC plan monitored at the marae with a s 282 order available for satisfactory completion. There is complete agreement on that.

[99] Although I accept there were clear and good reasons to remand her in custody on 9 October 2019, the length of remand was not due to the absconding risk, the seriousness of the offending or danger to public safety. It was due to her care and protection status.

[100] As a result of being locked up for so long she was denied the opportunity most young people get; to go to a FGC and have a plan created that could be monitored at the Marae. In [L]'s case that would have been a tremendously important opportunity to engage in the cultural processes at the marae with the prospect of a s 282 order on all charges for successful completion of the plan.

[101] For [L] to miss that opportunity is a grave injustice because there is something profoundly significant about her life and character that stands out from everything I have read. Against a background of great sadness, pain and darkness, the thing that shines vividly and brightly, is how people describe her when she is able to engage with her culture; "proud", "strong", "clever", "awesome to engage with", and with special gifts that have been handed down to her from her tūpuna (ancestors).

[102] I had two options regarding disposition:

(a) The first was to feel concerned about the time [L] spent on remand in custody, and the tragic missed opportunity I have just mentioned, but

punish her anyway by attaching the label "youth offender" to her, knowing the impact that will have on her future and knowing it would increase the risk of her re-offending.

(b) How important is it to attach that label? In that regard, the UN general comment is instructive. Although it does not specifically say so, it is apparent from the text that the strong emphasis on increasing the use of diversion, even for serious offending in appropriate cases so as to avoid stigmatization, is based on the latest science. And that is exactly what the science does say; that the prevalence of crime committed by children decreases after adopting approaches in line with the principles set out in the general comment.

(c) When I have regard to [L]'s well-being and best interests, the public interest, and the fact that she was held accountable in a substantial way, I did not think stigmatizing her was appropriate.

(d) As well as that, the second option I had was in accordance with the relevant provisions of the Act and the articles of the CRC. Granting [L] the s 282 order on all charges goes some way toward reducing disparity and gives a young woman who has never had a fair chance in life the opportunity for a different future.

(e) Although her past places her at risk of further offending, that need not be her destiny if she now receives the care and protection she deserves which must include restoring her to where she belongs in the world and nurturing her special interests and talents.

[103] It was for all those reasons I made the s 282 order on all charges.

Criminalising care and protection

[104] Although I have been critical of what has happened in the past regarding [L]'s care and protection, my comments and concerns regarding the practices followed here are not all directed at OT but at all who exercise power under the Act which includes

various people. In particular, I must emphasise that I have great respect and admiration for the high quality of social work being done right across metropolitan Auckland.

[105] We all have a responsibility for making sure that the purposes and principles of the Act are honoured and applied and that will only happen when everyone is fulfilling their duties appropriately and changing practices to conform to the new provisions of the Act.

[106] Also, my comments about the time [L] spent on remand in secure custody are not a criticism of the care provided in those facilities by the dedicated staff who work there. Those of us who are disturbed by the large number of dual status crossover kids who spend months at a time in such facilities are consoled by the knowledge that the quality of care and support is very high.

[107] But that is not the point. The very concerning fact is that [L]'s case is by no means rare; what has happened here is a feature of a large number of the cases of dual status crossover kids. What happens in practice amounts to the criminalisation of care and protection and it has been going on for years.

[108] Various attempts have been made to try and fix that problem including information sharing protocols between the Youth Court and Family Court, crossover lists and better case management, but the problems remain, as [L]'s case illustrates.

[109] I expected that the amendments to the Act, that came into force on 1 July last year, would result in significant changes to practice that would see improvement in the handling of crossover cases, but that has not happened – yet.

[110] As I have been pointing out in the various Youth Courts in which I have been sitting recently, the plans being provided in both the Youth Court and Family Court do not even include words and terms such as "hapū", "iwi", "mana tamaiti", "whakapapa", "whanaungatanga" "tikanga Māori.". The templates being used are exactly the same as they were before 1 July 2019. Of course, it is not just a question of including the words; the spirit of the amendments needs to become normal practice and it has not yet. It will take us closer to compliance if we start using the words, thinking and talking about them and applying the concepts and practices in every single case.

[111] In the meantime, those things that have always happened to crossover kids just carry on happening as they always have. The following things that happened in [L]'s case are just a few examples common to many; it is by no means an exhaustive list.

[112] Most crossover kids come in to the Youth Justice system with a background of running away from placements in which they are unhappy, usually to try and get back to their family. It is often how they have learned to cope with the trauma they have suffered both before and after state intervention. When they are very young such behaviour is a concerning feature of their care and protection concerns.

[113] For years the practice has been that when they are old enough to enter the youth justice system, care and protection steps back with the result that youth justice powers and facilities are used to manage that behaviour. For example, the 218 times [L] had run away from places she did not want to be, become "absconding". That is responded to by the police using powers of arrest, detention in cells, being put before the Court with bail opposed. In other words, we take these highly traumatised children and further traumatise them by dealing with the issue in that way, thereby greatly increasing the likelihood of further offending – as the latest UN general comment mentions.

[114] Once remanded in custody little, and sometimes nothing, is done to find a place for such children and young people to be bailed to. Just as [L] did, they stay in custody, not just for days or weeks but usually for months. Eventually they have been locked up for so long that everyone agrees their charges should just be discharged. As a result, they miss out on the options most young people get to resolve their charges, usually to their great prejudice. By simply being discharged in that way there is usually no transition home. In all likelihood all we have achieved is increasing their risk of reoffending. In some cases, such as [L]'s, victims too miss out because the FGC's only ever deal with "custody" or "disposition" which are not agreed and so the process just ends there.

[115] For young Māori in particular, the new provisions of the Act provide very strong obligations on all of us to change current practice. They also provide very important, powerful tools, such as the CRC and the Treaty of Waitangi, that are capable of being used to achieve much improved outcomes.

FAMILY COURT PROCEEDINGS

[116] Today I am unable to approve the care and protection plan provided because it does not comply adequately with ss 4, 4A, 5, 7 and 7AA of the Act.

[117] I am therefore adjourning the Family Court proceedings to the crossover list on 7 May 2020.

[118] In the meantime, I strongly recommend and urge that a FGC be convened and held to which hapū and iwi are invited. In my opinion it is absolutely essential that happen in this case. As I mentioned earlier it has been very clear for years that [L]'s immediate whānau are dysfunctional and in need of a great deal of help and support, which I am hoping can be found, at least in part, from hapū and iwi involvement.

[119] The importance of involving hapū and iwi cannot be understated in the case of a young woman who is so proud of her cultural heritage but disconnected from it currently. The sooner the connections are made, the better.

[120] I am especially grateful to Ms Sophie Griffiths for the tremendous help she has already been since coming on board, at short notice, as lay advocate in the Youth Court proceedings, which are now finished. Her appointment is continued now as lay advocate in the Family Court proceedings. She will have a vitally important role to play in those proceedings too, given that her principal functions are to:

(a) Ensure the court is made aware of all cultural matters that are relevant to the proceedings, and,

(b) Represent the interests of [L] and her whānau, hapū and iwi to the extent that those interests are not otherwise represented.

[121] There must also be provision in the plan to nurture [L]'s interests and talents as well as appropriate supports and programmes to properly address her trauma. If she is to live with whānau, they too will need to be very well supported to ensure they are able to provide proper care.

[122] I direct that an updated social work report and plan that comply with ss 4, 4A, 5, 7 and 7AA, and have those components, be filed and served one week before 7 May 2020.

[L]

[123] I finish by returning to where I started; with [L]'s pepeha. That is where she belongs; with whānau, hapū and iwi; cooking, doing yoga, Zumba and whatever else makes her happy.

[124] It is no longer a question of if that will happen, but when it will, which must be soon.

A J FitzGerald
Youth Court and Family Court Judge