Guardianship, Custody and Access: Māori Perspectives and Experiences

Di Pitama
George Ririnui
Ani Mikaere

MINISTRY OF
JUSTICE
Te Manatū Ture

This report was commissioned by the Ministry of Justice and Department for Courts from Strategic Training and Development Services and Ani Mikaere.

First published in August 2002 by the
Ministry of Justice
PO Box 180
Wellington
New Zealand

© Crown Copyright

ISBN 0-478-20170-2

Foreword

He whakataūaki: "Ka mate kāinga tahi, ka ora kāinga rua"[1]

E ngā mana, e ngā reo, e ngā karangatanga maha,
tēna koutou, tēna koutou, tēna koutou katoa.

E ngā mate –haere, haere, haere.
I roto i te rīpoata e whai ake nei i puta ake ētahi o ngā kōrero i te ao Māori.

It is important that the Māori perspective is taken into account when family law policy and Family Courts processes are being developed. The Ministry of Justice and the Department for Courts accordingly commissioned this research as part of the review of the Guardianship Act 1968. The objective of the research was to provide information on the experiences of Māori whanau and individuals when they engage with the Family Courts over matters of guardianship, custody and access.

The research involved a small number of kanohi ki te kanohi (face-to-face) interviews with whanau who have been involved in guardianship proceedings. It also included interviews with legal counsel and social service providers involved in the Family Courts. From these interviews valuable insights are gained about the impact of the guardianship, custody and access arrangements on Māori whanau.

The literature review provides a broader context for the individual perspectives recorded in the research by identifying key principles underlying Māori child raising.

The report identifies key principles that could be further explored for better recognising Māori perspectives on guardianship, custody and access, and facilitating more effective Māori participation in Family Court proceedings.

This research provides useful input into the development of policy to better meet the needs of Māori involved in guardianship proceedings and, more broadly, Māori users of the Family Courts.

Belinda Clark
Secretary for Justice
Ministry of Justice

Wilson Bailey
Chief Executive
Department for Courts

[1] He whakatauāki: The proverb can literally mean "When one home disappears another is created." In the context of this project this proverb can mean one of the following: moving from one home to another, a renewal of circumstances, or exchanging one life for another.

Contents

Foreword **iii**

Acknowledgements **vii**

1 Research Objectives **1**

2 Introduction **3**

3 Information Needs **7**

4 Methodology **9**

4.1 Carrying Out the Research 11

5 Pilot Study **13**

6 Main Study **15**

6.1 Engaging Participants 15
6.2 Whānau Involvement 16
6.3 Interviews with Counsel 17
6.4 Interviews with Iwi/Māori Social Service Providers 17
6.5 Literature Review 17

7 Māori Concepts of Guardianship, Custody and Access: A Literature Review **19**

7.1 Introduction 19
7.2 A Māori World View 20
7.3 Māui-tikitiki-a-Taranga 23
7.4 The Principles Underlying Māori Child-Raising 27
7.5 The Contemporary Significance of Tikanga Māori 34
7.6 Recognition of Tikanga Māori in Current Law Concerning Guardianship, Custody and Access 38
7.7 Access to Justice Issues 43

8 Interviews with Counsel **47**

8.1 Counsel/1 47
8.2 Counsel/2 48
8.3 Counsel/3 49
8.4 Counsel/4 50
8.5 Summary 52

9 Interview with an Iwi Social Service Provider **53**

9.1 Summary 55

10 Interview with a Māori Social Service Provider **57**

10.1 Summary 58

11 Interviews with Applicants and Respondents 59

11.1 Area 1/Applicant 1 59
11.2 Area 1/Applicant 2 61
11.3 Area 1/Applicant 3 63
11.4 Area 1/Applicant 4 64
11.5 Area 1/Applicant 5 66
11.6 Area 1/Applicant 6 69
11.7 Area 1/Respondent 1 70
11.8 Area 1/Male Applicant – Counter-application made by Mother 71
11.9 Area 1/Respondent 3 73
11.10 Area 2/Applicant 1 74
11.11 Area 2/Applicant 2 76
11.12 Area 2/Applicant 3 77
11.13 Area 2/Applicant 4 79

12 Pilot Study Interviews 83

12.1 Pilot Study/Applicant 1 83
12.2 Pilot Study/Applicant 2 84
12.3 Pilot Study/Respondent 1 86
12.4 Pilot Study/ Respondent 2 88

13 Issues and Themes 91

13.1 Framing the Issues and Themes 91
13.2 Principles Related to the Care and Upbringing of Children 93
13.3 Access to Justice Issues 97
13.4 Favourable Experiences 97
13.5 Counsel for the Child 98
13.6 Cost Issues 98
13.7 Other Services 99

14 Hei Whakamutunga 103

15 Glossary of Māori Terms 105

16 Bibliography 107

Acknowledgements

Strategic Training and Development Services would like to thank the following people for their contribution to the production of Guardianship, Custody and Access: Māori Perspectives and Experiences.

- Di Pitama (Ngai Tahu, Ngāti Mutunga) – Di conducted the applicant interviews and wrote the final report
- Ani Mikaere (Ngāti Raukawa ki te Tonga) – Ani wrote the Literature Review
- George Ririnui (Ngāti Ranginui, Ngaiterangi) – George conducted the respondent interviews
- Sheryl Ririnui (Ngāti Ranginui) – Sheryl was the first point of contact for potential participants and formatted the final report
- Advisory Group:
  - Angela Lee, Department for Courts
  - Judy Moore, Department for Courts
  - Helen Walker, Department for Courts
  - Brigid Feehan, Public Law, Ministry of Justice
  - Andrew McLellan, Public Law, Ministry of Justice
  - John Clarke, Director Māori, Ministry of Justice
  - Alison Chetwin, Principal Research Adviser, Ministry of Justice
  - Trish Knaggs, Senior Research Adviser, Ministry of Justice
  - Tui McDonald, external consultant

Thank you especially to all Legal Counsel, Applicants, and Respondents who participated in the interviews for this research.

1 Research Objectives

To provide information on Māori perspectives on guardianship, particularly in relation to custody and access.

To investigate and describe the experiences of Māori applicants, respondents, as well as their wider family/whānau, when they have gone to the Family Court to settle custody and access issues.

2 Introduction

The review of the Guardianship Act 1968 takes place in a context in which the diversity of family types and diversity of values regarding families and relationships are increasingly being recognised and reflected in legislation and policy. There have also been significant changes in the way the relationship between Māori and the Crown is defined in terms of the Treaty since 1968. The Guardianship Act 1968 has been described as one of several family law statutes that reflected the assimilationist policies of the period.[2] The Children, Young Persons, and Their Families Act 1989, in contrast, makes specific provision for whānau, hapū and iwi involvement in decision-making about the lives of children and young people. Puao-Te-Ata-Tu, a major report published by the Department of Social Welfare in 1986 had a significant influence on the way the Children, Young Persons, and Their Families Act 1989 was developed. While the focus of the report was developing ways of working within DSW that would be responsive to Māori needs, it was also an important means of gathering information about Māori views regarding whānau, and matters such as guardianship and custody.

The focus of this particular piece of research is the experiences of Māori whānau and individuals when they engage with the Family Court over matters of guardianship, custody and access. While the Guardianship Act 1968 is one path to this engagement, other pieces of legislation, notably the Children, Young Persons, and Their Families Act 1989, and the Domestic Violence Act 1995 can also result in Family Court involvement over these matters. The Guardianship Act 1968 sets the legal rules for guardianship, custody and access in respect of guardianship, custody and access.

Under this Act, guardianship[3] means:

- The custody of a child or young person; and
- The right of control over the upbringing of the child or young person. "Upbringing" is defined to include education and religion. It also includes things such as change of name and major health decisions.

Custody is defined as the right to possession and care of a child. This day-to-day care of the child is usually the right of both parents, but if they separate the Family Court can grant a custody order in favour of just one of them if necessary. A parent, step-parent or guardian may apply to be granted custody. The term 'access' is only relevant where custody has been given to one parent. In this context, 'access' refers to the arrangements for the child or young person to spend time with the non-custodial parent.

---

[2] Justice: The Experiences of Māori Women, Law Commission, April 1999, p24.

[3] Definitions of guardianship, custody and access here are taken from: *Responsibilities for Children Especially When Parents Part,* Ministry of Justice Discussion Paper, August 2000.

Under the Children, Young Persons, and Their Families Act 1989, matters of guardianship, custody and access may become relevant when there are issues related to the care and protection of the child or young person. If it is determined that the natural parents cannot adequately care for or protect the child or young person, the Family Court may grant guardianship and/or custody to another person or persons.

The Object of the Domestic Violence Act 1995 is:

To reduce and prevent violence in domestic relationships.[4]

Under the Domestic Violence Act 1995, the definition of violence includes causing or allowing a child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship.[5] Under the Guardianship Act, if the Family Court accepts that a parent has been violent against anyone in the immediate family, then the court will not grant custody or unsupervised access to the child unless the court is satisfied that the child or young person will be safe.

In seeking the perspectives of Māori regarding guardianship, custody and access, the diversity of Māori experience and whānau type must be considered. The interviews conducted reflect this diversity of experience and whānau type. Those who took part in the interview process came from both large urban settings and remote rural locations. Their involvement with the Family Court over matters of guardianship, custody and access was initiated in a number of ways, and participants include aunts, mothers, fathers, grandparents and whāngai parents. Some were able to clearly articulate the centrality of whakapapa and whanaungatanga to their beliefs and decisions regarding the care of tamariki. Others were isolated from their own extended whānau, and had little contact with hapū or marae.

In recognition of this diversity of experience, and in order to provide a context in which Māori concepts of caring for children are clearly articulated, Ani Mikaere has conducted a Literature Review.[6] The Literature Review begins with a brief summary of a Māori world view before moving to a discussion of key principles underlying Māori child-raising. The principles identified are:

- The significance of whakapapa;
- Children belong to whānau, hapū and iwi;
- Rights and responsibilities for children are shared;
- Children have rights and responsibilities to their whānau.

[4] See *S5(1)* Domestic Violence Act 1995.

[5] See *S3(3)(a)(b)* Domestic Violence Act 1995.

[6] The researchers and advisory group welcomed John Clarke's recommendation that the research be supported by a clearly-articulated description of the traditional values and beliefs pertaining to tamariki-mokopuna and their care.

These principles have also clearly emerged in the participant interviews, and provide a context for understanding why particular aspects of the current legislation and court procedures are difficult for whānau to understand and cope with. It is also clear that while many whānau are cognizant of their ongoing kinship obligations, that these obligations are at times a source of stress and concern, particularly where whānau lack financial resources.

While the information needs outlined below set the general parameters for the dialogue with participants, the participants themselves had their own ideas about what the salient features of their experience were. The case profiles are a means of allowing the voices of those participants to be heard, and include a number of verbatim statements from them. Likewise, counsel and the Māori social services professionals interviewed had clear personal views about what constitute the most significant barriers to effective Māori participation in Family Court, and how these barriers can be overcome, if at all.

The interviews are followed by a discussion of the issues and themes that emerged in the course of the interviews. The first part of this discussion focuses on the links between the principles identified in the Literature Review and the experiences and views described by those who took part in the research. This includes suggestions of ways that these principles and Māori perspectives could be further recognised in the Family Court. While there is a necessary focus on guardianship, custody and access, the need for consistency across Family Court legislation is noted. Access to justice issues raised in the course of the research are also discussed in this section.

3 Information Needs

In the course of the research, information has been sought from Māori applicants/respondents and their whānau, counsel, and social service providers involved with guardianship, custody and access matters. In relation to parents and whānau, the following information needs were identified in the project brief:

1. Profile of the sample – family type, number and age of children, type of case.

2. A description of the involvement that the participants (both parents and whānau) have had with the Family Court.

3. A description of the extent to which these parents and whānau have been involved with Family Court professionals and services (including lawyers, counsellors, judges, Counsel for the Child, specialist report writers) and their level of satisfaction.

4. A description of the extent to which parents and whānau have been involved with Family Court procedures (including mediation conferences, Family Court hearings, appeals) and their level of satisfaction.

5. A description of favourable experiences and issues of concern associated with the administrative aspects of court procedures (e.g. physical surroundings, facilities and atmosphere, court sitting times and information needs of parents), and identification of ways in which these concerns might be addressed.

6. An indication of the extent to which legal costs are a barrier for Māori Family Court clients.

7. Identification of favourable experiences as well as issues of concern for Māori associated with the specific types of custody and access arrangements experienced by the participants.

8. Identification of the ways in which the Family Court could further recognise Māori perspectives on guardianship, custody and access.

Providing a synopsis of each case/interview will cover items 1-4 of the information needs. While a case study approach is not being used, it is important that the comments and concerns of those taking part in the research are placed in context, and that the range of case types is identified. The Literature Review provides a framework for analysis and discussion of the themes and issues that emerged from the interviews. The thematic approach taken to these issues and themes addresses the other information needs.

The project brief identified the following information requirements from lawyers, Māori community organisations or other professionals with experience and knowledge of Māori guardianship and custody issues:

1. Profile of the sample – proportion of work which is family law, proportion of clients who are Māori, length of time in practice.

2. An assessment of the extent to which Māori perspectives are currently being recognised in guardianship, custody and access decisions.

3. Identification of ways in which Māori perspectives on guardianship, custody and access might be included in future Family Court practice.

The views of these groups provides a valuable extension to whānau experiences, as counsel and experienced practitioners are able to generalise across a number of case types and situations, and have had the opportunity to observe a range of Family Court procedures.

4 Methodology

The project brief established some key expectations in terms of the methodology. Accordingly, this is a piece of research that is qualitative in nature, and based on a narrative enquiry or storytelling approach. The demographic profile of the areas in which the research was carried out was the means used to try and ensure that a diversity of whānau type and Māori experience was represented. As the case profiles show, this diversity of experience was evident. It should be noted that while clear themes emerge, we only have the stories of those who felt confident enough to take part in a research process. No attempt was made to use a case study approach and interview applicants and respondents involved in the same proceedings. This could have created a significant risk of inappropriate transfer of information between parties, and in some instances there was potential for physical risk. It would also have meant that cases could have been more readily identifiable, and made issues of confidentiality difficult to manage.

The researchers who worked on the project are Māori, and have had considerable experience in working with whānau in social services and justice settings. Our values and beliefs as Māori researchers formed the basis of our analytical framework or methodology. Linda Smith argues that:

> *Methodology is important because it frames the questions being asked, determines the set of instruments and methods to be employed and shapes the analysis.*[7]

The distinction she adopts between methodology as 'a theory of how research does or should proceed' and a method 'as a technique for or way of proceeding gathering evidence'[8] is one that is increasingly used in both indigenous and feminist research contexts.

While kaupapa Māori research and initiatives have been variously described, Graham Smith's summary usefully identifies the points that are salient in terms of this research.

He contends that kaupapa Māori research:

1. is related to being Māori;
2. is related to Māori values and principles;
3. takes for granted the value and legitimacy of Māori, the importance of Māori language and culture; and
4. is concerned with 'the struggle for autonomy over our own culture and well-being'.[9]

---

[7] Smith, Linda, *Decolonising Methodologies,* 1999, p143.
[8] See above.
[9] Cited in Smith, Linda, reference above, p185.

Those conducting the interviews and engaging with research participants were Māori, as were the participants.[10] The objectives of the research are clearly linked to developing an understanding of the ways that Māori values and principles can be given greater consideration within the Family Court, and in the framing of legislation. The risks of using an existing Western legal paradigm as a starting point for discussing Māori perspectives on the care and upbringing of children are rightly pointed out by Ani Mikaere in the literature review. A wider and significant argument also exists in regard to the relationship between state sponsored research, indigenous projects and the struggle for autonomy Smith refers to.

In terms of the methodology adopted within this research, the commitment to Māori values and principles, and the legitimacy of Māori language and culture found expression in a series of questions that governed decision-making processes and methods used. The use of these questions as an internal frame of reference promoted processes of reflection and dialogue. This reflection and dialogue centered on key issues such as the physical and cultural safety of participants and researchers, and the methods used to engage participants and meet the information needs set out in the project brief. The questions were:

What is the tikanga pertaining to engaging with this person or whānau?
What is the tikanga that governs my decision making as a researcher?
What is the tika response when I am faced with a difficulty in the course of carrying out the research?

Tikanga as used here 'does not denote a static set of rules'.[11] It refers rather to a set of principles and practices that result in the appropriate demonstration of respect to all people, and the maintenance of order in conducting relationships.

In terms of the selection of methods for the research, this resulted in the use of interviewing processes that placed emphasis on:

- Participant selection of the time and place of interview;
- Participants having whānau support whenever desired;
- Minimal use of paper-based tools;
- Plain language description of participant's rights in the research process;
- Allowing time for mihimihi, karakia, kapu ti, depending on the preference of the participant;
- Bringing some kai when interviews took place in participants' homes;
- Provision for participants who traveled to an interview;
- Ensuring participants knew how to contact the researchers after interview if they wished to withdraw;
- Developing a knowledge of a range of iwi/Māori support people and services should participants require further support.

[10] The exception was a respondent who was wrongly identified as Māori on Family Court record, but was the father of four Māori children.
[11] See discussion of meanings of *tika* and *tikanga* in *He Hinatore ki Te Ao Māori,* Ministry of Justice, 2001, p10.

A primary emphasis was placed on the use of a *kōrero mai* approach that allowed participants to tell their stories in their own way. It was the responsibility of the researchers to listen to the stories, and link the stories back to the information needs.

4.1 Carrying Out the Research

The research has been conducted in two parts, the first part being a Pilot Study, the second being the Main Study involving two different districts. The Pilot Study was built into the project brief as a means of ascertaining likely response levels for the Main Study, and for identifying other issues, which could result in modifications of approach for the Main Study. The Pilot Study was conducted in a court district with a large urban centre with a significant Māori population, with a number of Māori also in the surrounding rural areas.

5 Pilot Study

Ministry of Justice staff conducted a file search to identify potential participants, and letters were sent to them explaining the purpose of the research and inviting them to contact the researchers if they were interested in taking part. The letters were accompanied by *Ngā Patai,* a one-page document explaining a little more about the research and researchers, and giving an 0800 number for potential participants to call. A simple data collection sheet was also developed to ensure that necessary contact details and preferences of interviewees regarding researcher contact were recorded.

The number of responses to the letters was very low, so further letters were sent out with a small number of further responses being gained. The low response rate was identified as a potential problem for the Main Study, and strategies for increasing the response rate for the Main Study are discussed later in this report.

A Family Court lawyer in the Pilot Study district was also interviewed. Three applicants[12] and two respondents were interviewed. The applicants were female and interviewed by a female researcher; a male interviewer interviewed the male respondents. With the exception of one applicant who requested an interview at her workplace, all participants chose to be interviewed at their homes.

A plain language consent form was developed in consultation with the advisory group. This was used by the researchers to ensure potential participants understood that they could withdraw from the research at any time. It was also explained to potential participants that participation in the research would not have any effect on matters before the Family Court, nor could outcomes of any prior court decision be influenced or changed. Researchers developed a list of support agencies for the areas in both the Pilot Study and Main Study so that participants who requested further support or legal advice could access this appropriately.[13]

Interviews were carried out using a narrative or *kōrero mai* approach.[14] Participants were guided through the telling of their stories by the interviewer, with the interviewer using the Interview Guide as a prompt to ensure that the information needs were being met.

Interviews were taped with participant permission and transcribed. Participants were advised of the measures that would be used to ensure confidentiality was maintained, and were asked if they had particular concerns about this. In some instances minor changes were made to potentially-identifying details in order to protect confidentiality.

---

[12] The fourth applicant showed initial interest in being interviewed but subsequently was unavailable for interview.

[13] This was needed once during the Pilot Study and once during the Main Study.

[14] See earlier discussion.

Participants were invited to have whānau or other support people with them for the interview. This took place for three respondent interviews. Issues regarding whānau involvement are discussed in more detail below.

Despite the small number of participants in the Pilot Study, both the researchers and the Advisory Group were satisfied that the methods used for gaining consent and conducting the interviews were appropriate for meeting the information needs and maintaining the safety of participants.

6 Main Study

The Main Study was carried out in two areas. Area 1 was selected based on the significant concentration of Māori population who continue to live in their own rohe. Anecdotal information also suggested that a number of custody and access matters involving grandparents and wider whānau were also common in the area. Area 2 was selected as a court in a large urban area that also has a significant Māori population. Some of this population are the local *tangata whenua*,[15] but a number are second or third generation urban residents whose whānau were part of the post-war urban migration.[16]

For each area it was envisaged that participants would include:[17]

- Approximately six Māori applicants and six Māori respondents;
- Approximately 20 wider family/whānau;
- Two lawyers (not necessarily from the same district as the other participants); and
- Other Māori community organisations or professionals with experience in the area.

6.1 Engaging Participants

Concerns about low response rates were discussed with the Advisory Group, and issues pertaining to engaging participants are discussed below.

Engagement with the Family Court over matters of guardianship, custody and access is a stressful experience for most participants. Such matters are perceived as private to the whānau involved, a perception supported by the confidential nature of Family Court proceedings. Carrying out research among Māori participants over such sensitive matters can be particularly difficult because in many iwi/Māori whānau and communities there is an inherent mistrust of 'the system',[18] and of research processes.

Based on the low response rate for the Pilot Study, and experience in other projects such as the research associated with domestic violence programmes, low response levels were anticipated for the Main Study. In Area 1 iwi radio was used as a further means of informing people about the research. The pānui over radio both invited people to take part in the research, and informed them that some people might get letters from the court inviting them to take part. While only two responded directly as a result of the radio pānui, others who did

[15] *Tangata whenua* meaning people of the land.
[16] See Walker, R. *Ka Whāwhai Tonu Mātou,* p197-199.
[17] See *Project Brief,* p2.
[18] 'the system' can include courts, police, government departments and welfare agencies.

respond commented that they had heard about the research through radio. There were significantly more responses made in Area 1 than in Area 2. This could be attributed to several factors, such as a more stable population base, as well as the radio pānui.

Iwi radio was not a viable option for Area 2 due to the radio coverage area. The response rate in Area 2 was very low, with only three initial responses being made to the Court letters. Area 2 has a highly mobile and transient population. Additional participants were gained in Area 2 through counsel and social service providers. They contacted clients, provided them with information about the research and gained permission for the researchers to contact those who were willing to take part.

6.2 Whānau Involvement

A key issue that emerged from the Pilot Study was that those who agreed to take part showed little interest in involving other whānau members in the discussion with the researchers. For some this was because the key support people from their whānau were deceased or lived in another location. It was difficult to tell whether or not a low level of whānau involvement would be evident in the Main Study, as the low number of participants in the Pilot Study meant that trends could not be inferred. Researchers and Advisory Group members discussed this at some length.

The reasons for seeking whānau involvement were twofold. Firstly, it was seen as important that any potential participant be able to identify their sources of support and have this *tautoko* during the interview process. Secondly, it was hoped that whānau involvement would provide a broader range of insights into the Family Court experience.

Very few of those who agreed to take part in the research wished to engage whānau members in the dialogue with researchers. Where there were other whānau members present, for the most part, they took on a *tautoko* role. This may also have been because those who responded to the invitation to take part were already highly motivated to do so, and because the letters were addressed to individuals. Several of those who were applicants had senior roles within their whānau, and had previous experience of court systems and processes. In some instances people were happy to talk, but were concerned about confidentiality, or about reopening issues that had either been resolved, or were a continuing source of whānau tension. In other instances, key support people such as parents had passed away.

Given the expectation of a number of whānau interviews set out in the project brief, this was a matter for some discussion between the researchers and the Advisory Group. The reflection and discussion that occurred here centred on the question – what is the tika thing to do in these circumstances?[19] Both the researchers and the Advisory Group members agreed that it would be inappropriate to exert influence on participants in order to gain whānau participation. It was also clear that the depth of information provided by participants was such that information needs were being met. Several participants commented that they provided support for other whānau members or within their community when court matters

[19] Reference to Methodology section, page 9.

arose, or that they were the people who normally spoke for their whānau on such matters. This was particularly the case for those kuia who had sought custody of mokopuna.

6.3 Interviews with Counsel

A number of Māori counsel were contacted during the course of carrying out the research. Suggestions about possible counsel for interview came from the Advisory Group, Family Court Co-ordinators, Iwi/Māori social service providers and other counsel. Two male and two female counsel were interviewed; with one from the Pilot Study Area, one from Area 1 (rural), and two from Area 2 (urban).

6.4 Interviews with Iwi/Māori Social Service Providers

One interview was conducted with the CEO of an Iwi Social Service organisation, and another with an experienced practitioner in an urban-based social services setting. Both had significant previous experience of statutory social work and working with whānau.

6.5 Literature Review

The literature review is placed before the information from the interviews to provide a context for reflecting on the issues raised in the interviews themselves. The principles pertaining to the care and raising of children identified in the literature review form the basis for the analysis of the issues and themes that emerge from the interviews.

7 Māori Concepts of Guardianship, Custody and Access: A Literature Review

Ani Mikaere

7.1 Introduction

Guardianship is defined in section 2 of the Guardianship Act 1968 as meaning "the custody of the child . . . and the right of control over the upbringing of the child", including education and religion. Custody is defined as "the right to possession and care of a child". Where custody has been given to one parent, the other parent may apply to the Family Court for access so that she or he is able to spend time with the child.[20]

The task of seeking to explain Māori concepts of guardianship, custody and access is, inevitably, a complex one. These concepts are creations of Western law and as such have been born from a particular philosophical base. The Māori philosophical base is quite different. It would be surprising, therefore, if it were possible to identify Māori concepts of law that correlate readily with guardianship, custody and access. As Metge has pointed out:[21]

> *To come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts, which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation - the direct reference - is substantially the same, the connotations are significantly different.*

A related problem is the temptation to define Māori concepts with reference to Pākehā ones, in other words, simply to explain Māori concepts in terms of what they are not. This results in shallow explanations of Māori concepts that fail to source them in their own unique philosophical underpinnings. An example might be the assertion that Māori concepts of land tenure did not include the notion of individual ownership: rather that land was considered to be held by the collective, in trust for present and future generations. While there is nothing incorrect in such a statement, focusing merely on the individual-collective contrast that a comparison with Western land law invites results in the omission of a vast amount of material about the true significance of land: the role of Papatūānuku as a spiritual being, as ancestress, as the ultimate nurturer of her human descendants; the dual meaning of the term 'whenua'

[20] Section 15(2).

[21] Metge, J. *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 3; cited in Law Commission *Māori Custom and Values in New Zealand Law* (Wellington, Study Paper 9, 2001) 29.

(meaning both land, and afterbirth) and the significance of returning the whenua to the whenua after a child is born to the hapū; the profound importance of land to the question of hapū identity; and so on.

In order to try and avoid such difficulties, this literature review begins with a brief summary of a Māori world view, beginning with Māori cosmogony. The point of doing this is to accord the philosophical base of Māori law primacy of position in the discussion that follows. It will become clear that any Māori concepts that are relevant to this topic do not exist merely as somewhat insubstantial counterpoints to Western legal concepts. Rather, they are drawn from and firmly rooted in their own unique philosophical base. Next, the paper will consider the story of Maui-tikitiki-a-Taranga, from which will emerge a number of significant principles concerning the roles and responsibilities of whānau, hapū and iwi[22] members with respect to the rearing and education of children. The following section examines each of these principles in greater depth. It is not to be expected that any of the beliefs and practices explored here will necessarily correlate neatly with the concepts of guardianship, custody or access. The paper will then turn to the issue of how Western ideas and law have impacted on Māori philosophies, and question the extent to which those philosophies are relevant in contemporary Māori society. Finally, the degree of recognition accorded Māori concepts by the current law concerning guardianship, custody and access will be discussed.

7.2 A Māori World View[23]

The essential starting point for looking at Māori law is Māori cosmogony, the Māori view of how the world began. Māori cosmogony was a blueprint for Māori life, setting down innumerable precedents by which Māori communities were guided in the regulation of their day-to-day existence.

The Māori creation story begins with Te Kore, a period that lasted for an unimaginable length of time, one, which has been translated as "the void"[24] or "the nothing".[25] However, it is much more, having been described as:[26]

> *"the realm between non-being and being: that is, the realm of potential being. This is the realm of primal, elemental energy or latent being. It is here that the seed-stuff of the universe and all created things gestate."*

---

[22] The whānau was the smallest social unit, numbering up to thirty people and consisting of two or three generations living as a unit within their hapū-based community. The hapū was made up of many related whānau, and could number several hundred. All those within the hapū descended from a common ancestor. The hapū was the most important social, political and economic unit. The largest political unit was the iwi, which consisted of many related hapū. Once again, all iwi members descended from an eponymous ancestor. Iwi would only come together for important meetings and for such matters as warfare.

[23] This section relies heavily on Mikaere, A. "Racism: Alive and Kicking in the Colony – an examination of racism and colonisation in Aotearoa/New Zealand" (Faculty of Law Seminar Series on Racism, University of British Columbia, January 2001) 3-5.

[24] Buck, P. *The Coming of the Māori* (1958) 434.

[25] Buck (1958) 434; See also Kahukiwa, R. & Grace, P. *Wahine Toa* (1984) 16.

[26] Marsden, M. "God, Man and Universe" in King, M. *Te Ao Hurihuri: Aspects of Māoritanga* (1992) 134.

Out of Te Kore was born Te Pō, which lasted for another unimaginable period of time. It too can be likened to the time in the womb,[27] Marsden describing it as the realm of becoming.[28] It was within Te Pō that the parents of Māori, Papatūānuku (earth mother) and Ranginui (sky father) were conceived and developed.

This first couple conceived many children and held them between their closely-entwined bodies. Te Pō continued to envelope them. Light, as Buck notes, "awaited the revolt of the brood".[29] And revolt they did, as they came to resent their cramped existence and to long for their independence. After much discussion, the children decided that their parents must be separated. It is said to be Tāne, one of the younger children, who eventually succeeded in forcing his parents apart, thereby letting in the light. In some versions, the appearance of the children out of Te Pō and into Te Ao Mārama (the world of light - the realm of being, according to Marsden)[30] is likened to their being born. It is said that the pain experienced by Papatūānuku as her children move within her and try to break out is similar to the pain experienced during labour.

Following the separation of their parents, war broke out amongst the children. Tawhirimatea (god of the elements), who had opposed the separation from the beginning, raged against the others with violent winds and storms. All but Tūmatauenga (god of war) fled before Tāwhirimatea, and friction existed amongst those who had formerly been in agreement.[31]

A number of themes emerge from the story of creation. The first is the theme of balance: the beginning of the world hinges on the presence of both male and female elements, and the female reproductive functions are of central importance. The story teaches us that children inevitably grow beyond their parents' world, and even that they are capable of pushing their parents apart. We see that it is only through collective decision-making that the children arrive at a conclusion as to what to do about their predicament, and we find that it is possible for a teina, a younger sibling, to achieve leadership status should they have the required qualities. We are also shown that it is normal to have elements of disagreement and friction, perhaps even that dissent is an essential part of decision-making and of progress - but that the collective good must ultimately prevail.

The supernatural children of Papatūānuku and Ranginui wanted to create human life. Tāne once again took the lead but found that mating with the supernatural females present in the world at that time simply created more supernatural beings.[32] Eventually, he sought the advice of his mother, who advised him to go to her pubic region, Kurawaka. Papatūānuku told Tāne to create a woman-shape from the red earth at Kurawaka, the only place where the human element could be found. Tāne shaped the woman and breathed life into her. Her name was Hine-ahu-one. Together, they produced the first human child, a girl, named Hine-tītama.[33] All Māori descend from this union.

[27] Kahukiwa & Grace (1984) 16.
[28] Marsden (1992) 135.
[29] Buck (1958) 435.
[30] Marsden (1992) 135.
[31] Ministry of Justice *He Hinatore ki te Ao Māori: A glimpse into the Māori world* (2001) 13.
[32] Buck (1958) 450.
[33] Kahukiwa & Grace (1984) 28.

We learn from these stories that Māori trace their descent from these supernatural beings, and that all Māori are connected to one another, to past and the future generations, and to the world around them through whakapapa (genealogy). Whakapapa is central to Māori life. It is whakapapa that ensures the interconnectedness of all living things, therefore creating the imperative to maintain a state of balance at all times. The preservation of balance - between people and the gods, people and the environment, the generations, women and men, and the internal balance (spiritual, physical, emotional) of every person - is of paramount importance.

The concept of whanaungatanga (the root word of which is whānau, meaning kin group and also to be born) is similarly crucial to Māori existence. It embodies the nature of the Māori person's relationships to other members of their whānau, hapū and iwi; to other Māori; and to the world around them. It entails a complex web of responsibilities and obligations. Concepts such as utu, which demand reciprocity in all things, ensure that the wealth of a community is constantly being distributed according to need and binds the members of the community to one another in a never-ending cycle of benefit and obligation.[34]

Closely related to the importance of whakapapa and whanaungatanga is the ethic of collectivism. This does not diminish the value of the individual, but adds to her or his significance, each person representing a link in the chain of life. The concept of what some have called intrinsic tapu[35] is crucial to understanding how whakapapa and whanaungatanga enhance the value of the individual:[36]

> *[Intrinsic tapu] is the recognition of the inherent value of each individual, the sacredness of each life. No individual stands alone: through the tapu of whakapapa, she or he is linked to other members of the whānau, hapū and iwi, and to other Māori as well. Every person is linked to the generations to come and to those that have been before. Every person has a sacred connection to Rangi and Papa and to the natural world around them.*

Another essential characteristic of the Māori world view is the relationship of the people to the land. Papatūānuku is revered as the founding ancestress, the mother of all Māori, to whose womb all are returned upon death. The particular land on which an iwi dwells is a fundamental part of how that iwi relates to the world around it. Iwi members identify themselves with reference to particular geographical features such as mountains, lakes and rivers. Iwi histories are replete with references to the special relationship they have with their particular area of land. Battles have been fought over it, their dead have been buried in it and the living celebrate it as an enduring symbol of their identity.

[34] Walker, R. *Ka Whāwhai Tonu Mātou: Struggle Without End* (1990) 69; *He Hinatore* 70.

[35] Henare, M. "Ngā Tikanga me ngā Ritenga o Te Ao Māori" in *Report of the Commission on Social Policy* (1988) Vol III 5, at 19.

[36] Mikaere, A. "The Balance Destroyed: The Consequences for Māori Women of the Colonisation of Tikanga Māori" (1995) 21.

These are some of the fundamental tenets underlying Māori law. While it has been noted that there is no single term in Māori that translates into "law", the closest equivalent may be "tikanga":[37]

> *Tikanga derives from tika, meaning correct or just or proper. The addition of the suffix ngā renders it a system, value or principle, which is correct, just or proper.*

Traditionally, the law was taught through oral transmission: songs of all kinds, proverbs, genealogy and storytelling were the means by which vital information was passed on. Children were taught from a very early age that there was a right way of doing things (tika) and a wrong way (he). To transgress tikanga was to court disaster, not simply because you could be detected by others in the community and punished, but because you were breaching spiritually sanctioned rules, precedents that had been set down by ancestors. Therefore, your actions would inevitably create an imbalance within the community that would endure until the principle of utu operated to ensure the restoration of balance.

One of the stories from which lessons can be drawn about the content and operation of Māori law is that of Māui-tikitiki-a-Taranga.

7.3 Māui-tikitiki-a-Taranga[38]

Māui-tikitiki-a-Taranga is known as a demi-god, one who was born some generations after the initial fusion between celestial and earthly elements, and a man who was gifted with supernatural powers. His mother was Taranga, who dwelt in the earthly world by night and in Paerau, one of the strata of the underworld, by day. His father, Makea-tūtara, dwelt permanently at Paerau.[39]

Māui was born prematurely, a child of his mother's old age. Thinking the child to be stillborn, Taranga cut off her topknot, wrapped her baby in it and set him adrift on the sea. Why she did not see to it that the baby underwent the usual ceremonies in such situations to ensure that its spirit was laid to rest rather than remaining as a possible source of future trouble for the living, is not clear. What is clear, though, is that her choice of protective covering for her baby was significant in some way. The head is a highly tapu part of the body, and the hair taken from the head similarly so.[40]

The healing powers of the sea and the spiritual powers of his mother's hair ensured Māui's survival. He was rescued from the sea by an ancestor, Tama-nui-ki-te-rangi, who nursed him to good health and reared him. The Māori terms for the raising of a child who has been born to another person is "whāngai" (meaning literally, to feed or nourish) or "atawhai" (meaning to show kindness to or foster). Tama-nui-ki-te-rangi schooled the boy in waiata, haka and

[37] Williams, J. "He Aha Te Tikanga Māori", paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki 11-13 August 2000) 1-2.

[38] This section draws extensively from Mikaere (1995) 15-20.

[39] Ministry of Justice (2001) 20; Kahukiwa & Grace (1984) 40, 72.

[40] Kahukiwa & Grace (1984) 40.

whakapapa,[41] and told him his true parentage. When Māui grew to adulthood, he sought out and reunited himself with his birth parents and his brothers:[42]

> *[Māui] crept into the house and hid behind one of his brothers as his mother was counting them. She was bewildered when she found that she kept counting an extra person. Māui finally told her who he was but she denied that he was her child.*

Māui told her how she had wrapped him in the topknot of her hair when he was born and cast him into the sea. He was found on shore by his great tipuna Tama-nui-ki-te-rangi, who reared him . . . Māui told her that when he was in her womb, he had heard her say the names of his older brothers and proceeded to recite them to prove that this was so. When his mother heard this she cried out, "You dear little child, you are indeed my last born, the son of my old age, therefore, I now tell you your name shall be Māui-tikitiki-a-Taranga".

Māui was also determined to meet his father, to whom his mother went at first light each morning. He tricked his mother into oversleeping, by blocking up the gaps in the house so that the light would not enter. When she awoke late and rushed to join her husband at Paerau, Māui followed her, changing his form to that of a kererū (pigeon). His father accepted him and performed a tohi rite[43] over his son, but a mistake in the recitation meant that Māui would fail in his later attempt to achieve immortality.

Māui was bold, resourceful and quick. As are many youngest-born, he was also very precocious and indulged, particularly by his kuia (grandmother figures) to whom he turned for assistance and advice. They recognised him as a special child, and treated him accordingly.

He is said to have tricked his ancestress, Mahuika, into giving him all of her fire children. Each of the first nine she gave him he doused in water, simply to see how far he could push her. There is also another version, however, which states that it was by accident that he dropped the first of the fire children into a river, the effects of which were so entrancing that he simply could not resist repeating his actions.[44] Upon returning for the tenth time to request the tenth and final fire child, however, he found that he had pushed his kuia too far, for she threw it to the ground and called upon Whaitiri, the goddess of lightning, to send down burning coals. Māui nearly perished in the fire that resulted and was saved only by Tāwhirimatea who responded to his cries for help by sending a flood. Fire was very nearly lost to the world as a result of Māui's actions, but Mahuika took pity on her human descendants and threw her final few sparks into the kaikōmako, puātea, māhoe, pātete and tōtara trees so that they would be able to continue to obtain fire from them.

Māui also developed a special relationship with another powerful kuia, Muriranga-whenua. She was old and blind, and depended upon her relatives to bring her food each day. Over time, the two developed a close bond, he bearing food to her each day and she nurturing him

[41] Biggs, B., Hohepa, P. & Mead, H. *Selected Readings in Māori* (1967) 12-13.
[42] Ministry of Justice (2001) 21-22.
[43] A tohi rite was performed over children, dedicating them to particular lines of ancestors.
[44] Brailsford, B. *Song of Waitaha: The Histories of a Nation* (1994) 111-112.

with her wisdom. When she considered her mokopuna[45] to be ready, she gave him her enchanted jawbone, which she had been preparing for him over a long period.[46] With the jawbone, Māui made the club with which he subdued the sun in order to create longer days and shorter nights. It was also from the jawbone that he fashioned the fish-hook with which he fished up Te Ika a Māui, the North Island of Aotearoa.

However, there are limits to what the precocious mokopuna can do, and it is often the kuia who have the task of prescribing those limits. Māui's boldest challenge was his attempt to gain immortality for humankind. To achieve this, he had to reverse the birth process by entering Hine-nui-te-pō through her vagina, proceeding up through her birth canal and into her womb. He was then to work his way through her body, and emerge through her mouth. His attempt failed, however, when Hine-nui-te-pō crushed him. Kahukiwa and Grace give a powerful account of Maui's audacious attempt to obtain the unobtainable, in the form of a narrative from Hine-nui-te-pō as she awaits his attempt:[47]

> *See Māui now. In the world of light he has achieved all he can achieve. He comes now to challenge me in the world of no light, seeking to achieve what cannot be achieved . . .*
>
> *Now he stands at the edge of light, exuberant, changing from one disguise to another while the little birds watch, excited and trembling. My vagina, where he must enter, is set with teeth of obsidian, and is a gateway through which only those who have already achieved death may freely pass . . .*
>
> *Come Māui-tikitiki-a-Taranga. Your bird companions chuckle and flutter at the strange sight of you, but they are not your undoing. There is one purpose only for these obsidian teeth. In this your last journey, you will give your final gift to those of earth, the gift not of immortality, but of homecoming, following death.*

These stories tell us a great deal about the role of kuia as repositories of knowledge, and the conditions under which they are prepared to share their wisdom. Mahuika, Muriranga-whenua and Hine-nui-te-pō all possess vast amounts of knowledge and supernatural powers. They recognise Māui as a special person, one to whom they are prepared to gift some of their knowledge and power in order that long-term benefits might be gained for their human descendants.

Embedded in the stories about Māui's life are a number of principles that "[u]nderlie. . . the Māori pattern of child-raising".[48] Each of these principles will be identified and examined in the context of the Māui stories: in the next section, they will be examined with reference to a broader range of experiences.

---

[45] Grandchild, or descendant.

[46] Ministry of Justice (2001) 23-25.

[47] Kahukiwa & Grace (1984) 58.

[48] Metge, J. *New Growth from Old: the Whānau in the Modern World* (1995) 140.

The first principle concerns the significance of whakapapa and how that enhances the value of the child:[49]

> *[C]hildren are to be valued not only for their own sakes as unique individuals but also as the uri (descendants) of recent tupuna (grandparents and great-grandparents), as links in lines of descent that stretch from the beginning of time into the future, and as nodes in the kinship network which connects living individuals and groups.*

Māui is important not just because he is a child with special qualities. Each of the adults involved in his upbringing and education know who he is in terms of how he fits into the whānau, hapū and iwi. Tama-nui-ki-te-rangi is aware of Māui's identity and understands that it is part of his responsibility to ensure that Māui knows his whakapapa. Taranga and Makea-tūtara both embrace Māui once they know who he is and accept him back into the fold of the whānau. The kuia who share their knowledge and powers with Māui also know full well that he is their mokopuna and this dictates the way in which they relate to him.

The second principle deals with the issue of to whom the child "belongs" and the significance of so belonging:[50]

> *[C]hildren belong, not to their parents exclusively, but to each of the whānau to which they have access through their parents. Belonging in this context is a matter of identity, not possession. It derives in the first place from whakapapa but should be confirmed and strengthened by regular social interaction.*

At all stages of his life, no matter who has assumed principal responsibility for his care, there is no question that Māui belongs. The various tupuna who spend time with Māui know that he belongs to them. It is also accepted that he has a right to rekindle his connection with his birth parents and brothers, thereby confirming and strengthening his whakapapa by social interaction.

The third principle teases out what this means in terms of the rights and responsibilities of adults within the whānau:[51]

> *[R]ights and responsibilities for raising children are properly shared by the adult members of the whānau to which they belong and in some cases reserved to senior relatives.*

Maui is cared for by Tama-nui-ki-te-rangi as an infant. When he is old enough to make his own choices he returns to his birth mother and brothers. As he grows older, he spends increasing amounts of time with kuia such as Muriranga-whenua in order to be appropriately trained for the life tasks that lie ahead of him. It is clear that he has a range of adults who are responsible for seeing that he gets the care that he requires. It is also apparent that as his needs change, the principal adult in charge of his care may change. It is quite likely that Tamanuiterangi was the only person with the special capabilities necessary to nurse an ailing

[49] Metge (1995) 140.
[50] Metge (1995) 140.
[51] Metge (1995) 140.

child back to health. Once he had reared Māui to a certain age and equipped him with the necessary knowledge as to his whakapapa, Māui's needs changed. At that point he was driven to receive acknowledgement of his identity from his birth parents, and he needed to strengthen the bonds of whanaungatanga by being with his mother and brothers. As he grew older and it became apparent that he had special gifts, kuia such as Muriranga-whenua became important as only they were able to equip him with the knowledge and power that would enable him to perform the necessary tasks to improve the lives of all their human descendants.

The final principle refers to the rights and responsibilities of the child:[52]

> *[C]hildren also have rights and responsibilities. They have rights to their genealogical identity, to love, to support and to socialisation in tikanga Māori, from other members of their whānau, as well as, and sometimes instead of, their parents. In their turn they are expected to honour reciprocal responsibilities to their parents, their ancestors and the whānau as a group.*

Māui's right to care is acknowledged by the adults around him throughout his life, as is his right to know and give substance to his identity. But he also has responsibilities: in order to receive the knowledge and jawbone of Muriranga-whenua, he must feed her and spend time with her until she considers him to be properly prepared for the challenges ahead. Ultimately, while he is an indulged child who is gifted much, he pays a heavy price. As become apparent, the duties he owes his human descendants are onerous: in the end, he is merely the conduit through which Mahuika, Muriranga-whenua and Hine-nui-te-pō pass their gifts on to the generations to follow.

7.4 The Principles Underlying Māori Child-Raising

The Significance of Whakapapa

According to tikanga Māori, whakapapa is the glue that binds whānau, hapū and iwi together. Knowledge of one's whakapapa is a vital aspect of being Māori. It has been pointed out that whakapapa "defines both the individual and kin groups, and governs the relationships between them".[53] It confirms an individual's membership and participation rights within her or his kin groups. Pere notes:[54]

> *Traditionally every adult person was expected to know and to be able to trace descent back to the tribal ancestor, or back to at least the common ancestor after whom the group with whom one lived was named. The rights and claims that an individual could make to the resources of the group she or he related to, or identified with, depended on such knowledge.*

[52] Metge (1995) 141.
[53] Ministry of Justice (2001) 27.
[54] Pere, R. *Ako: Concepts and Learning in the Māori Tradition* ((1982) 11.

The enhanced value of the individual when regarded as but one link in the chain of descent is encapsulated in the following saying:[55]

> *Ko tātou ngā kanohi me ngā waha kōrero o ratou ma kua ngaro ki te po.*
>
> *We are but the seeing eyes and speaking mouths of those who have passed on.*

The same idea is conveyed when people are greeted as "ngā kanohi ora o ratou ma kua wehe atu" – literally "the living faces of those who have gone on before us", or when an elder greets a young person by saying "tēnā koutou". This form of greeting applies to many people, not just to an individual, so when greeted in this way the young person understands that she or he is being greeted along with all their ancestors. In a similar vein, Metge recounts a conversation that she had with a Māori teacher who told her "with passionate intensity that when she looks at the Māori pupil she sees not that child only, but the line of ancestors who stand behind him or her and whom she must take into account in her dealings with that child".[56]

The importance of children having access to their whakapapa is poignantly expressed by a Māori woman who was legally adopted by strangers and who could not trace her whakapapa:[57]

> *In Māori terms your whakapapa gives you everything – it places you in the context of the world, and of your own culture. You know way way back, not only your immediate relatives who are living now, or the grandparents who may have died, but right back through the tribes, the different canoes you could be related to, back to Hawaiki. So you are very firmly centered. 'This is where you came from, these were your relations, this is how they related to one another; this is the history and the history of your area, the battles that were fought, the stories that happened . . .' You can relate more easily to myths, generalised and tribal. You can tell your children – you know exactly who you are and what your position is. You then have a whole infrastructure, you're on the map of your own country – you're placed in relation to everyone else and everything else that's happening. It sets the pattern of what your relationships are likely to be. Other Māori people can relate to you because they can* place *you. It's the network or grid of your existence, both physically and spiritually.*
>
> *To deny someone their whakapapa is one of the worst things I can imagine that can happen to you in Māori terms. You don't have a marae you can go to, you don't have access to those teachers of knowledge, or to your relatives. . . How can you participate in a cultural life fully? You can't . . .*
>
> *If it was just for me, I could say tough luck – but it doesn't end with my life. It denies your own children, which I think is the worst thing. . . How can you have a future, or a present, if you didn't have a past? So I feel very very sorry for my children, because how are they going to function in this country, in Aotearoa, if they don't know their whakapapa? And my*

---

[55] Ministry of Justice (2001) 27.

[56] Metge (1995) 140.

[57] Else, A. *A Question of Adoption* (1991) 193-194.

children's children, my mokopuna, will have this problem too. If you don't get your whakapapa right, in this generation, it's going to go on and on, it just gets worse.

Children Belong to Whānau, Hapū and Iwi

The notion that children are not the property of their parents, but rather belong to the whānau, hapū and iwi is one that has been expressed many times over. One such explanation is as follows:[58]

> *In Māori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately or in association, outrage Māori sensibilities. Children belong not only to their parents but also to the whānau, and beyond that to the hapū and iwi. They are 'a tātou tamariki (the children of us many) as well as 'a taua tamariki' (the children of us two). . . They belong to a descent group but at any given time are held by individuals on its behalf, in trust for future generations.*

According to tikanga Māori, it is quite normal for members of the whānau other than the birth parents to make important decisions about the child's future. When the kuia whose expertise had been called upon to assist at the birth of Eruera Stirling came to take him from his birth mother some two or three years later, there appears to have been no argument. The kuia had judged from the birth marks on the boy that he should be trained by herself and her husband, both of whom had themselves been carefully schooled at tribal whare wānanga. Eruera remained with the elderly couple, largely isolated from the rest of the world, until the age of seven, by which time he had learnt all they had to teach him. Then he returned to his parents and began attending the Native School alongside the rest of his siblings.[59]

Another illustration of the decision-making power of whānau members other than birth parents is provided by Tamati Cairns in his discussion of how he came to be raised by his old people:[60]

> *[T]he discussion was not made between my natural parents and my kuia and koroua, rather it was between my kuia and koroua and my adopting parents. So straight away we have a situation where the decision-makers for my destiny were not my parents. I was taken at one week old to my adopting parents by my grandmother and grandfather. My grandmother simply said: 'Here is your child', nothing terribly complicated, simply that.*

---

[58] Durie-Hall, D. & Metge, J. "Ka Tu te Puehu, Kia Mau: Māori Aspirations and Family Law" in Henaghan, M. & Atkin, W. (eds) *Family Law Policy in New Zealand* (1992) 54, 63. The same sentiment is expressed in *Puao-te-atatu* (Ministerial Advisory Committee on a Māori perspective for the Department of Social Welfare, 1988) 29.

[59] Stirling, E. & Salmond, A. *Eruera: The Teachings of a Māori Elder* (1980) 88-93.

[60] Cairns, T. "Whāngai – Caring for a Child" in Maxwell, G., Hassall, I. & Robertson, J. *Toward a Child and Family Policy for New Zealand* (1991) 100.

Years later, when his own sister became pregnant at a time when raising a child may have been difficult for her, Cairns writes of how he and his wife "saw an opportunity". They were unable to have children. Rather than negotiating with his sister, they went to his mother and father, who considered his request and told his sister "you are giving your child to your brother".[61]

The practice of raising a child born of other parents is commonly known as "whāngai", although other terms are also used. Professor Wharehuia Milroy explains:[62]

> *It must be pointed out that the term "whāngai" differs from the term "atawhai" in that the delineation is that "atawhai" tends to equate more with "fostered child" and "whāngai" with adopted child. Other synonyms which are used to describe an "atawhai" child as used by Joan Metge are tiaki (look after) and taurima (to treat with care) and whakatipu (to make grow). These terms are used by Tūhoe as well to establish the difference between a "whāngai" and an "atawhai".*

Professor Milroy also makes it clear that kinship is "the main principle"[63] in whāngai and that hapū or even iwi consent may be required in some situations.[64]

The fact that a child was considered to belong to the whānau, hapū and iwi imposed considerable responsibilities on those charged with the child's immediate care:[65]

> *Parents largely held their children in trust for their immediate relatives and the tribe generally. If a child that was under the care of its parents met with an accident and lost its life, a* taua-muru*, or raiding party, was organised against those parents by the relatives and tribe. This party proceeded to the parents' resistance and stripped them of their possessions. The object thus served was a two-fold one; it was a warning to other parents to be careful of the children, and it secured compensation for the loss of a member of the tribe.*

This was certainly the case for the people of Omaio when, in 1900, sixteen children were drowned crossing the Motu river on their way to Omaio school. It is thought that a flash-flood may have been to blame, but there were no survivors to recount what happened. The community was subjected to a taua muru to mark the wider hapū and iwi anger at what had happened:[66]

> *These people, when they come to the tangi from all over . . . Whakatāne and Whakatōhea, and all over the place . . .They were angry. Because the parents were careless in not going to see the children across the river. It was he taua. All these people are under taua, because they let a terrible thing like that happen. Yes. Oh, every mob that comes, they had to lock us up, put the children away, because they know there's trouble.*

[61] Cairns (1991) 101.

[62] *Re Hohua* (Māori Appellate Court, 21 May 2001, Chief Judge William, Judges Carter and Wickliffe) 9.

[63] *Re Hohua,* 8.

[64] *Re Hohua*, 8.

[65] Stowell, H. cited in Orbell, M. "The Traditional Māori Family" in Koopman-Boyden, P. *Families in New Zealand Society* (1978) 104, 109.

[66] Binney, J. & Chaplin, G. *Ngā Mōrehu – the Survivors: the life histories of eight Māori women* (1986) 61.

Rights and Responsibilities for Raising Children Are Shared

Examples abound of Māori children being raised by a number of adults in their whānau, sometimes including their birth parents but not always:[67]

> *In whānau, which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whānau members. Sometimes, especially with the firstborn, this means relinquishing their daily care and/or legal control over them to grandparents or other senior relatives, either temporarily or permanently. Generally, it means that other whānau members do whatever parents do for their children, from feeding, tending and cuddling them to disciplining and giving them orders, in everyday and crisis situations, whether their parents are present or not. In public and private gatherings, children are attended to by whichever relatives are closest to hand and quickest off the mark. When children have only one parent for any reason, the lack is supplied by other whānau members; as long as the whānau is functioning effectively, they have no lack of role models. Other members of the whānau share in the guardianship of parents or other primary care-givers while the latter are exercising it. In most cases they are supplementary or additional guardians, not substitutes for the parents.*

As John Rangihau noted, "Māori children know many homes but still one whānau".[68] Rose Pere observes that typically a child had ongoing contact with a cross-range of ages "from at least the first generation to the fourth", and suggests that this communal living "helped the child to learn his or her whakapapa, and his or her place in the order of things".[69] Whakahuihui Vercoe also regards the regular interaction he had with his wider whānau as an important factor in his upbringing:[70]

> *I grew up with a myriad of relationships with old people, middle-aged people and my peers, which established for me that human relationships are more important than anything else.*

Children could expect support and guidance from all adults in their whānau. This extended to discipline. Rangihau notes that "[d]iscipline could be imposed on a child by a distant relative and it was a strange parent who took umbrage".[71] Stowell observed:[72]

> *Parental control was rarely of the strict nature; because if children had reason to complain of it to their uncles and aunts, these promptly severely scolded the parents and in many instances relieved the parents of further control by taking off the children. On the other hand, the discipline practiced by uncles and aunts was usually very strict, they being more particularly responsible to the parents, and also to the tribe, for the proper upbringing of the children.*

---

[67] See Durie-Hall & Metge (1992) 64; Marie McCarthy also provides a useful summary of the way in which the whānau structure operated to provide "an inbuilt support structure" for both the child and the parents in "Raising a Māori Child", Te Whaiti, P. & ors (eds) *Mai i Rangiatea: Māori Wellbeing and Development* (1997) 25, 29.

[68] Rangihau, J. (1987) 4.

[69] Pere, *Ako* 59.

[70] Vercoe, W. "A Self-Sufficient Māoridom" in Ihimaera, W. *Kaupapa New Zealand: Vision Aotearoa* (1994) 110.

[71] Rangihau, *Speech to the HC Judges* 4.

[72] Stowell, cited in Orbell (1978) 109.

> *From this discipline the children realised that they could not escape. They also discovered that their uncles and aunts had more authority over them than had their actual parents, consequently they became amenable to this discipline.*

Pere notes that this pattern of shared responsibility for raising children constituted a highly-effective support system for young parents. They simply became part of the parenting system, and were therefore able to fully develop their own potential and strengths. According to Pere, it was the older generations who had the greatest responsibility for and influence over the learning and development of the young.[73] She also discusses the special nature of the tipuna-mokopuna relationship that is reflected in the childhood experiences of so many Māori, pointing out that "[t]he tipuna link up the mokopuna with the past, and the mokopuna link up the tipuna with the present and the future".[74]

The literature reveals numerous examples of Māori for whom their kuia and koroua were the main caregivers. Whakahuihui Vercoe states that he "grew up in [his] grandfather's arms",[75] while Iranui Haig says that she was "one of the lucky ones that grew up with the old people", having been raised by her grandparents.[76] Rose Pere tells us that it was her grandparents' generation, and older, who influenced most of her learning in her early years.[77] Marie McCarthy notes:[78]

> *Elderly people, as repositories of cultural knowledge, play an integral part in ensuring and assisting in the development of a Māori child's knowing who he or she is. This is a form of understanding which extends beyond knowing your genealogy, to include knowing your history as told by your own people, being skilful in your language, recognising the nuances of your culture that make you different from another, and owning a world view that is distinctively Māori.*

There were many reasons why children were raised by adults other than their birth parents at different stages in their lives. Tom Smiler suspects that one of the reasons why he was taken by his paternal grandmother at birth, aside from custom (which, in his whānau, was that the first-born would be taken by the paternal grandparents), was that he was extremely ill. Perhaps, like Tama-nui-ki-te-rangi, his grandmother had the special skills required to nurse the baby back to health. Tamati Cairns believes that his grandparents could see by the rapidity with which the first four children had been born to his parents, that many more children were to follow and they took the appropriate steps to ensure that his parents did not become over-stretched with the weight of childcare responsibilities. He, along with a number of other siblings, were taken by his grandparents and given to other whānau members to raise. He considers that reinforcing connections within the wider whānau was also a motive. At the age of five, Mihipeka Edwards was taken to her paternal grandmother to be raised. Her mother had died and her father had another six children to bring up. Mihipeka was the

---

[73] Pere (1982) 58-59.

[74] Pere (1982) 49; see also Durie-Hall, D. and Metge, J. (1992) 64.

[75] Vercoe (1994) 112.

[76] Haig, I. "Titiro, Moko! Whakarongo, Moko!" in Ihimaera, W. *Growing up Māori* (1998) 40.

[77] Pere (1982) 3.

[78] McCarthy (1997) 29.

youngest, and she believes that she must have been too young for her father to take care of.[79] When Amiria Stirling was a little girl, her grandmother asked her mother if she could take her, because she was lonely. Amiria's mother, who had other children, agreed.[80]

Sometimes children were singled out for the specific purpose of being raised by the old people. Eruera Stirling, who was taken by an elderly couple specifically for the purpose of being trained in whakapapa, iwi history and other matters, is one such example. While he was not taken until weaned and was returned to his parents at the age of seven so that he could go to school, he was chosen at birth, when the kuia whose expertise was called upon, saw his birth marks.[81] Rose Pere speaks of the tradition in both her Tūhoe Pōtiki and Ngāti Kahungunu descent-lines of elders taking particular children for the specific purpose of ensuring that important knowledge be passed on to the following generations. Tamati Cairns notes that of his fourteen natural siblings, he alone speaks Māori, something that he considers "an absolute asset" that he owes to "the wisdom of my grandparents" in deciding that he should be reared by elderly relatives.[82]

A situation that could result in children being removed from their birth parents and taken far away to be raised was the fear of the whare ngaro. Literally meaning "lost house", the term refers to the situation where, for whatever reason, a line of descent is at risk of dying out:[83]

> *When a woman loses all her children at birth, and none are born alive, it is called a whare ngaro, a house extinct or a lost house, and with the very rangatira people, this is considered a terrible tragedy. A Tohunga would be in attendance to perform karakia at each birth, and if it should happen that a child was born alive, it would be taken right away from the mother, and brought up by a foster mother.*

The fear of the whare ngaro and steps that had to be taken to overcome it, are recurrent subjects in the life histories of the Māori women in Ngā Mōrehu.[84] It should be noted, however, that even in situations of this kind, where children may not have had any physical contact with their birth parents while young, the principle of openness that prevailed in all Māori childcare arrangements, was maintained. The children would still be made aware of their whakapapa and would understand why they had been removed from their birth parents.

Children have Rights and Responsibilities to their Whānau

Just as children had the right to know their whakapapa, to be secure in their identity and to expect support from the adults within their whānau, the principle of reciprocity operated to ensure that they also carried responsibilities to the whole whānau. When Tamati Cairns decided that he would like to raise his sister's child, he understood (by virtue of the way in which his own fate had been decided when a child) that he had to negotiate with his own

---

[79] Edwards, M. *Mihipeka: Early Years* (1990) 20.
[80] Stirling, A. & Salmond, A. *Amiria: The Story of a Māori Woman* (1976) 3.
[81] See footnote 40 and accompanying text.
[82] Cairns (1991) 101.
[83] Makereti, *The Old-time Māori* (1986 ed) 116-7.
[84] Binney & Chaplin (1986) 26, 140-141.

parents in order to obtain the child. It could not be resolved simply between his sister and himself, as it was an issue that affected the wider whānau.

The notion of reciprocity is particularly apparent for those children who were chosen for the purpose of being schooled in tribal knowledge by the elders. As Pere noted, such children "would be expected to support and advise [their] generation and younger members during their adulthood, particularly those who were closely related".[85] When Eruera Stirling completed his training at the hands of the elderly couple that cared for him from the ages of three to seven, the old man told him:[86]

> *E tama, now the mana and the mauri rest upon you; I have given you the power of your ancestors, and it will lead you for the rest of your days. No one will ever come across your way. You have been through the faith and you go in light, with the knowledge I have passed on to you; one day you'll be helping your people.*

When he finally left them to return to his birth parents, the elderly couple simply said:[87]

> *Go, child, but we have given everything to you, and it will stay with you for the rest of your life.*

Having the support of a wide whānau network as a child means that the child has life-long obligations to the entire whānau, and beyond that, to the hapū and iwi. This is the essence of whanaungatanga, and ensures the continued viability of the collective group.

7.5 The Contemporary Significance of Tikanga Māori

The impact of colonisation on tikanga Māori cannot be denied: it has been claimed that "[a] process of denial, suppression, assimilation and co-option put Māori customs, values and practices under great stress".[88] In particular, the Māori preference for collectivism, philosophically at odds as it was with the settler ethic of individualism, was subject to attack. As Māori had their cultural and economic base wrested from them[89] and as they were ravaged by introduced diseases[90] their social structures were inevitably undermined. The disruption of Māori social organisation was no mere by-product of colonisation, but an integral part of the process. Destroying the principle of collectivism which ran through Māori society was stated to be one of the twin aims of the Native Land Act that established the Native Land Court in 1865, the other aim being to access Māori land for settlement.[91] Not only was the very

[85] Pere (1982) 50.

[86] Stirling & Salmond (1980) 93.

[87] Stirling & Salmond (1980) 93.

[88] Law Commission *Māori Custom and Values in New Zealand Law* (Study Paper 9, 2001) 22.

[89] First the land was taken through confiscations carried out pursuant to the New Zealand Settlements Act 1863 and later via the operations of the Native Land Court, established by the Native Land Act 1865. Later, seas and waterways were taken through legislation beginning with the Oyster Fisheries Act 1867.

[90] Pool, I. *Te Iwi Māori: A New Zealand Population Past, Present and Projected* (1991) chapter 5.

[91] These twin aims were spoken of by the Hon H Sewell, NZPD Vol 9, 1870: 361.

concept of individual title to land destructive of collectivism,[92] but the massive land loss brought about by the workings of the Native Land Court[93] meant that, as the Māori population stabilised at a low point towards the end of the nineteenth century and began to grow,[94] Māori found that they had insufficient land left to support themselves. Increasingly, whānau were forced to break into nuclear families and move to towns and cities in search of work.[95] Māori migration to the urban centres was hastened by the need for labour in the factories during the second world war and, following the war, by the Māori Affairs Department "relocation" policy which restricted housing loans to those people prepared to buy properties in town.[96]

The Native Land Act 1909, dealing with matters such as Māori marriage and the necessity for legal recognition of Māori "adoptions", also signaled a determination on the part of the state to intrude into the whānau.[97] In so doing, the state was merely continuing the work begun by the missionaries a century earlier. The missionaries, convinced that the Western institutions of marriage and family formed the foundation of civilised society, sought to remove Māori marriage from within the whānau context and to remould it into a nuclear family arrangement:[98]

> *Māori marriage was the despair of the missionaries. They made it a high priority for elimination and they preached hell-fire and brimstone to the sinful pagans who continued to practice it. They refused to accommodate or tolerate Māori marriage as being an alternative to their idea of the nuclear family and its demands on the colonial wife to be subservient, lacking in initiative and obedient to her husband.*

The introduction of Christianity also struck at the very heart of tikanga Māori by denying the validity of Māori cosmogony. While Māori continue to acknowledge the significance of Papatūānuku and Ranginui, it has been argued that the Māori creation stories have been deeply affected by the Christian influence, and that the popular version of Māori cosmogony that survives today is a colonised, mutated version of the original.[99]

---

[92] For an account of how the principle of collectivism was undermined by the law, see the *Report of the Commission of Inquiry into Native Land Laws* (1891) AJHR, G-1, xi. More recently, the Waitangi Tribunal has commented on the profound social consequences of the tenure reform that was embodied in the Native Land Acts of 1862, 1865 and later amendments in *Rekohu: A Report on Moriori and Ngāti Mūtunga Claims in the Chatham Islands* (Wai 64) chapter 11.

[93] Simpson, T. *Te Riri Pākehā: White Man's Anger* (1986) 168-173.

[94] Pool (1991) 101.

[95] Pool (1991) 153-154,

[96] Jenkins, K. "Working paper on Māori women and social policy" written for and quoted in the *Report of the Royal Commission on Social Policy* (1988) Vol II, 163; Durie-Hall & Metge (1992) 66.

[97] Mikaere, A. "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) *Waikato Law Review* 125, 133.

[98] Jenkins, K. "Reflections on the Status of Māori Women (unpublished paper, 1986) 12.

[99] See Mikaere (1995).

Given the pressures that were brought to bear on Māori as a result of colonisation, it is hardly surprising that they "began to internalise colonial values".[100] There is no doubt that, on the whole, the Māori experience of whānau today differs dramatically from what it once was. McCarthy observes:[101]

> *The long-term effects of assimilative policies and practices have been far-reaching within the Māori community. One of the consequences has been the fracturing of the whānau unit. For instance, for some Māori the family unit has come to be synonymous with the single-parent or nuclear family rather than with the extended family. This is problematic for some Māori who in their struggle to have their children imbued with their culture and language are also struggling with a disestablished whānau base.*

The profound impact that Western philosophies and law have had on both the content and the practice of tikanga Māori raises an important question: to what extent can tikanga be said to be relevant to contemporary Māori? If the project of assimilation has been successful, it may be that discussions about Māori principles for child-raising are of no more than historic interest, ultimately irrelevant to meeting the needs of present-day Māori whānau.

The answer to this question hinges on the view that one takes of the ability of law (Māori or otherwise) to develop and adapt. As the Law Commission has observed, "[t]here is no culture in the world that does not change. Change does not necessarily imply that a culture is 'dying' or that it is now somehow inauthentic. Culture is always a living, changing thing".[102] Hirini Mead writes:[103]

> *Tikanga Māori are not frozen in time, although some people think that they ought to be. . . . There are some citizens who go so far as to say that tikanga Māori should remain in the pre-Treaty era and stay there. To them tikanga Māori has no relevance in the lives of contemporary Māori. That body of knowledge belongs to the not so noble past of the Māori. Individuals who think this way really have no understanding of what tikanga are and the role tikanga have in our ceremonials and in our daily lives. It is true, however, that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the people. They do link us to the ancestors, to their knowledge base and to their wisdom. What we have today is a rich heritage that requires nurturing, awakening sometimes, adapting to our world and developing further for the next generations.*

As the Law Commission has pointed out, tikanga should not be regarded as fixed from time immemorial, but instead as "based on a continuing review of fundamental principles in a dialogue between the past and the present".[104] Of course Māori life differs greatly from what it was prior to contact with Western law and philosophies. This does not mean that the

[100] Law Commission *Justice: The Experiences of Māori Women* (1999) 20.
[101] McCarthy (1997) 30.
[102] Law Commission (2001) 3.
[103] Mead, H. "The Nature of Tikanga" (paper presented at Mai I te Ata Hapara conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) 16.
[104] Law Commission (2001) 3.

philosophical underpinnnings of tikanga Māori are irrelevant. According to Durie, tikanga Māori has been receptive to change while maintaining conformity with its basic beliefs.[105]

Moreover, despite the dramatic changes that have occurred for Māori whānau since pre-colonial times, the fact remains that much of the way in which they continue to behave and relate to one another is only explicable in terms of tikanga Māori. In 1984, for instance, a major survey of Māori women, 94 percent of whom were living in urban areas or provincial towns, found that one in five had a whāngai child or adult living with them.[106] Even though the majority of Māori conform closely to the model of the nuclear family in their living arrangements, therefore, many of them nevertheless have members of the wider whānau staying with them for differing periods of time. The Law Commission has observed:[107]

> *Māori women are far more likely than non-Māori women to be living in households shared with relatives other than their immediate family. A study being conducted by Te Puni Kōkiri has identified a high degree of co-operation among the different households that make up the whānau in terms of, for instance, financial support, food and childminding.*

It has also been noted that "Māori nuclear families which are embedded in effective whānau differ in important respects from comparable Pākehā families" in the sense that "they are considerably more open to the participation and counseling of outside relatives, especially with regard to child-raising".[108] Moreover, it has been pointed out that even where a Māori nuclear family is not part of a functioning whānau:[109]

> *it would be a mistake to conclude that they therefore differ from those that do. Usually one or both spouses have had first-hand experience of whānau during the impressionable years of childhood and have internalized many of the associated beliefs and practices, affecting significantly the way they organize family life.*

A strategy that has been employed by Māori nuclear families that, for whatever reason, are isolated from an effective whānau, is the creation of what Metge calls "kaupapa-based whānau".[110] Organisations such as kōhanga reo, kura kaupapa Māori, urban marae, kapa haka groups and waka ama clubs, particularly in the urban context, have come to act as substitute or additional whānau for many Māori. As Metge notes, because members do not have descent as a unifying principle, kaupapa-based whānau emphasise commitment to the kaupapa as the main criterion for membership. Almost inevitably, members of the whānau relate towards one another as they would towards members of their whakapapa-based whānau:[111]

[105] Durie, E.T. "Ethics and Values", paper presented at Te Oru Rangahau Māori Research and Development conference, Massey University, 7-9 July 1998, 3.

[106] "Whānau, Hapū, Iwi" in Coney, S. *Standing in the Sunshine: A History of New Zealand Women Since they Won the Vote* (1993) 68, 69, citing Murchie, E. *Rapuora* (Māori Women's Welfare League, 1984) 82.

[107] Law Commission (199910 30.

[108] Coney (1993) 69.

[109] Durie-Hall & Metge (1992) 62.

[110] Metge (1995) 305-307.

[111] Metge (1995) 306.

> *In the course of time whānau set up to pursue one kaupapa typically acquire other functions as well, in particular the provision of emotional and practical support. This may be extended to include financial loans and gifts, shared child-care and the staging of life-crisis hui.*

A good example of this model is Te Whānau o Waipareira, whose members "are not all linked by kinship and where most live outside the traditional territories of the tribes from which they are descended".[112] Nevertheless, the members assume the reciprocal obligations and responsibilities of whanaungatanga towards one another, driven by the underlying principles of tikanga Māori.

For some, behaving in this way is part of a conscious effort to reaffirm the place of Māori philosophies in their daily lives, but that is not always the case. Frequently, Māori behave in ways that are rooted in the fundamental tenets of tikanga Māori without even realising it. Regardless of whether such adherence to the principles underlying Māori law is conscious or subconscious, the fact remains that the needs of Māori would be better met if the law concerning guardianship, custody and access were cognisant of those principles.

7.6 Recognition of Tikanga Māori in Current Law Concerning Guardianship, Custody and Access

After examining seven statutes in the area of family law, Donna Durie-Hall and Joan Metge reached the "inescapable conclusion" that Māori had been seriously disadvantaged under that law. They found that in most cases the statutes had been "formulated and passed on the basis of commitment to Pākehā values and objectives, without regard to their compatibility with tikanga Māori", resulting in Māori family forms and values being placed under great stress.[113]

The statute most offensive to tikanga Māori was found to be the Adoption Act 1955, with its open rejection of Māori beliefs and practices. The damage done to Māori conceptions of whānau by the model of closed stranger adoption that this statute implemented has been fully dealt with elsewhere.[114] John Rangihau observed that by cutting children off from their whakapapa, closed stranger adoption had the effect of making "a child of lineage, a child who belonged only at sea, to be rescued if possible".[115] The vision of Maui adrift on the sea, with no member of his whānau able to find and rescue him by providing him with the whakapapa necessary for him to reclaim his identity, is a haunting one. Such an outcome would not have been Maui's loss alone: not only would he have been denied the opportunity to benefit from the security that whānau membership brings, he would also have been unable to perform the many feats that improved the lives of his descendants. The magnitude of the loss to Maui's whānau and to all his human descendants had his tupuna not rescued him defies comprehension.

---

[112] Law Commission (1999) 30.

[113] Durie-Hall & Metge (1992) 79.

[114] Else (1991) chapter 16; Law Commission *Adoption: Options for Reform* (1999) chapter 12; Mikaere (1994) 135-142.

[115] Rangihau (1987) 5.

The Guardianship Act 1968 was found by Durie-Hall and Metge to be one of several family law statutes that:[116]

> *make no frontal attack on Māori social forms and practice but, by ignoring their existence and failing to accommodate them in any way, increase the pressures on Māori to abandon them.*

The Act defines guardianship as "the custody of the child . . . and the right of control over the upbringing of the child", including education and religion.[117] Custody is defined as "the right to possession and care of a child".[118] The birth parents are usually both guardians of the child.[119] If the mother is not married to the father of the child, or was not married to him at the time the child was conceived and was not living with him when the child was born, she has sole guardianship.[120] In these circumstances, the father may apply to be appointed guardian.[121] In any issue of custody or guardianship, the welfare of the child is to be the first and paramount consideration.[122]

The notion of children as "possessions" clearly does not sit well with Māori beliefs. It has been noted that from a Māori perspective "[t]here is no property in children"[123] and the idea of regarding the child as a chattel of his or her parents[124] is clearly repugnant to a Māori world view. It has also been argued by Māori that the centrality accorded the child is not in keeping with Māori tradition; nor is the assumption that a child's birth parents are the natural and exclusive guardians:[125]

> *The Māori child is not to be viewed in isolation, or as part of a nuclear family. The Māori child is not the child of the birth parents. Under Māori tradition, the importance attached to the child's interest is subsumed under the importance attached to the responsibility of the tribal group through the tribal traditions and lore of inherited circumstances. The hapū or tribal group, is bound to provide for the physical, social and spiritual well-being of the child and its upbringing as a member of a particular hapū. This responsibility would take precedence over the view of the birth parents.*

[116] Durie-Hall & Metge (1992) 59.
[117] Section 2.
[118] Section 2.
[119] Section 6 (1).
[120] Section 6(2).
[121] Section 6(3).
[122] Section 23.
[123] Rangihau (1987) 4.
[124] Rangihau (1987) 6.
[125] Rangihau (1987) 6.

The assumption that a child should ordinarily have a maximum of two guardians is also considered problematic:[126]

> *By assuming that parents are a child's natural and exclusive guardians, the Guardianship Act lends itself to the interpretation that non-parental guardians are essentially substitutes for parents. Usually their number is limited to one or two and they are appointed when a parent dies, abdicates responsibility or is disqualified on grounds of illness or wrongdoing. To Māori used to the responsibility for children being widely shared, this interpretation is both limited and limiting.*

This "limited and limiting" approach can also be detected in the provisions concerning access. Where custody has been given to one parent, the other parent may apply to the Family Court for access so that she or he is able to spend time with the child.[127] However, should relatives other than birth parents wish to seek access to a child, the Court may make such an order only in circumstances where the parent through whom the relatives are connected to the child has either died, been denied access, or is failing to exercise their rights to access.[128]

Thus the provisions of the Guardianship Act, in assuming that children belong first and foremost to their birth parents within the context of the nuclear family, cut directly across the Māori principles of child-raising discussed earlier.

The valuing of children as links in the chain of descent is not necessarily upheld by the prioritising of birth parents' rights. It is generally older relatives who provide that kind of education and knowledge to children. In cases where a non-custodial Māori parent has access, the opportunities for other relatives from that side of the whānau to provide such information may be extremely limited, or even non-existent. Moreover, tikanga Māori dictates that the Māori child should not merely have access to information about her or his whakapapa: the child has a right, as did Maui, to follow the information up by finding her or his rightful place within the whānau, hapū and iwi. Under the current law, this may not be possible until the child reaches adulthood, by which time she or he has lost the most important years of her or his life, particularly in terms of forging an identity. Moreover, the individualising of the child's interests, from a Māori perspective, actually devalues the child. To Māori thinking, the value of the child is enhanced by virtue of the fact that she or he is a link in the chain of descent.

The principle that children belong to the whānau, hapū and iwi is directly countered by the provisions of the Act, which is focused entirely on the nuclear family model. This focus also interferes with the possibility of whānau sharing the rights and responsibilities for raising children. Finally, the possibilities for children exercising both their rights and their responsibilities with respect to their whānau, hapū and iwi are heavily proscribed by a model that elevates the nuclear family as aggressively as it devalues Māori concepts of whanaungatanga:[129]

---

[126] Durie-Hall & Metge (1992) 69.
[127] Section 15(2).
[128] Section 16.
[129] Rangihau, J. *Te Puao-te-atatu* (1986) Appendix, 22.

> *The prevalence of Western opinion in influential areas of law . . . affirms the view that Māori is to be treated as an individual and that the communal orientation of Māoridom is without value or relevance.*

A perusal of the caselaw reveals that judicial awareness of Māori philosophies is growing. In Rikihana v Parson[130] the Court awarded custody of a twelve year old boy who had been living in Australia with his mother since the age of seven, to his Māori father who lived in New Zealand. Crucial to the decision was the clear desire on the part of the child to return to New Zealand:

> *[T]he strength and depth of the cultural influence which Nathan has now recognised should not on any account be underestimated. One has to live in New Zealand in order to appreciate its intense spiritual significance . . . In this case what has emerged very clearly, and what would instantly be recognised by one attuned to the significance of what has been said, is that it is very important to Nathan's whole being that he now stay in his father's home and with his wider New Zealand family. Nathan's love for his father is a clear factor, but there is more than that. It is a matter of Nathan having recognised his own need to return to his own ground, his own place.*

There have also been indications that the judiciary are prepared to consider the use of guardianship orders in order to allow adults from within the whānau to be involved in aspects of a child's care. In T v F[131] the Māori grandparents of a child sought to prevent their grandchild from being adopted out to a Pākehā couple by its Pākehā mother (the grandparents' son was the birth father and had been unsuccessful in his application for custody and guardianship of the child). The motivation of the grandparents in seeking custody and additional guardianship orders was not in question:[132]

> *The child has a Māori heritage, recognised by her adoptive parents, as part of her birthright. These very eminent and distinguished grandparents are, in a real sense, the guardians of that part of her birthright. They feel themselves called to their grandchild by the spiritual dimension of that birthright. There is no question of their good faith, their integrity, or their commitment to the welfare of the child. Nor is there any question that the child is uniquely fortunate in having such eminent grandparents to introduce her to the special qualities of her heritage, so enhancing and enriching her life and the lives of those around her.*

The Court concluded that the adoption should proceed but that, with the consent of the adoptive parents, there should be an order making the grandparents additional guardians, for the specific purpose of "introducing her to and maintaining her cultural heritage in cooperation with the adoptive parents, but not otherwise intruding upon [their] rights".[133]

[130] (1986) 4 NZFLR 289.
[131] (1996) 14 FRNZ 405.
[132] (1996) 14 FRNZ 405, 426.
[133] (1996) 14 FRNZ 405, 427-8.

In Re Applications Concerning H,[134] a virtually-identical situation resulted in no adoption order being made. Instead, guardianship orders were made in favour of the adoptive parents (who were Pākehā but who were willing for the child to have continued contact with her whānau), the Māori father and also his parents. In addition, a custody order was made in favour of the adoptive parents.

P v L[135] concerned a seven year old child who had spent most of his life being raised by various members of his extended whānau, including his maternal grandparents. The grandparents were appointed guardians to enable input into the child's education and upbringing. They were also awarded custody for a period of two years, during which time the child's father was to have increasing access. The Court found that the custody should go to the father at the end of the two-year period, or earlier if the whānau agreed.

However, despite a heightened judicial awareness of Māori concerns, there is still much to be found in the caselaw that offends Māori sensibilities. In T v F, for example, the making of the additional guardianship order in favour of the Māori grandparents was made subject to the consent of the adoptive parents. This outcome is hard to reconcile with the Court's insistence that "for this child of dual ancestry both sides of that ancestry are important to her and . . . in her upbringing neither is to be diminished at the expense of the other without good reason".[136]

Moreover, while many judgements note the significance of tikanga Māori in custody and guardianship applications concerning Māori children, the outcomes are frequently dismissive of Māori principles. For example, in a case where a Māori grandmother sought custody and guardianship orders with respect to her daughter's child (the daughter was willing for the child's foster parents to adopt her), both applications were denied. This was despite the Judge's finding that:[137]

> *I have little difficulty in accepting that when it is provided in the Guardianship Act, s 23, that in any issue of custody or guardianship the welfare of the child shall be the first and paramount consideration, an inquiry into what will be in the best welfare and interests of a child of Māori ancestry must take account of Tikanga Māori to the extent that it is relevant to the welfare and interests of the particular child in the child's particular situation. Indeed I would have thought that in this day and age such view of s23 would be taken for granted.*

A further illustration is provided by BP v Director-General of Social Welfare,[138] where a Māori grandmother was appealing against a refusal to grant her custody of her grandchild. The appellant's daughter, also the child's mother, had placed the child with a couple and was in favour of their proposal to adopt the child. While expressing the view that "this baby should grow up knowing of her whakapapa and knowing her whānau, if possible, even if she

[134] (1986) 4 FRNZ 312.
[135] Family Court, Gisborne FP 016/080/00, 22/12/00, Judge JG Adams.
[136] (1996) 14 NZFLR 405, 421.
[137] *B v M*]1997] NZFLR 126, at 133.
[138] [1997] NZFLR 642.

is adopted out of the whānau",[139] the Court nevertheless dismissed the appeal. The Court accepted the significance of Māori conceptions of whānau:[140]

> *[W[e accept as a starting point the account given by Professor Mead of the place of a child within a whānau and the obligations and responsibilities of members of the whānau to that child, together with the advantages which that brings of the child being nurtured within a group which not only focuses the ancestral and genealogical position of the child through whakapapa and the spiritual significance of the child's ancestry, but also emphasis the place within the land. . . We do not consider that it is possible to overstress the significance of these aspects of a child's upbringing . . .*

Despite accepting such concepts as a "starting point", however, the Court considered that they were ultimately "subsumed within the concept of the welfare of the child":[141]

> *[T]he child holds the central position within which the context provided by the concepts of family to which reference had been made. That means that the child's interests will not be subordinated to the interests of any other member of the family or whānau, nor will the interests of the child be subordinated to those of the whānau as a whole.*

This insistence on regarding the rights of the child as being in conflict with the responsibilities of the whānau to care for the child betrays an ignorance of Māori beliefs that the rhetoric of the judgements often belies. A perusal of the relevant judgements suggests that, while greater lip service is being paid to tikanga Māori in cases concerning guardianship, custody and access, judges continue to see Māori whānau concepts through the prism of Western law, which informs both the statutory regime and the judges' implementation of it.[142]

7.7 Access to Justice Issues

In 1986 the Advisory Committee on Legal Services delivered a stinging attack on lawyers and the courts for their inaccessibility to Māori and a myriad of other groups within Aotearoa/New Zealand.[143] Their report found that lawyers had an image as "inaccessible, insensitive, disempowering, over-priced, self-interested and unaccountable", while the Courts

---

[139] [1997] NZFLR 642, 655.

[140] [1997] NZFLR 642, 653.

[141] [1997] NZFLR 642, 653.

[142] An alternative approach to such matters might be that provided by Te Ture Whenua Māori (Māori Land) Act 1993 in its provision for the recognition of whāngai arrangements in land matters. Section 153 allows the Māori Land Court to make provision for whāngai, while section 3 provides that whāngai means "a person adopted in accordance with tikanga Māori". Tikanga Māori is defined in section 3 as meaning "Māori customary values and practices". According to the Māori Appellate Court, "[t]o establish what the relevant Māori customary values and practices relating to an application under section 115/93 may be, the Māori Land Court hears a range of evidential material including . . . whakapapa to determine whether a blood relationship exists, the length of the relationship between the whāngai and the adopting parents, whether there has been an ōhākī, the customary values and practices of the iwi or the hapū associated with the land in question and whether those values and practices permit a whāngai with or without a blood relationship to their mātua whāngai to take interest in land" – *Re Hohua* see footnote 43, 11. The Court has shown a willingness in such cases to seek expert evidence from those suitably qualified to provide advice on the tikanga of the iwi or hapū concerned.

[143] Advisory Committee on Legal Services, *Te Whainga I Te Tika: In Search of Justice* (1986).

were seen as "negative, dehumanising, intimidating, inefficient, overloaded, culturally-alien and insensitive, and designed to meet the needs of those in the legal industry instead of the consumers".[144] Māori perceptions and experiences of dealing with lawyers were particularly negative:[145]

> *When faced with a legal problem, Māori people rarely know a lawyer, especially a Māori lawyer, or how to make contact with them. Fear of high fees means few Māori will approach a lawyer even in desperation. There is an overwhelming feeling that lawyers lack sensitivity to Māori needs, and their attitudes, offices and ways of working were seen as alien and alienating to most Māori people. They have difficulty communicating and tend to talk over Māori heads, making Māori people feel they have no control over the decisions lawyers make. Failure to keep them informed of what is happening leaves people feeling 'ripped off' when they get the bill.*

Further criticisms that were made of lawyers included their inability to relate to human realities of other cultures, elitist and patronising attitudes to various groups, including Māori, gross cultural insensitivity and arrogance, basic failure to communicate, use of technical legal jargon which excludes lay clients from understanding and taking control, and having plush offices which make commercial clients comfortable, and ordinary people uncomfortable.[146] The report recorded a strong call for more Māori lawyers.[147]

The Family Court also attracted adverse comment:[148]

> *We strongly recommend a whānau approach to matters affecting Māori children or families which would replace the present intimidating, individualised, mono-cultural Family Court structure. Responsibility must be returned to whānau or hapū to find long-term solutions to their problems.*

The report recommended the establishment of a Māori mediation, counselling and referral service to ensure that Māori mediators and methods are used when Māori families are involved.[149] It also endorsed the recommendation of the Rangihau Report[150] that a child's whānau should be empowered to select Kai Tiaki from their hapū who could act as Children's Advocate:[151]

> *This would ensure the involvement of someone who has an understanding of the background and context of the situation, is aware of those who have a contribution to make to finding a solution, has the trust of all parties, and has the necessary cultural understanding and sensitivity.*

[144] Advisory Committee on Legal Services, (1986) 7.
[145] Advisory Committee on Legal Services (1986) 14.
[146] Advisory Committee on Legal Services (1986) 37.
[147] Advisory Committee on Legal Services (1986) 38.
[148] Advisory Committee on Legal Services (1986) 47.
[149] Advisory Committee on Legal Services (1986) 47.
[150] See footnote 115.
[151] Advisory Committee on Legal Services (1986) 89.

A question which might fairly be asked is whether the situation has changed in the fifteen years since Te Whainga I Te Tika. More recent reports would suggest not. In 1998, for example, it was found that in over a third of their Guardianship Act cases, Counsel for the Child who were neither Māori nor Pacific people were likely to be representing children from those ethnic backgrounds.[152] Less than 10% of those Counsel for the Child interviewed felt that the ethnicity of Counsel was irrelevant. Over four-fifths said that knowledge and understanding of a child's cultural background was important.[153]

In 1999 the Law Commission noted that "as a consequence of their cultural values being disregarded, in combination with socio-economic disadvantage, [Māori women] experience significant barriers to accessing the justice system".[154] This was further explained:[155]

> *The failure to acknowledge Māori cultural values in justice sector processes is a systemic failure. There was an overwhelming sense of irritation and, indeed, anger expressed, at what the women perceived to be a widespread tendency by some non-Māori to ignore the cultural values which differentiate Māori from non-Māori. Many of the agencies were perceived as unresponsive toward and dismissive of Māori desire to participate in society* as *Māori.*

The Law Commission recorded the view of many Māori women that Māori personnel needed to be appointed at all levels of the justice system, but it also noted that this was regarded as a first step in improving the justice sector's services: "[w]hat is sought is a quality Māori service capable of providing a responsive and effective service".[156] Ultimately, what was being sought was the option of services provided for Māori by Māori.[157] Also highlighted was the need for paid Māori advocates to assist Māori through court processes.[158]

---

[152] Gray, A. & Martin, P. *The Role of Counsel for the Child: Research Report* (1998) 39.
[153] Gray & Martin (1998) 41.
[154] Law Commission (1999) 43.
[155] Law Commission (1999) 28.
[156] Law Commission (1999) 39.
[157] Law Commission (1999) 41.
[158] Law Commission (1999) 41.

8 Interviews with Counsel

8.1 Counsel/1

C/1 is a senior and experienced practitioner of family law, with more than twenty years of experience. He does a lot of work as Counsel for the Child, and a significant proportion of his clients are Māori. In his view the difficulties experienced in working with the Guardianship Act arise from differing world views or philosophies.

> *In Māori terms it is a problem with the philosophy of the law of individual rights and nuclear families and not global rights and community families, and it doesn't recognise the increasing role that grandparents are now playing again. A grandparent does not have an automatic right to mokopuna unless one of the parents is dead or there are a couple of exceptions.*

He suggested that the struggle to ensure that legal systems are culturally appropriate is dynamic in nature and ongoing.

> *..because as soon as you arrive something is moving on again. We don't want to go back to how it used to be, we want to extract out of that the value, which creates and sustains our identity. We might all end up driving BMWs and having PhDs but we will inherently and arrogantly be Māori. So the sown seed? It actually gets stronger, that is the dynamic of change.*[159]

C/1 considers that legislative changes should provide a means for processes that are less adversarial, and more focused on processes that will allow people to reach a resolution before things become entrenched and adversarial.

> *My system is simply like this – you have a problem – a domestic problem of some sort, go to the court, fill out a form and it basically says, 'we've got a problem we would like some help please'. Don't make it a form six pages long and all that nonsense. There are limited areas of dispute in the family – you could list them 1 to 5 or whatever. Get it stamped at the court, loaded into the database. It is now in the system, it triggers Counsel for the Child and a skilled person – social worker or conciliator or whatever. No one has seen a lawyer, no legal aid application, the one thing that the whole thing develops around is the paramount interests of the child. So why don't we do all that in the beginning – stand by – somebody is going to contact you.*

He argues that this sort of streamlining should be accompanied by hui processes that allow people to express their feelings and achieve resolution.

[159] This is a reference to the whakatauki – E kore au e ngaro, te kākano i ruiruia mai i Rangiatea. I will never be lost, the seed was sown in Rangiatea.

> *Venting your spleen is important to Māori. If you don't understand that process then you don't understand the way they solve problems – it is a healing pathway. They will never get to the healing mode until they have done the spilling mode. Process is absolutely important to Māori. It is important that they have their say. Nothing worse than saying I was there and I couldn't.*

C/1 is currently working on a resource for legal professionals with a view to improving their understanding of cross-cultural communication.

> *You go to a Māori home and you take your shoes off at the door and they say – oh this fellow is well bred. Simple things like not putting your hat on the table…Language is the first thing. Start by getting her*[160] *name wrong .. the jarring note factor …*

C/1 is also concerned about the custody and access issues arising from the interrelationship between the Guardianship Act and the Domestic Violence Act.

> *We have created supervised access. I am not criticising the intent of it; I am looking at the results. There is no way you can have meaningful access with a stranger in a room for one hour. My men have said to me it is ridiculous. Most lawyers will tell you they have had clients that have decided to walk away from their family obligation altogether. We've got a whole new industry.*

8.2 Counsel/2

C/2 has been practicing family law almost exclusively since 1995. About 80% of her work is with Māori, with a third of that work being as Counsel for Child.

C/2 does not believe that current legislation makes adequate provision for whānau participation in court processes. She is a strong advocate for legislative change that will allow participation by the wider whānau, particularly grandparents.

> *I think some of the difficulties are that when you go to court there are only two parents named on the papers, and they are the only two under law entitled to have input ... and that is really difficult where the person has a large whānau base, really the client is part of a bigger environment … I am a big supporter of changing the Act to allow grandparents to apply for access. And at the moment the only way you can do that is by making access a condition of the custody order. That is not on considering a lot of moko are raised by their grandparents or have a strong link to them.*

This wider participation should in her view include extended opportunities for whānau hui and mediation processes to occur and be recognised in the legislation. This should be accompanied by the use of language that is less adversarial and ownership focused.

[160] The client's name.

The Family Group Conference is fantastic because it allows families to talk, but there is no similar provision under the Guardianship Act. It means that whānau are getting involved in the decisions that are made.

C/2 also suggested that the physical environment has an effect on the parties' level of comfort.

If we look at a contrast between Manukau where the desks are kind of in a crescent, and Auckland where the desks are in a row, I think having a crescent is better because people are more able to feel they are part of the proceedings. The difficulty for some Māori clients coming to court is that there are not enough meeting rooms – and because they come in with their whānau you've got members of both whānau there – sometimes it is good, but sometimes it is a huge strain.

C/2 expressed concern about the minimal level of training for Counsel for the Child in working safely and effectively with Māori.

You know you go to the door and you take your shoes off before you go inside, little things like that are really helpful. To understand that a child has to go to a tangi and that may mean a few days off school... Some whānau use a lot of Māori words, and it interrupts the flow if someone has to say – what does that mean? I went to a house and there were mattresses on the floor and one of the lawyers said 'they are sleeping on the floor!'. I said – on mattresses on the floor – there are a lot of people in the house at the moment and this is where they sleep. She said 'well isn't there anything wrong with it?' And I said – no.

C/2 also believes that there should be an extension of counselling and support programmes for children and parents. Having seen some good outcomes from programmes provided under the domestic violence legislation she would like to see access to programmes broadened to include situations where there is no protection order. She would like to see partnering programmes offered, as the coincidence of poverty, low educational levels and lack of parenting skills is a regular pattern for many of her Māori clients.

8.3 Counsel/3

C/3 has been practicing law for eight years, and Family Court work makes up 70-80% of his work. He has been doing Counsel for the Child work for about four years, and estimates that around 60% of his clientele are Māori.

In C/3's view, Māori experience of Family Court processes is directly related to the quality of legal representation parties receive.

I have seen the court work well (for Māori) where the parties are represented well. Where other family members who have a significant involvement with the children are allowed and encouraged to provide good information. The idea of family conferencing as a vehicle is really useful. If you get that happy combination of things working well, given there are a lot of people involved, then that is just great. And in fact they are healing times for families but also really optimistic times for the future.

He is strongly of the view that matters before the Family Court should be focused on the needs of the children, and that counsel do not always maintain this focus.

C/3 suggested that in many instances whānau are reluctant to become involved in court processes, and that this may be due to other negative experiences within the legal system. C/3 emphasised the importance of demonstrating respect for Māori engaging in court processes through things as basic as correct pronunciation of names by court staff.

> *I have seen people sitting there saying 'I wonder who that is' (when court staff call out names) – and they have missed their appointment – they have missed going in. Just basic respect for people and their culture, and the integrity of whānau.*

He did not consider that finance was a barrier for parents, but that it was problematic for other whānau members who currently are not seen as parties under the Guardianship Act 1968.

> *The matters that I deal with, the people are likely to be supported by Legal Aid – there seems to be the cycle of disadvantage, poverty, poor parenting…There was an older woman in my office the other day who was looking after the children (nieces and nephews) and the parents want the children back and she said no. She is having to go through all sorts of financial hardship to carry that decision on.*

C/3 is an advocate of well-managed whānau hui, and believes that it is appropriate for Iwi Social Services to be involved in this process, and in ongoing monitoring of hui outcomes. He believes that any review in the legislation should consider their role.

> *Those that operate well should be contracted – although at the moment they find themselves at a disadvantage if they go against CYFS. It probably comes down to a political movement – that will no doubt be the driving force. So the law would allow the iwi to have a main role and CYFS would fund it. I know they are looking at ways of negotiating and establishing those relationships and many judges or courts feel uncomfortable with what they don't know, and judges can be quite an unknown factor.*

C/3 also emphasised the need for good ongoing training for legal professionals, both in terms of working safely with Māori clients and in child-focused practice.

8.4 Counsel/4

C/4 was interviewed for the pilot study. She practices exclusively in the Family Court, and has done so for three years. She is Māori with children of her own. A significant proportion of her client base is Māori.

Counsel identified several issues of concern in the way Māori whānau experience Family Court processes and professionals currently. The first of these concerns was the actual courtroom setting and processes, which she described as follows:

I don't think the system is particularly effective for Māori. It's too hard. It's very impersonal; it's very clinical. In the family arena it's supposed to be a little more relaxed, but I think, and it may be more to do with the judiciary, I'm not sure, but they're much more inclined to treat it like a normal courtroom, where you must follow normal protocols – which is fine I guess when you're dealing with the lawyers. But when you've got clients coming through the door who may rarely come to town, let alone into a courtroom – it's very hard for them to come to grips with.

She expressed considerable dissatisfaction with the way the majority of judges and counsel related to Māori, citing the Law Commission's report on Māori women's experiences of court processes.[161] She identified issues such as correct pronunciation of Māori names and words, and a lack of sensitivity to/or awareness of Māori styles of communication. She felt that her clients for the most part feel intimidated and ill at ease. The result of this for clients is:

They're either whakamā or they're really angry, or a combination of both…

This she believes is accompanied by a more fundamental lack of understanding of the life experiences of Māori whānau. She was particularly concerned about this in relation to the pivotal role held by Counsel for the Child. She reflected on her upbringing, and the shared whānau care that her own children have, and said that many of her Pākehā colleagues find the idea of shared whānau care difficult to understand. She was extremely concerned that there was no Māori Counsel for the Child working in her court district.

She was clear that the implementation of the Guardianship Act 1968 could be damaging for extended whānau, particularly in terms of the relationship between grandparents and their mokopuna.

I've had grandparents come to me and say I can't see my mokos anymore, I want to see them, I've had contact with them and looked after them for years and now they're gone. And it's really hard because you have to tell them – you have no rights, unless you can hook it into a custody and access order that belongs to your child. That's really difficult.

Counsel was aware of some of the suggested changes to the Guardianship Act 1968, such as changes in terminology for custody, guardianship and access. She was not convinced that such changes would improve or alter the experiences of Māori within the Family Court. She believed that the language would still be a barrier for many Māori (and non-Māori). She argues that fundamental changes need to occur in the way that the Family Court operates at an interpersonal level. She also believed that any changes to the legislation needed to be accompanied by effective community education.

I don't think that changing the Act will change much for Māori – it is still going to depend a lot on your ability to relate to your lawyer, or more importantly the ability for your lawyer to relate to you. It doesn't matter what you do to it (the Act) if the system is still cold and hard and there is no education around it or human dimension given to it.. it doesn't matter what you do … They're only going to sugar-coat the wording…

[161] See Footnote 2.

Increasing opportunities for whānau participation would also be of minimal value in her view unless the Family Court is significantly modified to reduce formality, and to incorporate more culturally-appropriate practices. She was concerned that this was unlikely to happen, as she believed that many judges are of the view that the Family Court would lose status as a 'real court' if processes were relaxed or modified.

8.5 Summary

The interviews with counsel indicated a number of areas that are problematic for Māori engaging with the Family Court over guardianship, custody and access matters. The interviews provide information regarding possible areas for legislative change. They also highlight the importance of the quality of communication and professionalism of those working in Family Court settings.

9 Interview with an Iwi Social Service Provider

This interview was conducted with the Chief Executive Officer of an Iwi Social Service. The name of the CEO and the Iwi have not been included in the report as to do so make it likely that cases referred to could be easily identified. Large sections of the interview have been included verbatim, as the CEO was able to clearly articulate his views regarding the current legislation and his experience of it.

The CEO began by suggesting that the Guardianship Act should be made consistent with the CYPF Act in order to acknowledge the relationship between the child or young person and their whānau, hapū or iwi. He described the involvement of the iwi social services in seeking custody or guardianship.

> *Over the years since we have started we have been involved in a number of cases. Our experience has been that judges have been sympathetic to the different applications we have made. What has been interesting has been the opposition of the statutory agencies.*
>
> *The only time we have taken custody is when whānau have requested our involvement or those we take custody as opposed to CYFS solely having custody. We are seen as an option for the whānau if they want it.*

A key issue is that Iwi Social Service organisations are not funded for this work.

> *So if I am going to lodge an application with the Court and engage a solicitor – my last bill was approximately seven thousand dollars. That was an application for joint guardianship and joint custody. There is a whole grey area in the resourcing. I personally believe that our involvement should only be at the request of whānau, but there is a need for us to be resourced to actually assist them. Otherwise I have to be the gatekeeper and decide which ones we take on. I believe it is the right of every whānau to engage our services. It is their right as a member of our iwi.*

He was concerned by the lack of status accorded to Iwi Social Services in the court process.

> *There is a need for judges and iwi to develop a relationship. If you haven't got status, you can't actually present stuff to them. All the cases we have been involved in the judges have been pretty good, but they are difficult to meet with.*

He felt that this was a serious issue, because whānau often sought support from the iwi because of their sense of alienation and frustration in dealing with a system that feels disempowering to them. The CEO had strong views about the expertise of Counsel for the Child.

> *A lot of them are not actually culturally-appropriate for our young people. Counsel for the Child should be trained or Māori for Māori kids. I have a whole range of examples of how we have been victimised by Counsel for the Child because of their lack of knowledge of tikanga, Māori processes and whānau, hapū and iwi and the interrelationship between these levels.*

The CEO described three cases where they had made applications for custody and/or guardianship. They are indicative of the range of circumstances in which whānau approach their organisation. One involved a severely-disabled young person that the whānau were unable to provide care for and who was in CYFS custody. The Iwi Social Service became involved and found a specialist care placement which the whānau supported. The Iwi Social Service became part of a joint custody arrangement.

Youth justice matters initiated a second case; there were subsequent care and protection issues. In this case the whānau did not want CYFS to have sole guardianship, preferring this to be shared by the iwi. The young person is now back with the whānau, and the guardianship is being discharged.

The oral judgement made in a third case, involving the Iwi Social Service application for joint custody and joint guardianship under the Children, Young Persons, and Their Families Act has been provided to the researchers. The judge cites key sections of the Act that refer specifically to the role of whānau, hapū and iwi, and it is these principles that the CEO argues should be operated consistently across all Family Court legislation and practice. The judge stated that:

> *The Children, Young Persons, and Their Families Act was passed after considerable consultation with Māoridom. It is for this reason that this Act reflects the wish for the Māori identity of many children and young people to be properly reflected in decision-making and care arrangements that are made.*

The judge went on to cite Principle 5(a):

> *The principle that wherever possible a child or young person's whānau, hapū, iwi and family group should participate in the making of decisions affecting that child or young person and accordingly, that wherever possible, regard should be held to the views of the whānau, hapū, iwi and family group.*

He then cited s13(b) which says:

> *The principle that the primary role in caring for and protecting a child or young person lies with the child or young person's family, whānau, hapū, iwi, and family group and that accordingly –*
>
> *(1) A child or young person's family, whānau, hapū, iwi, and family group should be supported, assisted and protected as much as possible: and*
>
> *(2) Intervention into family life should be the minimum necessary to ensure a child or young person's safety or protection.*

The judge granted the joint guardianship application on the grounds that this would give proper effect to these principles.

For the CEO, the foundational principle for discussing issues relating to the care of children is whakapapa. He argued that wherever a child has this whakapapa, then issues about whether both parents are Māori become irrelevant.

> *In terms of whakapapa, the basis of Māori culture, that child is Māori. It has a Māori heritage, and whether or not the young person knows it at that time, it develops. That child is a taonga of that iwi. And we have an obligation as an iwi to care for people as best we can.*

9.1 Summary

The philosophy of the CEO, and the philosophical base of the organisation are clearly grounded in the Māori world view described in the literature search. Whakapapa is the basis for whānau engaging with the Iwi Social Service, and children who whakapapa to this iwi are seen as belonging to the whānau, hapū and iwi. Whānau, hapū and iwi are responsible for the care of the children. A fundamental concern for Iwi Social Service providers is that these principles, which are referred to in the Children, Young Persons, and Their Families Act 1989, are incorporated into other Family Court law. Consistency at this level should be supported by trained professionals and these principles applied in an informed way.

10 Interview with a Māori Social Service Provider

The social service provider interviewed is an experienced provider who has a background in statutory social work. The social services agency he now works with provides a comprehensive range of services for whānau and is based in a large urban centre. The majority of the client base is Māori. The agency receives referrals from Child Youth & Family Services and is approved to provide programmes for both respondents and protected persons under the Domestic Violence Act 1995. In addition, the agency receives a number of self and community referrals. The agency has a strong kaupapa Māori base to service delivery and several highly-skilled Māori practitioners, including social workers and therapists, some of whom are bilingual. The programmes offered meet the requirements of Regulation 27 of the Domestic Violence (Programmes) Regulations 1996 for programmes:

> *Designed for Māori or that will be provided in circumstances where the persons attending the programme are primarily Māori.*

The interviewee conducts assessments and induction for men referred to the agency, including those by CYFS and those referred to the DVA respondents programme.[162] A primary issue of concern for many of the men is the issue of access.

> *What I find with a lot of them is they don't understand what they have been given. They know they have abused their partner and they have this protection order out against them and a lot of them just think – oh I can't have contact with her. Some of the guys say – how come it covers the children? I have only done that to my partner. They can't understand why it protects the children too.*

A key part of working effectively with those men who are respondents to protection orders is providing them with good information about the relationship between the order and the possible impact of this on their access and custody. Few of the men they work with have good communication with counsel, and few understand the limitations imposed by supervised access requirements. In the experience of the interviewee, this often results in

> *a scenario where a respondent will go behind his partner's back to go to the kids. There is no communication, he will just turn up – just do it anyway.*

A primary motivation for many men to participate in and complete a DVA programme is the possibility of improving their access options. Under S16(5)(h) of the Guardianship Act, the Court shall regard '*any steps taken by the violent party to prevent further violence occurring*' when

[162] Under S32 of the Domestic Violence Act 1995 *On making a protection order, the Court must direct the respondent to attend a specified programme, unless the Court considers that there is a good reason for not making such a direction.*

considering matters of custody and access. Attendance at a stopping violence programme is frequently seen by the Court as an appropriate step towards preventing further violence occurring.[163]

The agency provides whānau with opportunities for whānau hui and reconciliation that focus on safety and managing long-term relationship issues. In their experience, ties of whakapapa and whanaungatanga mean that both biological parents and wider whānau place high importance on remaining in contact with tamariki-mokopuna, and there is often a need for facilitated hui and support to ensure that this occurs safely. The provider interviewed considered that there was a lack of recognition of these whānau dynamics in the current legislation.

10.1 Summary

The Māori service providers interviewed are working in very different contexts. The first interview is illustrative of the roles that an Iwi Social Service carries out and the importance of whakapapa as a principle that is applied in service delivery.

The second service provider works with respondents whose involvement with Family Court in relation to custody and access matters is frequently initiated by a protection order. The granting of a protection order means that the Family Court must be satisfied that children and young persons will be safe with the violent parent, and therefore the Court must consider issues of custody and access. Frequently this means that access is only allowed to occur under supervision. As indicated by the service provider, respondents often struggle to understand this, particularly if they have not been actively violent to their children.

[163] Under S16(5)(h) of the Guardianship Act, the Court shall regard '*any steps taken by the violent party to prevent further violence occurring*' when considering matters of custody and access.

11 Interviews with Applicants and Respondents

The interviews with applicants and respondents took place in two areas. One of these was an area with a high Māori population that encompassed a number of small towns and a large rural area (Area 1). The other was a large urban centre (Area 2). Different area types were chosen to provide a range of whānau and to reflect the diversity of Māori experience. The areas are not described any more specifically in order to protect the identity of participants. The interviews conducted for the Pilot Study are also included here.

11.1 Area 1/Applicant 1

Profile of Case

The grandmother of two mokopuna sought and was granted custody with the consent of her daughter and the natural father. She had become concerned about the level of care the first baby was receiving, and this initiated her interest in seeking custody.

> *When she first had him and her DPB came in … I was having him and getting his formula, his kākahu*[164] *.. not thinking I gave her a month to jack up her ideas or I would step in. I had the information, I had the knowledge to do that because I was working for a counselling agency and that was part of my job.*

She approached the father of the baby and suggested he and his whānau meet to discuss what position they would take.

> *I went to the parents and the Dad and I said – this is what I am going to do – and this is what J. has agreed to. Give me feedback. And they really had nothing to come back on, because I knew them.*

A primary concern for her was that both her daughter and the father of her mokopuna had drug and alcohol problems and gang involvement. She gained custody of the first child when he was approximately two years old, and applied for and was granted custody of the second child soon after his birth. The oldest child is now attending school, and the second child is three and attending kōhanga.

[164] Kākahu – clothing.

Involvement with Court Services and Professionals

As a counsellor, the applicant was aware that she would need the services of a lawyer.

> *I looked around – I wanted a Māori, and then thought – no, it's not the Māori I want, it's the legality, the legal part is what I wanted and the closest to work – and she was lovely.*

Both the applicant and her daughter got on well with the lawyer, although she advised her daughter to get her own lawyer. The applicant found counsel helpful in explaining the Legal Aid process and her financial options. Having given up her part-time work to look after the children she experienced considerable financial pressure during the period when she was caring for the children, but had not yet been granted custody.[165]

When the applicant made her initial approach to seek custody, she and her daughter attended Family Court-funded counselling. They saw the same counsellor, but in separate sessions over a period of three months. The applicant stipulated this as a deadline, because she did not want things to drag out. The counsellor was Māori, and the applicant believed this was helpful – *it made it easier because we cut a lot of things out and didn't have to spill everything.* The applicant was satisfied with the counselling process, and engaged in it because she wanted her daughter to have a full understanding of what was happening and why.

Court Procedures and Setting

The application for custody was with the consent of the natural parents, so matters were dealt with in court by counsel. The applicant commented that she knew everything was all right, but that she would still like to have seen the judge. She felt it was somewhat cold simply to get a letter through the mail.

Whānau Support

When asked about wider whānau support, the applicant replied:

> *I didn't feel there was a need to call them in. I talked to my whānau about it and they said why didn't I do it before... They supported me and everything ... I had support like my colleagues, and I had the information …*

The applicant was the oldest of her siblings, fluent in te reo, and regarded as a source of advice and support by other whānau members. She also commented about the level of support that she believed she received from her kaumātua.

> *Physically I wasn't looking for their presence, but spiritually I knew.*

[165] Several participants commented that the cost of supporting and caring for children before they had custody was problematic and stressful, and that this rather than court costs was their main concern.

Applicant's Evaluation of Her Experience

The applicant was very satisfied with the outcome of her experience, and regularly gives support to other whānau, especially grandparents seeking custody of mokopuna. She believes that her position as a counsellor provided her with information and confidence to deal with the system in a way that not all whānau can. For those whānau where situations are more difficult to resolve, she is a firm believer in whānau hui, where possible marae-based, to talk things through before going to Court. She is also an advocate of speedy resolution, and consistency in the professionals working with the whānau.

11.2 Area 1/Applicant 2

Profile of Case

The applicant is the whāngai mother of two sons, now in their early teens. At the time of the application for custody they were nine years old. The applicant is Māori and her ex-partner is non-Māori. They live within her iwi boundaries, and her ex-partner approached the applicant's mother[166] to seek her support for them having the babies, while both natural mothers were pregnant. One mother was her first cousin, the other was her sister.

> *It was when they had their last lot of babies, and they said the next one was for me. I said yes – both of them, and then they both had their babies, one in June, and one in August. A couple of months before they said to – hey A. asked for these babies …*

The whāngai arrangement was never legally formalised. When the applicant's relationship with her husband ended and she wished to seek custody, she therefore had to work with two separate sets of natural parents. Both sets of natural parents were legally married and residing together at the time the babies were born.

> *So when I applied for custody I had to apply for it against my tāne[167] as well as the birth parents. And that's what was tough, because I had to go to my cousin's and my sister's whānau and talk to them about what was happening.*

The applicant was eventually granted custody of both boys after a Court decision.

Involvement with Court Services and Professionals

Although the applicant wanted a Māori woman lawyer, she was unable to find one in her area, and ended up with a Pākehā male lawyer who she described as 'really good'. It took her a long time to come to terms with the fact that she would have to work with him.

[166] See discussion in Literature Review regarding whāngai, and the involvement of senior whānau members in decision making.

[167] Tāne - partner/husband.

> *It took me a long time to think – oh gee – isn't there anyone else? But I knew I had to do it there and then or I was going to lose them and the moment, and probably not end up going where I needed to go.*

She and her ex-partner were also referred to Family Court counselling. She does not think her ex-partner attended the counselling.

> *I went once I think, and even that I found interesting because they referred me to one of the court counsellors and that was a Pākehā woman – they had no one else. She had no idea*[168] *and then I sort of said – you're wasting my time, and she agreed.*

The applicant discussed this concern with the local Family Court Co-ordinator who agreed that there was a need to have Māori court counsellors. The applicant is in a professional occupational group, and considered that because of this she was concerned that other Māori might end up in the situation of struggling with a non-Māori counsellor and believing that they were the ones at fault.

> *I could probably stand up to some of the dumb processes, that's why I kept going.*

Court Procedures and Setting

The applicant was accompanied to Court by a number of whānau members including her mother and several prominent kuia. She felt this created an atmosphere of manaaki for her.

> *It was not an easy time … the actual court hearing was about 5-6 months later and I was still very emotionally tender – and you hear the recorder reading and all that information coming through the lawyers. I did say to my whānau I don't know whether you can come in.*[169] *When the judge was speaking with me, I didn't look around thinking I was really mokemoke.*[170] *I think I could stand up to more than any of my other whānau. They would probably crawl out at the first post – and I am not surprised that they would.*

Whānau Support

The applicant required considerable whānau support and co-operation in order to resolve the issues regarding the status of the two sets of natural parents. Raising the matter of the boys' whāngai status so long after the boys had been given into her care was difficult for her. When they realised there were issues of violence involved:

> *They took a very hard line with my tāne and they were really happy that I was going for custody. I needed my whānau supporting the kaupapa. I don't think they would have contemplated opposing.*

[168] The applicant found herself trying to explain what a whāngai relationship was to the counsellor.
[169] Only the parties were allowed in.
[170] Mokemoke – lonely.

As already described, the applicant had whānau support in attending Court. She and her whānau are satisfied with the outcome, and the respondent continues to have access visits with the boys in the town she and the boys live in. The applicant was unwilling for other whānau members to be involved in the research process, as she believed that things should now be left alone.

11.3 Area 1/Applicant 3

The applicant applied for custody of her baby (now two years old) while her ex-partner was in prison. She had two teenage children when she became pregnant while in a casual relationship with someone much younger. There were issues of violence and the baby's father had threatened to take the child out of the country. They were not living together at the time of the birth of the baby. She was unsure about his rights, but he did not contest custody in Court, despite making a number of threats to do so.

> *Well, there was a lot of pressure. They really wanted to... She is the only grand-daughter and great grandchild, and the only great-great grandchild, so that's the reason. But the great grandmother is getting quite elderly now and she couldn't cope with a little baby, and I spoke about the mother …*[171]

The applicant considered that if the paternal grandmother had been a more stable person that shared custody could have been an option. The custody application was granted with counsel only appearing in Court.

Involvement with Court Services and Professionals

The applicant used a lawyer that she had used some time before on several occasions for criminal matters. She trusted this lawyer and found her easy to talk to. She also believed that this lawyer could see the progress she had made in her own life to:

> *…tidy up my act. When you have children you have to think of them, their best interest and stability and security...*

The applicant was referred to a Family Court counsellor, but did not want to engage unless she had to do so. It does not appear that this was an ongoing issue for the Court.

Whānau Support

The applicant has lived in the area most of her life. She was open about having some level of estrangement from her whānau due to whānau difficulties, her own previous gang involvement and imprisonment. She believed, as a mature adult who had brought a child into the world, that she was responsible for sorting things out without active whānau support.

[171] The paternal grandmother is living a transient lifestyle and was described as unstable.

> *My mum is elderly and she's had a major stroke. My mum and dad are not together and I didn't get any support from anybody. Not that I didn't want it you know. I would have liked to talk to somebody about it, but because I had gone through a lot of things in my life it was a matter of being strong and dealing with it the best way you know how.*

Applicant's Evaluation of Her Experience

The positive relationship with her lawyer was key to the applicant's satisfaction with both the process and the outcome. She considered that she was kept well informed, and that counsel did not allow things to drag on. She was also satisfied that Legal Aid meant that there was no barrier to her doing what she wanted to do. She was also very positive about the meaning of 'the piece of paper'. When her ex-partner was released from prison he became threatening again, and went to kōhanga reo and threatened the teachers. The applicant has taken the letter showing she has custody to the kōhanga reo and it is now on the wall, so only the applicant can pick up the baby.[172]

> *You basically know what you want with your child – what is best for the child, so it is just a matter of striving for it, and that piece of paper means a lot, it does really mean a lot.*

11.4 Area 1/Applicant 4

Profile of the Case

The child in this case was six years old when she and several younger siblings were removed from her mother and stepfather as a result of a notification to Child Youth & Family Services. The child had suffered serious sexual and physical abuse, was malnourished and had not been enrolled at school. An aunt in Auckland contacted the child's maternal uncle and his wife back in the mother's home of origin, and asked them to take the child. They applied for temporary custody, and eventually full custody was sought and granted. Two other siblings have been placed in the custody of other whānau members in the same small rural community.

> *I felt so worried. If my husband's mother had been alive she would have taken the lot of them, she's that kind of person, We had plans to go and see my son in *. Twelve o'clock at night you know she arrived on our doorstep. Like a whole new baby, life starting over again. She had no clothes, just the things she was wearing. We made the choice to take her instead of going to see our boy. That's his[173] own flesh and blood, his sister's child.*

[172] Her ex-partner had been imprisoned again at the time of interview for a range of offences including assault on the applicant.

[173] Her husband's.

The maternal uncle and aunt received the letter inviting them to take part in the research, and they agreed that the aunt would travel to the nearest urban centre to meet with the researcher. They were very concerned about issues of confidentiality, and did not want any other whānau members involved.[174]

Involvement with Court Services and Professionals

The applicants had considerable involvement with state agencies and professionals. In the course of the discussion the applicant was not always clear which services were initiated directly as a result of the custody application and which were as a result of the child's ongoing involvement with Child Youth & Family Services.

This involvement over a period of time included counsel, the sexual abuse investigative team, a psychologist, CYFS social workers and WINZ. Health and education professionals were also involved in the child's care. Involvement with this number of services was stressful and difficult for the applicants to manage. They lived some distance from the nearest town where these services were provided, and had to make frequent trips to town. The child had disturbed and irregular sleep patterns, was bed-wetting, and had severe swings in mood. The applicants found this extremely stressful. They were frustrated by promises of help that were not always forthcoming.

> *We've had a lot of battles – it's been an uphill battle the last two years. I felt my husband and I – we should have had support from CYPS and people around. They talk but no action. They put all the details down about what's happened and then after that they just go – no one comes back.*

The applicants found counsel (a Pākehā woman) helpful, but were somewhat confused by the range of written communication they received from counsel and Child Youth & Family Services, particularly when it was in writing, and often appeared to be overlapping or out of sequence.

The psychologist was the professional that the applicants found most useful in terms of their own needs in working with the child. They felt he was one of the few people who acknowledged how difficult it was for them to care for a child with extremely challenging behaviour patterns, and who was able to give them clear information.

Court Procedures and Setting

The applicants appeared in court for the temporary custody hearing, and then six months later for the full custody hearing. The applicants were happy that the lawyer had explained everything to them fully, and felt that the judge was also sympathetic. They felt that court staff was helpful to them. They were particularly happy that the actual court process started on time and took only about twenty minutes. They had been through several situations

---

[174] The child's natural father is from the same hapū as the mother, and resides in the same rural community, as do his parents. He is married with children, and neither his wife nor parents know that he is the father.

where appointment times with professionals had been changed with little notice, or where there had been delays.

Whānau Support

Other whānau members are caring for siblings of the child in the same community, and they have been a source of support for each other. The applicants' adult children have also been a source of some support to their parents in terms of practical things like transport. The day-to-day care of the child, and management of the relationships with government agencies and professionals largely fell to the interviewee, as she expressed:

> *I have to do all the talking, it's the woman who does the work. It's mostly the woman, not the husband – mainly because they won't talk and don't know how to communicate with high up people. I was kind of like the meat in the sandwich.*

Applicant's Evaluation of Her Experience

The applicant was clear that she would not go through this again. Child Youth & Family Services have asked the applicants to apply for custody of another baby from the same whānau, but they have declined to do so. She was bitter about the lack of financial and practical support, and believed that no agency was prepared to take the responsibility of ensuring that they were not under financial pressure, especially in the period before the child was in their custody. Transport costs and clothing costs were not adequately covered. She also did not believe that suitable arrangements were made to give them respite time, and that this had taken a serious toll on whānau relationships. She discussed at some length the impact that taking the child had had on her own aspirations for further study or work and a missed opportunity to travel overseas to visit her son. The applicant believed that they had done the right thing, and that it was their obligation to ensure that children stayed within the whānau.

> *We want her to grow up in a safe environment with a happy family, with whānau all around and the joy that most people have in life. To build it up over the years so that when she gets older and to teenage years she can look back on that and not just what happened to her when she was little.*

11.5 Area 1/Applicant 5

Profile of the Case

The grandmother in this case applied for and was eventually granted custody of three of her mokopuna. At the time of the initial application, the three mokopuna were under three years old. She described the events leading up to this as follows:

> *How it started was my three moko were in a very dysfunctional and abusive environment, so my son took the three of them and we brought the whānau together and hui at my sister's place, but in the end we couldn't come to any resolution and my son said stuff them all, came back here with his children, and then the police turned up about a month later and uplifted them at nine o'clock at night. It was my boy mokopuna – he just screamed and screamed.*

> *When I got there, my son was a mess. Then the fight started, and I rung CYFS to get advice. What can I do? I knew the mokopuna had gone back into that same abusive situation, gangs and prostitution. They said it hadn't been reported, why don't you go for custody?*

The applicant did not believe her son could care for the mokopuna adequately due to his own drug abuse issues, and thought that as the grandmother she would have some rights. She was dismayed by the legal barriers she faced and the lack of resources available to her. The process of gaining custody took 18 months and in this period the mokopuna was seriously physically and sexually abused. Members of both the applicant's whānau and of her daughter-in-law's whānau approached her about this, but they were unwilling to approach police or CYFS. The daughter-in-law's whānau were feared in their community due to gang status and ran both drug dealing and prostitution. An aunt eventually broke the silence and reported the prolonged beating of one of the children. Subsequent investigation showed that all three children had been beaten, and that the girl had suffered serious and repeated sexual abuse.[175]

The grandmother was frustrated and frightened by the slowness of CYFS and court processes. She eventually was able to negotiate with her daughter-in-law with the support of a Māori social service provider, and her daughter-in-law gave her consent for custody to go to the applicant.

Involvement with Court Services and Professionals

The applicant was unhappy with the procedural and bureaucratic delays with CYFS. She was also concerned that Counsel for the Child was inappropriate and naïve.

> *I said – how are you going to assess my mokopuna when they can't talk, they look well dressed, they look healthy. He said 'from my life experience'. I said – come off it! I got a report back saying they were fine and dandy. Six months down the track he rings me – come and get your grandchildren.*[176]

Her own lawyer initially believed she had little chance of getting the children, and she also found this distressing. She was particularly upset by the lack of support services offered to her after the children were placed in her care and believes that she was inadequately supported and resourced.

> *I got the children – and to be honest with you I started hitting them because I couldn't understand their bizarre behaviour. Here's this little girl sexually manipulating the others – and I've got other mokopuna. I was brought up in an authoritative way and that's how I was treated. And not once did CYFS or the courts do anything for me.*

The applicant initiated therapy and counselling for both the children and herself, and found this helpful. She is still grief stricken at the level of abuse the children suffered during the period of her seeking custody, and that she was powerless to prevent it happening.

---

[175] This abuse included being used in prostitution.
[176] This occurred after the aunt made a CYFS notification.

Court Procedures and Setting

The applicant felt that the Family Court environment was an uncomfortable one for Māori, and felt stressed by her experience.

> *In the Family Court I wasn't allowed to have any whānau with me – and that was like – it was terrible. I had my mum and she had to sit outside. She had come to support me and she wasn't allowed in – so that has to change. It was the first time I had been in court, even though I was fighting for my mokopuna, I would have been really happy to have my Mum sitting in court. So the court process wasn't very good.*

Her confidence developed in her struggle to gain and keep the children, and she described her relationship with the judge as 'really good by the end'. She was pleased that she had the same judge throughout the process, but felt that even he did not understand the extent of what she was dealing with.

> *I gave the baby to my brother, and the judge said – you haven't got all the children with you? And I said – no I haven't your Honour. He said – you know I will have to take these children off you, you realise you have to keep these three children with you. I said I would not give my mokopuna to my brother if I knew he wouldn't look after him – he is going to a safe environment, and why do I have to justify that to you? It is time our culture was recognised and accepted and our whanaungatanga.*
>
> *I said – you're having me on your Honour, you see if you can cope with three children under three that have been badly sexually abused and neglected. I said – all right – you have them your Honour. He looked over at me and said – you are the most bolshie grandmother I have ever met.*

Whānau Support

The applicant was primarily supported by her mother, who travelled to each Court appearance and meeting with CYFS with her. Her mother was adamant that the mokopuna should stay with the whānau. Her brother, who lives a block away, has also been a source of support, and continues to care for the youngest child. In order to manage the two older children, the applicant moved out the other mokopuna she had living with her to whānau members. The applicant considered that the profound nature of the abuse the children had suffered caused some whānau members to distance themselves as they found the children's behaviour frightening, and were concerned for their own children. The applicant was very positive about the support she received from Māori service providers, particularly in negotiating with her daughter-in-law. Her mother passed away a few months after the children were placed in her care.

Applicant's Evaluation of Her Experience

The applicant described the system she dealt with as 'culturally inappropriate' but believes that she is able to use what she learned through her experience to help others. She was concerned at the misinformation and communication delays that resulted in her mokopuna suffering further abuse. She believed that part of the delay was caused by a lack of

recognition in law of the role of the wider whānau and grandparents in particular, and that this acted as a barrier to her efforts. She also felt that the role of Counsel for Child was crucial and that counsel needed to have experience of working and living with whānau Māori so they could focus on '*more important things than how many bedrooms and stuff like that*'.

11.6 Area 1/Applicant 6

Profile of the Case

This interviewee rang the researchers in response to the pānui on iwi radio. She wanted to talk about her experience of the Guardianship Act in relation to her sister's three children. She was saddened to find out that guardianship of the children had gone to another whānau member without consultation with the rest of the whānau. At a Family Group conference, the interviewee and her father agreed that the children could be cared for by another whānau member, as she was unable to take them immediately herself. Her sister had ongoing drug, alcohol and mental health problems, and the children had been placed under the care of the Director-General. She believed that her inability to make an immediate response to CYFS regarding taking the children meant that she was closed out from then on.

She was unaware, until after the application had been made for guardianship, that she and the rest of the whānau could not be present in court to help decide what would be best for the children. She felt angry that the focus of the Guardianship Act seemed to be that someone had to 'own' the children. She is currently caring for two children who are part of her wider whānau, and considers there is no reason to formalise these care arrangements.

> *To me it was really selfish of them to do that because they cut all of us out. They know the whakapapa, they know their links, but they don't need to go and get guardianship, and I was so bummed out. But it was the *** social workers that told them to do it. The social worker in this just went over me; she didn't bother to contact any of our family. I have my own whakaaro, and my whānau say – that is not the Māori way. Whoever is bringing up the kids – if they can do the job well, let them, but not by any act.*

As a result of the guardianship going to these particular whānau members, the interviewee believes that the children are being denied their right to know her and other whānau members with close whakapapa ties.

> *They are my blood. And they will grow up thinking – oh you should have come to see me. You never bothered with me. If I want to have visits and stuff, they can just say no. Those kids don't even really know me. And that is the hurtful aspect of it, because it doesn't recognise the whakapapa and they should know us.*

The interviewee sought some legal advice, but was advised that there was no basis for her to challenge the guardianship, or to apply for access visits. She wanted to be interviewed so she could communicate her sadness about the lack of recognition of Māori perspectives in the current law.

11.7 Area 1/Respondent 1

Profile of the Case

The respondent in this case never engaged with court services and did not make any Court appearances. The profile of this case is structured to reflect this.

The respondent had three children from his first marriage. Two of the children (girls aged 10 and twelve) lived with the respondent and his new partner from the ages of four and two. The other child lived with his ex-wife. Although living arrangements had never been formalised through court proceedings, the respondent believed that the girls were in his custody.

> *We had all sorts of different arrangements for our children. Like, we gave one back for a period of time to my ex-wife. And she was happy with that eventually, and then after a while she wanted the other girl back and that's when I started getting a bit hoha. Right through I thought I had custody of the two girls. I was speaking to my ex-wife off and on, and then I got an official letter saying what I had to do to help that process along, the actual custody.*

The respondent asked his children what they wanted to happen, and they wanted to live with their mother at that time. He did not want to go against their wishes, but was unsure about the implications of this. Someone suggested that he see a lawyer to discuss the situation.

> *So I did. I went into the lawyer next to the courthouse. I just walked into an office and spoke to a secretary and told her what I was there about, and she said I would have to make an appointment and that. I thought, oh well, there's money involved. And because I had decided not to contest it, I thought maybe I didn't really need a lawyer's involvement.*

The respondent signed the papers sent to him and agreed to his ex-wife having custody, on the understanding that he would have 'reasonable access'.

> *Reasonable? It sounded to me like it was in my ex-wife's hands when I was allowed to see the kids. And that was who decides what reasonable is. Obviously not me. I can't say – oh I think my kids should come to me, because they were not in my custody anymore. So that left me up in the air a bit.*

Despite considerable efforts to keep contact with the girls and arrange this in a co-ordinated way, the respondent was frustrated by lack of communication from his ex-wife, and the frequent changes of address she made. He was also distressed when he found out that the mother had given custody[177] of the girls to her grandmother without consulting him.

[177] It was unclear from the interview whether this was a formal arrangement, or simply that she gave the girls to her grandmother to care for.

Respondent's Evaluation of His Experience

The respondent described his experiences to the researcher as 'a real nightmare'. He and his partner felt that the process favoured the applicant and her wishes. Anxious to avoid any kind of confrontational process that might upset the children, they felt that there was no process for them to negotiate or reach a shared decision about access arrangements. It seemed to them that 'one person is a villain and the other a good person' in the eyes of the Court. The communication they received by letter from the court did not offer any avenue for them to seek advice or suggest what Court services, if any, were available to them. They also felt that the Court should have taken some responsibility for monitoring or checking whether or not access was in fact occurring. While it is likely that having his own lawyer would have resolved some of these matters for the respondent, it was clear that he believed that engaging a lawyer would mean an expensive and confrontational process.

His primary support person was his partner, and he did not wish to discuss other whānau involvement.

11.8 Area 1/Male Applicant – Counter-application made by Mother

Profile of the Case

This case involved four children who were aged between 8 and 16 at the time the custody matters went before the Court. The family was living on a farm in a remote rural location when the mother left the father, and he cared for the children alone for the next twelve months. The father made the initial application for custody, as he was concerned about the lifestyle and living arrangements of the mother. She immediately filed a counter-application. From the start, the father's primary concern was to keep the children together and in a stable environment. A mediation conference was held, but the parties were unable to reach agreement. Both parties had legal representation, and two psychologist's reports were completed.

Access arrangements agreed to at the time of mediation and at a Family Group conference were not adhered to, with the result that the father spent considerable time and money on travel. At the time when the Court made the final custody decision, the oldest child was over 16. She was not included in the judgement, and she and the father felt that her interests and opinions were given no consideration. The final Court decision was that the father was granted custody of the two boys, and the mother was granted custody of the youngest child, a girl. Subsequently, the girl has moved back in with her father, as she was unable to get on with the mother's new partner, and because there were domestic violence issues. This arrangement has not been contested by the mother or formalised in Court.

Involvement with Court Services and Professionals

The father did not feel satisfied that any of the professionals involved in the case adequately understood his desire to keep all of the children together. He was not confident that Counsel for the Child understood the importance of this to the children.

No, I got the impression that the legal eagles part of it all … all they were there for was to grab the dough. There was no compassion. I got the impression they were there to grab the dough and run.

He found his experiences with the psychologist confusing and unfriendly.

She was a child psychologist. I didn't even know her name. When she turned up to do the first one, I thought 'there's a bit of a brick wall there – you haven't got a shit show'. They initially did a psychologist report and by the time it got to the end, the judge ordered the second report to see if anything had changed. The first report was that (mother) had to address a lot of issues. The kids were OK with me and things on our side were fine – and nothing had changed. When it came to the second report the kids were doing well at school and such like. But in that one, you could have switched the names and changed the roles. So as I say, I don't know when it came to the second report whether I didn't put enough sugar in her coffee. It was a complete reversal of the first one.

Court Procedures and Setting

The father had few comments to make about Court procedures or setting. His focus was on what he believed was a bad outcome for the children being split up. He was concerned, however, that the judge appeared to offer no explanation or rationale for excluding the older daughter from the judgement, or for splitting up the children. He continues to puzzle over this. He was also frustrated by what he perceived as the court's failure to ensure that access arrangements were adhered to.

Next time it came up before the judge they would just say – oh well, these haven't worked out. And she hadn't bloody tried or anything – well I don't know if she had or she was just being pigheaded – they said turn right and she would turn left sort of thing. There was no directive from the court to say – look, you've got to stick to this.

He found this infuriating, as in order to manage access arrangements and transporting his children to school and extra curricular activities, he ended up giving up his job, because the farm was too remote. The only positive side of this was that it meant he then qualified for legal aid, after having spent five thousand dollars to initiate proceedings.

Whānau Support

In this case, the father was non-Māori and the mother was Māori. Due to his farm work, they were living some distance from either of their own families. His primary source of support was his employer and his wife, and his new partner.

Evaluation of Experience

There was nothing anywhere along the way in my particular case that made anything bloody easy. There was no recommendation or anything really to assist the kids getting through the turmoil.

The father believed that a lot of time and money was spent on achieving an outcome that did not adequately reflect the needs of the children. He is content that all of the children ended up together and with him, as this is the outcome he sought from the beginning.

11.9 Area 1/Respondent 3

Profile of the Case

This case involves a couple from a remote rural location who gave their youngest son to a cousin and his wife as a whāngai.

> *We used to go eeling with them, and we listened to them for maybe two years talking about somebody offering them a baby … and I thought he was good ... we made the decision before she dropped the baby and they took the baby home from the annex.*

They were happy that they would know where their son was, and comfortable that he would know who they were.

> *To me that sort of stuff goes a long way. I want that child when he grows up to be able to talk to me if he is in trouble and I am able to sort it out. I mean, you listen to a lot of stories about suicide, to me that really awful stuff.*

When the child was about six years old, the whāngai parents separated. Relationships between the couples had also become strained due to the drinking and frequent absences of the whāngai father. The birth parents received a registered letter from the Court. The whāngai parents were applying for guardianship of the child. They were surprised and confused by this, and attended Court to find out what was going on. They had little understanding of the papers they received.

The judge told them they had the right to representation and stood the matter down to allow them time to consider what they wanted to do. The birth parents did not get legal representation because they were concerned about costs. The primary issue for them was that they should be able to continue to have contact with the child.

The birth parents were visited by 'someone from the Court',[178] but they were unclear about the purpose of the visit. All they knew was that the report would go to the Court. They did not receive a copy of the report.

> *I didn't know who he was until we got talking, just asking me a few questions to do with the couple, like was I happy with the couple – and I thought to myself – oh yeah – I didn't really say anything about it, so it was like the system was all in place for them, but there was nothing for us, like the other party to go and discuss things.*

[178] It seems likely from the description given that the person visiting was a CYFS social worker.

When the matter went back to Court the birth parents expressed their desire to maintain contact with the child. The whāngai parents were granted guardianship, the birth parents were made additional guardians, and guaranteed 'reasonable access'. It was the judge who suggested they should be additional guardians. The birth parents are not satisfied with the level of access they have, and felt the Court should have taken more responsibility for helping them negotiate how the access arrangements could be planned and carried out. They are also bitter about the fact that the whāngai parents have separated, and that they are now required, as additional guardians, to pay child support.

> *There is a lot wrong – we are the persons that gave him to her and we are still getting penalised and like to the max. These are all the issues inside of that piece of paper.*

In their view they are being both financially penalised and made to look as though they have abandoned their child.

Involvement with Court Services and Professionals

This couple had limited involvement with court services and professionals, and little understanding of court processes. It is likely that they could have qualified for legal aid, but were not clear about how to go about this. Due to their remote location, any phone calls to counsel or to courts are toll calls, and visits to town are costly.

They believed that someone should have come to see them early on before they received the registered letter to explain what was happening and what it meant. They then would have been able to make an informed choice about whether or not they needed counsel. Although they felt the judge was being helpful in recognising their role as natural parents, they do not think it was his intention that they become financially responsible for the child.

A key issue for them was the lack of a process for negotiating and agreeing on 'reasonable access'.

> *They should have included somewhere about how you work out access. Without the judge as far as I can see, just people that have authority, so that while it is discussed, a system can be worked out.*

11.10 Area 2/Applicant 1

Profile of the Case

The applicant in this case was contacted by CYFS and invited to attend a Family Group Conference for her nephew. The nephew had been seriously physically abused by his brother, and his mother was drug-dependent and living a transient lifestyle. The father of this tamaiti has never been named. The tamaiti was twelve years old at the time the custody application was made. After the Family Group Conference, a whānau hui was held to determine who would be the best person to care for the tamaiti. The whānau supported the applicant's wish to take care of him, based on her senior role in the whānau, and her ability to provide a safe home for him. Counsel for the Child had been appointed and he spent some

time with both the applicant and her sister (the mother), explaining the processes involved in her applying for custody. During this period, the tamaiti was with CYFS caregivers.

Eventually the whānau, CYFS and Counsel for the Child negotiated a plan for moving the tamaiti into his aunt's care, and for his mother to have supervised access visits. The plan and the custody arrangements were agreed to by the court.

Involvement with Court Services and Professionals

The applicant was very satisfied with the level of support received from Counsel for the Child. She considered that he played a key role in assuring the tamaiti that everyone wanted to keep him safe, and in communicating with her.

> *I felt quite comfortable knowing he had a lot of influence in the decision making. He gave me the sense of security or that comfort. He seemed to be there to protect (the tamaiti). And I think to that he sees (counsel) as a buddy. He feels he can trust his lawyer.*

The Court also recommended counselling for the tamaiti, and this was arranged by CYFS. The tamaiti is in a bilingual unit at school, and the applicant is happy that a bilingual counsellor with the same iwi affiliation is working with her and the tamaiti.

> *She is the right person. I thought I would keep him going, at first I wasn't sure. But putting boundaries and consistency in for him – it has been good with her.*

Court Procedures and Setting

> *There were so many people in there, although it was a closed court. When we went to court it was good. They were willing to pick us up. And when we got there it was the sort of greeting that made us feel comfortable. The lawyer had a talk to us again and let us know what the process was. They said the judge had read through everything and it was good. The whole thing was done quickly which I liked. I didn't want them to drag out too much in court.*

The applicant has been satisfied that at both the initial Court appearance and subsequent reviews of custody and access arrangements, the focus has been on the welfare of the tamaiti. She felt that she was offered good support from social workers and Counsel for the Child. She did not consider that in this case it was necessary for her to have other whānau present, as the Court procedures were formalising things the whānau had already agreed to.

Whānau Support

The applicant was happy that the whānau hui endorsed her as the best person to care for the tamaiti.

> *They all had their reasons why it's best for me to have my nephew. I think they made the right choice.*

The applicant's whānau live five miles away by car, but she has support from a sister who comes to the city to care for the tamaiti when she needs a break. She continues to have whānau support to care for the tamaiti.

11.11 Area 2/Applicant 2

Profile of the Case

This case involves an aunt who applied for custody and guardianship of her three nieces after both parents died. A key issue in this case was that the parents came from different iwi, and the aunt is very conscious of her responsibility to ensure that the girls maintain contact with both iwi. The aunt filed the custody application at her sister's request; the youngest of the children was in CYFS custody.

The aunt had to get her own lawyer and she found it difficult to communicate with a non-Māori lawyer about issues to do with whakapapa and wider whānau involvement. The father of the girls was from the area they lived in; her own iwi and that of the mother is several hours away by car.

> *I couldn't explain it to a Pākehā because it is hard for them ... all that turmoil. There were some of our relations from here, and then on the girls' side, some of them are pretty high up too. We have contact with our side of the whānau too. Holidays and things like that I take them to our side. So they get a balance of both – both iwi.*

The aunt was relieved that Counsel for the Child was Māori, and visited her and the girls in their home environment. She felt that she was able to 'have a kōrero' with him, and that he was respectful of her efforts to keep the children involved in kōhanga and the Māori unit at their local school. He also understood the key support role that her local urban marae played for her. She attributes the overall smoothness of her custody application being processed to his involvement, and felt that he was helpful in suggesting support services for the girls.

She did have some initial difficulties with whānau friends from the community who had been involved in caring for the girls prior to her being granted custody, and needed support to understand her rights and responsibilities and communicate these.

> *They used to set the girls off – ring from the house and say the girls want to stay – and I said you have to ask permission first – bring them home right now. I had things like that I had to understand.*

Again Counsel for the Child has had a key role in supporting her efforts to establish stability and routines for the children.

Involvement with Court Procedures and Services

The custody application went through without the aunt having to appear in Court. She believes that Counsel for the Child achieved this on her behalf, and also acknowledged that CYFS did not oppose her having custody. Apart from counsel and a visit from a CYFS social worker, she was not involved with court services or professionals.

The local school and marae assisted her in finding a Māori counsellor who could work with the oldest girl in particular, who found the double bereavement very difficult to cope with. This girl developed health and behavioural problems and is continuing to receive counselling.

Whānau Support

The aunt was supported by her own children and whānau in her custody application. She believes that the whānau of the father did not oppose the application because she made contact with them to discuss custody. Her willingness to make sure 'they know all their whakapapa', and maintain whānau ties with both iwi was appreciated, as was her involvement with kōhanga and the local marae. She continues to be supported by both whānau members and the whanaungatanga expressed by the local Māori community.

11.12 Area 2/Applicant 3

Profile of the Case

Applicant 3 and her daughter recently applied for, and were granted, joint custody of a seven month old baby. The applicant is in her mid-sixties and has spent, at her estimation, 'about 20 years' caring for children placed in her care by the courts and CYFS. She has primarily cared for tamariki that she or her husband have a whakapapa connection to.

> *When you really total it up, the ones that came through social welfare and the police were mostly my own whānau and extended whānau. I think my aroha goes out for kids that are hurt and it never bothered me at all.*

Applicant 3 lives in a suburb with a high Māori population. She has a whakapapa connection with the father of the baby that she has custody of, and described the situation that led to the custody application.

> *So this one comes from the Black Power and he is my moko – Oh, you want to smack one another up, go and do it somewhere else. They are not going to fight up and down the road for the sake of a baby… she had the baby and a hammer in one hand – and he had the car and he reversed back – and I thought – oh – he is going to ram her. I ran over and grabbed the baby. The next time she had a butcher knife – the police came up and said we will help you out with this one. I am the only one of the (whānau name) left, so she (baby) comes to me.*

Although she is the primary caregiver, the applicant wanted her daughter to share custody because she wanted someone younger that she trusted, who could also care for the baby when she needed a break.[179] She has worked with her daughter and sister to ensure they understand the legal issues relating to custody and access. Currently the natural parents are only allowed access to the baby under her supervision and in her home.

Applicant 3 described other situations in her street where children were left home alone, neglected or abused. Where there is an immediate safety issue, she rings the local police who know her well. Wherever possible, she contacts extended whānau to provide support for parents in this kind of situation, and draws on her training as a counsellor and in sexual abuse intervention. The applicant believes this training is essential for looking after tamariki who may have been abused or traumatised. She has extensive community networks with local marae and churches. She believes the issues of whakapapa and identity are crucial, not only in determining custody and access issues.

> *Whakapapa is the main thing for me. That is one thing I have learned – they want to know who they are. One thing I never do is withhold it. Look at all the lost kids over here, lots.*[180] *And then when they get older, you have to know who you are joining with – you have to be careful whose whakapapa you are going into.*

She is particularly concerned that young people might form relationships with others when the whakapapa connection between them is too close, and that children could be born as a result. She also believes in the significance of understanding inter-iwi and hapū relationships.

Involvement with Court Services and Professionals

The applicant is well-known in her local court, and frequently sought out to help resolve disputes, or to explain procedure to whānau. She believes whānau need to be encouraged and supported to talk and hui together before matters reach the court stage. She is confident in dealing with the 'system'.

> *But with all of the cases I have done, I never had problems making sure that things get done and it never used to take me long. Sometimes they wait years! I say – no – you're getting paid – move it! Well I mean the Law Society pays most of them – but I don't have any difficulty, – not if you're good with the paper work.*

Although the applicant has worked with a number of Pākehā lawyers, she has a Māori lawyer that she has worked with many times, who she prefers to use where possible. She was able to show me two large boxes full of filed papers relating to custody and access cases she has been involved with, along with the photos of the tamariki.

[179] She is also conscious of her age and health, and wanted to provide continuity for baby.
[180] She was making reference to the number of young Māori in her own suburb and street.

Whānau Support

As already indicated, the applicant is directly supported by her daughter and sister in caring for tamariki. She maintains regular contact with her whānau network and travels to hui and tangihanga whenever she can:

> *I don't stay away very long because I've got all these mokos. I say to the kids – Nana is going to a tangi, I'll be back – I promise you I'll come back. I do travel a lot to other whānau, but when I do I don't take the kids unless it has to do with one of them. Over here (in her home) it has to be my daughter or my sister.*

Her husband is now deceased, but was very supportive of her over the years that they took in tamariki. She attributes her commitment to caring for tamariki to the teaching she received from her own parents – 'you must always look after your own' being a key message she received. As the oldest child in her own family she had particular responsibility for caring for younger whānau members. She believes she also benefited from the teaching she received about both the significance of whakapapa, and how to work with and establish whakapapa links.

11.13 Area 2/Applicant 4

Profile of the Case

Applicant 4 has a two year old son, and first made contact with counsel regarding her parental rights when she was seven months pregnant. She has had protracted involvement with the Family Court, and with Family Court services and professionals.

> *We were not married, we were not de facto, it was very early in the relationship – at first he agreed to try a relationship with me because of the child, then he changed his mind and returned to a former relationship. Despite this, he kept in touch with me and carried on a part relationship I suppose. Anyway, he called it off with me several times, then he threatened me — if you don't let me see my son I will take you to court. Then he made a decision to come and live with me when the baby was 4 months. It was an intolerable situation, and it lasted 5 weeks, then I ran away.*

Applicant 4 and her partner attended Family Court counselling, but she became increasingly concerned about her safety and the safety of her son, calling the police on several occasions.

> *He was physically violent, he was emotionally and verbally abusive, but the worst of it was when I decided not to react, when he didn't get his own way, he would be off with the boy – in the car – no car seat.*

Applicant 4 took out a protection order, and they both attended programmes provided under the Domestic Violence Act 1995. This was helpful for a time, then her partner's behaviour became abusive again, so she terminated the relationship, and sought legal advice regarding custody and access.

The applicant and respondent are from different iwi, and her whānau believed strongly that the child's father and his whānau should have contact with the mokopuna. The applicant believes that her ex-partner manipulated this, and that her father in particular lacked an understanding of the abusive nature of the relationship. It was her father and ex-partner who engaged in much of the early negotiation regarding access arrangements. Her father's home was the venue for picking up and dropping off the baby for access visits.

> *My father also didn't understand the process, didn't understand the issues. He said he was doing the best thing for the child, he thought he was doing the best thing by being very co-operative and open-minded. But he also made arrangements without consulting me.*

The applicant was concerned by the nature of these arrangements, and by the fact that she did not have an address for her ex-partner. Access arrangements continued to be problematic, and after a judicial conference, the judge suggested mediation. Mediation was followed by a hearing, at which time Counsel for the Child was appointed.

Her ex-partner married when the baby was about a year old, and his new wife has been involved in court proceedings since then. Interaction with the court has been protracted, and the applicant has not been satisfied with the process. She continues to be fearful about the long-term emotional effects of the relationship between her son and his father. There are still some outstanding issues regarding overnight access.

Involvement with Court Services and Professionals

Applicant 4 has found her own lawyer supportive throughout the process. She felt that at the early stages of engaging with the Family Court she did not receive clear enough advice about the implications of decisions she made, or an understanding of how complex the processes would be. She was very positive about the women's support programme she was able to access through Domestic Violence Act provisions and found this helpful and informative.

Applicant 4 and the father of her child are both Māori. She felt that court staff and professionals, including the judge, made assumptions about her and her ethnicity, based on her fair appearance. She believes that her need for whānau support was not recognised, and that her single status also contributed to this.

> *I was annoyed, frankly, that in both the judicial conference and the mediation hearing there had been no consultation about having anyone to support me, and (ex-partner) had been allowed to take his wife. I was also called into Counsel for the Child with her, and I was faced with having to meet her on my own.*

She was concerned that because a previous mediation conference ran over time, they were only left with twenty minutes. Although the judge apologised for this, it gave her a feeling of being rushed, and not able to fully explain her concerns about access arrangements. After the mediation conference, the applicant 'felt just a mess' and requested further counselling, but she had used up her entitlement. Her counsel helped her find a counsellor funded through other means.

> *It really shook me. It was the first time I had met her and seeing them together… and also I could see his line of attack. He was basically putting me up to be lying.*

She was dissatisfied that there appeared to be no avenue for information she put to Counsel for the Child about her ex-partner's police history and a protection order from a previous relationship could not be checked without the ex-partner's permission. She believed that this would have indicated a pattern of behaviour.

She was also unhappy that matters such as failure to release her ex-partner's address and breaches of Court-directed access arrangements on his part were treated as inconsequential by the Court.

Applicant 4 was satisfied with the legal aid support she received, and believed her counsel kept her fully informed about cost issues and options in relation to this and counselling options.

Whānau Support

Applicant 4 described her whānau relationships as strained during the period of her Court involvement. During this period she was also heavily engaged in Land Court matters on behalf of her whānau, and she found this very stressful. She also felt that few of her whānau could understand the abusive nature of the relationship, and that she was perceived as blocking her ex-partner from his 'natural right' to see his child.

Her ex-partner's whānau had observed his violent and abusive behaviour.

> *At his mother's tangi he went off at me in front of everybody, and they didn't take sides, but they didn't leave me alone. Some of the women sort of sidled alongside and I got the feeling this wasn't the first time.*

During this period, both her stepmother and her ex-partner's mother passed away, and the applicant found this very difficult to deal with. As already noted, she felt it was unfair that her ex-partner was able to bring his wife into court proceedings while she was alone.

Further Respondent Interviews

Two further respondent interviews were scheduled for Area 2. One of these was completed, but the custody and access issues were initiated in both instances due to protection orders being taken out. Neither respondent engaged with the Family Court over these issues, so these interviews have not been included.

12 Pilot Study Interviews

12.1 Pilot Study/Applicant 1

Profile of Case

Applicant 1 is Māori, her mother is non-Māori, and she has no contact with her own father who is Māori. She identifies strongly as Māori and works for a Māori organisation. Applicant 1 was 16 at the time of the birth of her child and was not living with her partner at the time of the birth. Her partner was also Māori and his parents were very keen to have the baby. Applicant 1 applied for custody when the child was a year old due to the concerns she describes below:

> *…to me all they*[181] *wanted to do was take her off me, so I didn't see them until after I had my daughter. They still tried to turn up and take her whenever they wanted, so it came down to the day when I thought I needed to go and get custody, and her father had also threatened to take her out of the country.*

Involvement With Court Services and Professionals

Applicant 1 had a Māori woman lawyer, and Māori woman as Family Court Counsellor. She spoke very positively of her experiences with these women. She found the counselling helpful and felt that the counsellor was easy to relate to.

> *She made me feel real comfortable, like because someone is coming to your house and I was all nervous and stuff – and she was real good – like one day someone turned up at my house and she was like a friend and didn't say who she was …*

Court Procedures and Setting

Applicant 1 was very nervous about attending Court, and was supported by a close friend and by her mother. She was put at her ease by being met outside the Court by her lawyer, who talked her through the process again on the way in. She was also put at ease by the judge and his relaxed attitude to the noise her baby made. The lack of opposition by her ex-partner to the application meant that the process was not as stressful as she had initially feared.

Whānau Support

Applicant 1's main sources of support were her mother who is non-Māori, and a close friend. Applicant 1 did not want her mother approached, and her friend was out of the country.

[181] Her ex-partner's parents.

Applicant 1 found her lawyer through using the phone book, and was accompanied by her friend to the lawyer's, primarily because she had no transport herself. Both her mother and her friend attended Court with her.

Applicant's Evaluation of her Experience

Applicant 1 was satisfied with the outcome of her involvement with the Family Court. She did not find cost a barrier as she qualified for legal aid. She was positive about the Court personnel and the attitude of the judge. Her partner's parents continue to have some access to her daughter, but these arrangements have not been formalised, and Applicant 1 feels confident that she has control of the situation. Despite this satisfaction, she is not totally clear about what it means to have custody of her daughter, but she is confident that having the piece of paper means no one can take her daughter away.

> *I still find that though I have access or custody of her, like what does it really mean? On the piece of paper it says that A. is under your care until she is 16. In my mind I know that no one can take her off me. I feel better about that.*

12.2 Pilot Study/Applicant 2

Profile of Case

Applicant 2 is in her late 40s, and is the great aunt of the child she now has guardianship of. The birth mother of the child was her 15-year-old niece and the father was a 13-year-old.[182] Applicant 2 became involved with the mother and baby at the request of other whānau members.

> *My sister said you better come and get this girl – she is playing up, and my house isn't big enough. And I thought why me? So I asked them respectively (her siblings) and they said because you are the oldest of the whānau ... so that was OK, I was there to support them.*

The mother and baby moved in with Applicant 2, who was concerned for her niece, but also concerned with the quality of care the mother was providing and the lack of bond between mother and child. Due to the age of the birth parents and their previous CYFS involvement, CYFS maintained contact with the mother and Applicant 2. Gradually the mother stayed away from home more and more, returning to a street kid lifestyle, leaving Applicant 2 to care for the child. Applicant 2 found dealing with changing staff from two different CYFS offices exhausting and confusing. There were several periods when the mother, with support of CYFS staff, removed the baby and went to stay with other whānau. A return to her previous behaviour patterns and the baby being returned to Applicant 2 followed this.

[182] The parents were residents in a Department of Child Youth & Family home at the time the child was conceived.

The father of the child was killed in an accident when the child was two years old. At around this time the child was placed under the guardianship of the Director-General.[183] This was followed by a prolonged period of involvement with Child Youth & Family Services, with the child being in the care of Applicant 2 for much of this time. Due to a change of CYFS staff, and some conflict between Applicant 2 and her niece, the child was placed for a period of six months with a CYFS caregiver. The CYFS caregiver wrote to CYFS and said that she wished to adopt the child.

> *The Department woke up to that and told her you cannot have this child, this child has to go back to the whānau, and then a letter came to me. Now I wasn't aware that you had to get a lawyer to get guardianship and custody. I wasn't aware of that because I wasn't clued up on all that sort of humbug. All I was doing was following CYFS and the Family Group conferences, giving them reports.*

Applicant 2 applied for guardianship and custody, and found a lawyer with the assistance of a Māori social service provider. She was very dissatisfied with continuous process delays. A period of almost two years went by from when the initial application for guardianship and custody was made, and the child was discharged from the guardianship and custody of the Director-General.[184] The continuous process delays were due to miscommunication, difficulties in contacting and working with the birth mother, and changing CYFS staff.

> *Were they waiting for me to crack up – well I didn't. I was pretty clued up by then. When it came to my lawyer, here he was representing me, and all you get is 'don't worry about it, don't worry about it!' A year down the track and still all I am getting are letters form lawyers saying the department is blah blah blah, they are having a meeting between themselves. For two years it was just letter after letter.*

Applicant 2 was frustrated by repeated miscommunication between CYFS and the Family Court, and upset after the amount of time she had spent caring for the child to be the subject of a police check.

She was, however, impressed by the skills of the male psychologist who observed the child and birth mother at Applicant 2's home on two occasions. She felt his report was fair, and that he was sensitive and responsive to her concerns, explaining the process in a way she could understand.

Involvement with Court Services and Professionals

Applicant 2 had experience of her own counsel, a specialist report writer and of appearing in the court when guardianship and custody were transferred from the Director-General to her. As noted above, she was very positive about the specialist report writer's ability to establish rapport with the child. She had initial misgivings about having someone in her home, and was also unsure about how a child would be 'interviewed'. She felt that the report writer took time with her, and also offered further avenues for support that she could access if required. She was less positive about the lawyer, and felt that she was not kept adequately informed.

[183] Applicant 1 was confused about the sequence of events involved here.
[184] Applicant 2 produced documentary evidence of this.

She repeated her concerns about being told 'don't worry', as she felt that she had a lot to worry about in the process, and that her concerns were being minimised. Due to her negative experiences with CYFS, Applicant 2 kept detailed records in a diary, and had two full clear-files of correspondence. She had little recall of the actual court appearance, as this was the culmination of months of stress, and had no comment to make about this. The issue of cost was of minimal concern to her in terms of the actual court proceedings, but she was angry about the number of times that the child and mother were placed in her care without adequate discussion or consideration of the financial burden this imposed. She felt this meant that 'the department' was depending on whānau and that her financial entitlements were not explained to her.

She was particularly concerned with the poor communication between CYFS staff, herself and counsel. A key concern was that for a large part of the time, because she was neither a parent nor grandparent, her concerns and issues were disregarded until/unless things reached a point of crisis that resulted in a Family Group Conference. She also believed that some staff she had worked with understood little about whānau dynamics, and had an idealised view of whānau relationships in trying to get her to be responsible for both the mother and the baby.

Whānau Support

Applicant 2 received her primary support from her mother and brother. Both are now deceased, her mother passing away a few months after guardianship and custody was awarded. Despite her love and commitment to the child, Applicant 2 conceded that without their support she might have given up. She was particularly grieved that her mother did not get to see the child reach school age and grow settled. She did not consider that there was anyone in the whānau that she could have spoken to about her experiences, as others in the whānau did not know all the details of the case.

Other Issues

Applicant 2 was angry that CYFS had not been responsive to her concerns about the two other children that her niece had given birth to. She believed that 'the department' ignored the rights of the children and when she expressed concerns, she was placed under pressure to take the other babies and to keep track of her niece. Subsequently, one of these babies has died. Efforts are now being made to place the third child under the guardianship of the Director-General. The mother had access to the child which she could initiate, but only visited the child on two occasions. The child is now seven years old.

12.3 Pilot Study/Respondent 1

Profile of Case

Respondent 1 was the respondent to a protection order for repeated physical violence. He has also been imprisoned in relation to this violence and other offences. Respondent 1 has also suffered a serious head injury, and had some difficulty in remaining calm and focused during the interview, although he wanted to take part in the process. He and his ex-partner

had two children, both of whom are under five years old. Respondent 1 now has a new partner, and accepts that his actions were what resulted in his loss of custody of his children.

> *… I mean it all stems from my actions anyway, or our actions. But I mean ultimately in the end my actions. I bought into it ... if I was wiser perhaps I might have been able to save that.*

He was also clear that he and his ex-partner continued to share responsibility for the welfare of the children.

> *Because we both believe in our children and in the family. Besides me and her not being able to get it together, what we wanted together, we got to do something. Like she didn't want the children just on her own, but they should be with me or her ... our kids don't want to see us fighting and bickering and you know and kicking things in and fighting over them and all that …*

Respondent 1 was unclear about the meaning of the terms custody and guardianship and was concerned that it made the children sound like objects to be owned. He has access to his children with the consent of his partner.[185]

Involvement with Court Services and Professionals

Respondent 1 has had considerable experience of court services and professionals. Due to his involvement with both the family and criminal courts due to domestic violence and other offences, he was not totally clear about which services or professionals were engaged directly in relation to custody and access issues.

Respondent 1 attended an anger management programme while in prison. He was also directed to a stopping violence programme as a result of the protection order, a programme he described as being full of '*angry men, and like you know, so desperate'*. Respondent 1 was also evaluated by a neuro-psychologist prior to sentencing in the criminal court, and he believed the judge might have taken this into account as he mentioned it at sentencing. Respondent 1 was unclear about how he had gained legal representation, and it appeared from the way he described the range of court proceedings that he had been involved in, that he pleaded guilty to the criminal charges, and did not contest his ex-partner having custody of the children.

Whānau Support

Respondent 1 was unwilling to discuss issues of whānau support, although he did say his father *'might have been involved'*. He became agitated around this time in the interview, so the interviewer broke the interview for a cup of tea and to ascertain whether he wished to continue. The interviewer did not consider it appropriate to probe further regarding whānau support when the interview recommenced.

[185] It was unclear from the interview whether the terms of the access were court ordered.

Respondent's Evaluation of Experiences

Respondent 1 acknowledged that his actions in assaulting his ex-partner were wrong, and felt that the loss of custody of his children was part of the process of being punished for his actions.

> *Yeah well, it was like my punishment as a whole. You had to go through the court system and everything and the law to pay for your crime or whatever.*

He described himself however, as being '*psyched out*' when he realised the implications of losing contact with his children through imprisonment, and feared that he could lose access to them. During this period he was placed on quarter-hour checks because he was considered a suicide risk.

It appears that he and his ex-partner have reached agreement over access arrangements, and he described going over and sleeping on a stretcher, doing dishes and caring for the children to give her a break.

12.4 Pilot Study/ Respondent 2

Profile of Case

Respondent 2 has two children who are now in their early teens. His ex-partner is non-Māori. He was subject to a non-molestation order prior to the Domestic Violence Act 1995 being passed. His ex-partner has been treated for both head injury and mental health problems.[186] He strongly contests the descriptions of events that he believes lead to him losing custody of his children, and believes that the extent of his ex-partner's health problems was hidden by her family and from the Court. Although Respondent 2 has court-ordered access, his ex-partner has denied this access on more than one occasion. The most difficult experience Respondent 2 had in relation to this was at the death of his mother.

> *I said, look, can I pick the children up and take them to mother's funeral? No, no they're busy, or one is sick. She is always making up stories. I knew they weren't sick or anything like that. And that was really .. because being Māori – Mum loved these children, and I just felt Jesus this is a shame… They were forbidden. It shouldn't be.*

He described the feeling of loss his mother experienced prior to her death, due to the limitations placed on access. He is also greatly grieved by the lack of contact his children have with their wider whānau due to the limitations imposed by the loss of custody, and by denial of access. H e has enrolled his children on their iwi roll.

[186] It should be noted that this description is based on information coming from the respondent.

I did that behind her back you know. I did it for my own self and said – hey these are my children. When they grow up they can go either way, but they can still be Māori you know. She will never change that, because they are Māori… they'll find their own whānau and iwi later on.

Involvement with Court Services and Professionals

Respondent 2 had little direct involvement with court services or professionals. He made no appearance in the Family Court.

I just signed papers. I just signed them. A lawyer said that's what you sign. It was her lawyer; I never had a lawyer. I just thought oh well, I'm out of here. You can't fight the system. No use me going to a lawyer because then I am going Pākehā style, and then you make them money.

Respondent 2 was not entitled to legal aid due to high earnings as a fisherman. He felt that his ethnicity and occupation would count against him in court, and that a Pākehā woman's word would be seen as more believable to a judge. At the time he was unclear of what the consequences of not having his own legal representation and just signing papers could be. He now greatly regrets this, and stated that if he could do it all over again he would go to a Māori lawyer. He believes that a Māori lawyer would both understand his concerns and experiences, and be able to explain the legal system and jargon to him in a way that he could understand.

I would never go to a Pākehā lawyer because they would not understand our people. I would sooner go to a Māori lawyer and just say hey let's get back to our whakapapa. Starting from there we can work our way through the system. But explain the situation...

Respondent 2 spoke at length about his concerns that other Māori would not have the same kind of experience he had of the court process and that his participation in the research should be of value in preventing this happening. He expressed his concerns as follows:

Come to this era now and say don't let it happen again. If there is a court judgement of family in our days let them speak to a Māori lawyer. Give them access to Māori to explain the situation… I hope what I am saying to you now is not just work and is going to be put aside. … Who is the law made for? I've lost everything. If the system had been right from the start, if we had been educated, it would have been all right.

Whānau Support

A brother of Respondent 2 was present for the interview, but made little comment, apart from supporting his version of events and his opinions. He has a niece who he describes as 'being in the justice system' whom he discusses his views with, and gets information from.

13 Issues and Themes

The objectives of this research were:

To provide information on Māori perspectives on guardianship, particularly in relation to custody and access.

To investigate and describe the experience of Māori applicants/respondents, as well as their wider whānau, when they have gone to the Family Court to settle custody and access issues.

13.1 Framing the Issues and Themes

The principle of 'the welfare of the child' is a cornerstone of family law and practice. A perusal of the judgements discussed in the Literature Review indicates that this principle is at times seen to be in conflict with the rights and responsibilities of whānau, and the significance of whakapapa. In the Literature Review Ani Mikaere argues that attempting to explain Māori perspectives of guardianship, custody and access can easily become an attempt to define them in terms of what they are not. The explanation then frequently centres on 'differences in perspective' and how these can be accommodated.

This assumes that there is already a central or dominant view or perspective, the inference then being that this view is value neutral or grounded in objective reality. Māori perspectives are often reduced to the level of viewpoints. These viewpoints or 'starting points'[187] are frequently subsumed within a dominant view. The final power to define and decide within Family Court rests with the law and those who administer justice. The legitimacy or lack of it accorded a Māori world view has real and material consequences for tamariki-mokopuna and their whānau.

The ideas of a 'Māori world view' and Māori identity can be viewed as problematic, with a risk that static and uniform definitions will limit the possibilities for choice and recognition of diversity. The choice of the word 'perspectives' in the commissioning of the research may be seen as an attempt to manage that risk. Ihimaera's[188] discussion of what it means to 'grow up Māori' provides an insight into issues of identity and diversity.

> *Growing up Māori has come to mean growing up and across the fractures in time and space within our culture as well as finding oneself and one's location within the pastiche that is the post-modern world.*

---

[187] See Judges' Comments, Literature Review p37.
[188] See footnote 76.

> *We all now live in a universal reality. The original template came from Rangiatea, that's where the seeds were sown. I like to think that since then the process of maintaining our identity has been like the constantly-changing patterns of the cat's cradle. The primary pattern of culture was created when Māori began to live with each other in Aotearoa, and traditions and histories were devised based on our tribal and family relationships. Then the Pākehā came and, increasingly the tensions of maintaining that original pattern meant our ancestors had to weave more complicated designs over more empty spaces to ensure that the landscapes of the heart, if not the land, could be maintained.*

The 'fractures in time and space within our culture' that Ihimaera[189] refers to mean that not all tamariki-mokopuna have ready access to safe and supportive whānau, nor the positive childhood experiences described by Pere[190] and others in the Literature Review. This does not mean, however, that children should be denied access to the wider support networks of whānau, hapū and iwi. It is likely that children who have experienced the dislocation described in some of the interviews are those who most need the security of knowing who they are and where they come from.

A considerable body of work exists that articulates a Māori world view while acknowledging the complexity of such projects.[191] The authors of *He Hinetore ki te Ao Māori* contend that:

> *There is compelling evidence that custom did not constrain Māori adaptation and development. The adherence to principles, not rules, enabled change while maintaining cultural integrity*[192]…

The Literature Review was conducted in order to provide a context for understanding of the views and experiences expressed in the interviews, and to link these views and experiences to key principles. As Mikaere suggests, the starting place for understanding how Māori might view guardianship, custody and access is not in attempting to find equivalent Māori concepts. It is rather to locate the principles and practices related to the care and upbringing of children within a Māori philosophical framework. This means a process of 'framing' and 'reframing' is engaged in, in which decisions are made 'about what is in the background, what is in the foreground, and what shadings or complexities exist within the frame'.[193]

For the first part of the discussion of themes and issues that come through in the interviews, the principles identified in the Literature Review pertaining to the care and upbringing will be placed in the foreground. The second part of the discussion will focus on participant views and experiences that can be understood in terms of access to justice issues.

---

[189] See footnote 76.
[190] See footnote 54.
[191] See discussion in the Literature Review p19.
[192] *He Hinatore ki te Ao Māori* p10.
[193] Smith, Linda 1999, p153.

13.2 Principles Related to the Care and Upbringing of Children

The key principles identified in the Literature Review in relation to the care and upbringing of children are:

- The significance of whakapapa;
- Children belong to whānau, hapū and iwi;
- Rights and responsibilities for raising children are shared;
- Children have rights and responsibilities to their whānau.

The Significance of Whakapapa

The importance of whakapapa was a particular feature of those interviews where applications for custody were made by whānau members rather than the natural parents. Without exception, the grandparents, aunts and uncles who made these applications were committed to ensuring that the mokopuna stayed within the whānau. In several instances this resulted in financial hardship and setting aside of cherished individual life goals. The obligations inherent in a whakapapa imperative become clear when one considers that in three of these cases the whānau members who applied for custody had had limited contact with the mokopuna prior to their seeking custody. In these cases the imperative was not an emotional bond based on an existing attachment to the mokopuna, but on whakapapa.

Despite the strains imposed by colonisation and urbanisation, whakapapa continues to be a basis for decision making and the application of whakapapa principles has consequences that are real. In more than one case the decision about where the mokopuna should be placed was governed by the mataamua (oldest child status) of the aunt involved.

Applicants 2 and 3 from Area 2 both illustrated the importance of whakapapa in different ways. Applicant 2 took her responsibility for ensuring that her nieces retained contact with ‘both iwi’ extremely seriously, and consciously chose kōhanga and schools where the girls would have contact with their father’s iwi. Applicant 3 spoke of working with all of the mokopuna who came into her care to ensure that they knew their whakapapa. In her view she had a responsibility for any child who was hurting that she had a whakapapa connection with. She saw her primary responsibility for children outside of her own whānau[194] as attempting to establish connections for them, so they could be cared for and protected by their own.

Children Belong to Whānau, Hapū and Iwi

The principle of children ‘belonging’ to whānau, hapū and iwi is linked to the principle of collective responsibility for children. It is whakapapa that defines the descent group that children belong to. Whakapapa and whānau, hapū and iwi relationships form the basis for Iwi Social Service organisations. A key challenge in terms of Family Court legislation is consistently applying or enshrining in law these principles as has been the case in the Children, Young Persons, and Their Families Act, so they are placed at the forefront of any decision-making about guardianship, custody and access. Principles 5(a) and 13(b) of the

[194] This kuia lived in a urban setting, and is frequently called on by CYFS and local whānau for assistance.

Children, Young Persons, and Their Families Act make direct reference to whānau, hapū and iwi involvement in decision-making and protection of children. This cannot occur without the establishment and acknowledgement of whakapapa links. This applies whether or not both parents are Māori, because the whakapapa provides the link to the iwi. Links to Iwi/Māori social services for whānau having difficulties could provide a means of whānau accessing a range of other culturally-appropriate services.

Mikaere notes that a recommendation of the *Rangihau Report*[195] was that a child's whānau should be empowered to select Kai Tiaki from their hapū who could act as Children's Advocate. It should be noted that the term 'advocate' is used in its broadest sense in this context. There are a number of possible roles for a skilled Kai Tiaki as suggested below. It is clear from the interviews that where skilled Māori Counsel for the Child are working with the child and whānau, that much of the support children and whānau need is already forthcoming. Real possibilities exist however, for strengthening the resource base of iwi and hapū-based social services to provide both support to whānau and advice to the court as appropriate. Trained Kai Tiaki with knowledge of whānau and hapū relationships would be ideally positioned to work alongside and assist Counsel for the Child. These Kai Tiaki could also be part of facilitating whānau hui. Such hui could occur at a number of points. C/1 argued that hui and discussion should occur early in the process, before parties become locked in adversarial court processes. Other counsel also suggested that well-facilitated whānau hui could resolve many issues without court involvement, and that this was an appropriate role for Iwi Social Services. A1/R3 suggested that there should be *'someone with authority but not a judge'* to help negotiate and work out what *'reasonable access'* means. Kai Tiaki could also take on this role. Clearly several of the applicants and respondents interviewed did not have a clear understanding of what the outcome of their time in court actually meant, so appropriate Kai Tiaki support could also affect this.

Any movement towards the development of this kind of role would require further discussion of how to most effectively provide whānau[196] and children with support, and how to provide the court with quality information or cultural advice.

Rights and Responsibilities for Child Raising are Shared

The principle of collective responsibility for children was evident in several of the interviews. A1/A6 expressed her grief that her sister's children would grow up thinking *'you never came to see me, you never bothered with me'.* She believed that the granting of guardianship and the manner in which this occurred prevented her and other whānau members from sharing responsibility for these children. She felt that once CYFS had established that she could not actually take custody of the children that she was discounted from having any role in their lives.

[195] See footnote 115.

[196] There is also a need to look at this in relation to case management approaches being taken within Family Court. This should allow for more effective provision of information to parties.

A1/A5 had difficulty caring for her three badly-abused mokopuna and 'gave' the baby to her brother to care for. When censured by the judge for doing so, she indicated that she believed it was a totally appropriate action to take. A2/A3 and her daughter applied for shared custody of a baby girl. The kuia has the primary caregiver role while her daughter works, but she acknowledges that because of her age her daughter will take a more active role in the care of the child as she grows up. A2/A1 supervises the access her sister has with her son, because she wants them to retain a relationship, and she wants her sister to take on responsibility at a level that she can manage with her tamaiti.

In both of the cases involving whāngai relationships, both whāngai and birth parents saw themselves as having responsibility for the well-being of the children. As A1/R3 described:

> *We went to his*[197] *birthday, the whole whānau, because I wanted to be in touch with this sort of thing ... I want that child when he grows up to be able to come and talk to me if he is in trouble.*

The single most pressing issue of concern for those who went to court was not being able to have whānau support in the courtroom. Being alone in the courtroom was seen by most as alienating. On a profound level, it is also a visible reminder that the current legislation is based on '*individual rights and nuclear families'*.[198] In the case of A2/A4, this was particularly difficult because her ex-partner's spouse appeared to be allowed to attend court *'as of right'*. She was not offered the option of whānau support. In several instances, applicants commented on their need to have someone of kaumatua or kuia status present in a supportive role, and how alone they felt, knowing that their whānau support was sitting outside. C/2 expressed this as a recognition '*that the client is part of a bigger environment*'. She was of the view that this isolation also contributed to confusion and distress in terms of access arrangements where whānau members other than the parties had key roles in caring for the child. Those whānau members, particularly grandparents who have caregiving responsibilities, should in her view be able to apply for access.

An emphasis on sharing the rights and responsibilities for child-raising represents the availability of a range of skills and resources to the child. These skills and resources will not necessarily be resident in a nuclear family context. This has significant implications for involving a wider range of whānau members in decision-making about the care of mokopuna, and for ensuring that access arrangements reflect this shared responsibility. C/1 expressed it this way:

> *I have a phrase for you – who is looking after the mokos? That removes it to another generation and puts it in perspective. It is inferential that you don't need to make access orders. If you are within the tikanga there is no such thing as access. There is availability.*

[197] The baby they had given as whāngai.
[198] See interview C/1.

Clearly the issue of access for whānau members other than natural parents was a significant issue. This was evident for PS/R1 who was unable to take his children to his mother's tangihanga due to problems with access arrangements. He also spoke of the grief his mother expressed before her death, as she watched her mokopuna drive past her house on a daily basis, but was denied access to them.

There were some interviewees who did not have close links with their own whānau, hapū and iwi. It should be noted, however, that nearly all in this category were part of 'kaupapa-based whānau',[199] and had strong links with kōhanga reo, urban marae or Iwi/Māori Social Service organisations. These 'kaupapa-based whānau' were a source of emotional and practical support, and it was apparent that those who were estranged or living some distance from their own whānau would have welcomed the opportunity to have this support in a court setting.

Given the range of difficulties whānau may experience, and the cycles of poverty, poor parenting and intergenerational abuse that exist for some whānau, the need for skilled Māori professionals is evident. Those whānau members who took on the care of mokopuna with serious abuse histories all indicated a need for professional support and guidance in caring for the mokopuna. The emphasis on shared responsibility for the mokopuna does not absolve state agencies from their responsibilities to ensure that whānau and Iwi Social Services are adequately resourced to care for mokopuna placed with them.

Children have Rights and Responsibilities to their Whānau

Mikaere suggests that:

> *Just as children had the right to know their whakapapa, to be secure in their identity, and to expect support from adults within their whānau, the principle of reciprocity operated in order to ensure that they also carried responsibilities within their own whānau.*[200]

The expression of these lifelong obligations to the entire whānau was particularly evident for those women who were mataamua[201] in their whānau. As already indicated, the level of responsibility this imposed on many of the women meant that their individual life plans had been abandoned or significantly changed.

PS/A2 described her experience this way:

> *My sister said you better come and get this girl – she is playing up ... And I thought why me? So I asked them respectively (her siblings) and they said because you are the oldest of the whānau ... so that was OK.*

[199] See Literature Review p37 for a discussion of what Metge describes as 'kaupapa-based whānau'.
[200] See Literature Review p25.
[201] The oldest child.

The kuia who had taken on the responsibility of tamariki from her whānau for over twenty years believed that because she had been entrusted with whakapapa knowledge from an early age she had specific responsibilities in terms of the maintenance and passing on of this knowledge.

13.3 Access to Justice Issues

The Literature Review concludes with reference to Te Whainga I Te Tika,[202] and includes a comment describing the Family Court as 'intimidating, individualised, monocultural'. Mikaere argues that more recent reports suggest that little has changed in the fifteen years since Te Whainga I Te Tika. Interviews with counsel tended to support this view. It should be noted however that all counsel interviewed indicated that some judges and court staff were responsive to Māori needs. All counsel emphasised the key link between quality of representation and client satisfaction.

13.4 Favourable Experiences

It should be noted that not all applicants or respondents actually appeared in court. In some instances where there were applications with consent from the respondent, or where the application was not contested, only counsel was required to appear. Some found this concerning, as they wanted to be seen by the judge.

Favourable experiences for applicants and respondents included the following:

- Being greeted in a friendly manner by court staff and judges;
- Having proceedings running to time;
- Counsel going over the court process with applicant/respondent immediately prior to entering the court;
- Gaining a sense from the judge's comments that he/she was familiar with the case;
- Not experiencing delays.

Counsel were able to generalise across the experiences of a number of clients and all commented on the way that their client's experience was very dependant on the people involved on the day.

> *It is like anything really – you can have a good experience at the petrol station or a bad one. There are some judges who are incredibly accommodating and others who follow a traditional and distancing style.* C/3

Those who expressed most satisfaction with administrative aspects of court procedures were unsurprisingly those who expressed satisfaction about the overall outcome of the proceedings. Where involvement with the court was prolonged and there was a lengthy wait for contact with specialist services such as a psychologist, whānau found this very stressful.

[202] See footnote 143.

13.5 Counsel for the Child

Those who had positive relationships with counsel and Counsel for the Child also expressed high levels of satisfaction.

The role of Counsel for the Child was a pivotal one for most of the applicants[203] interviewed. Those who had Māori Counsel for the Child were uniformly positive about having someone who was able to establish rapport with them and the children concerned. Given that Counsel for the Child frequently visit homes, it was also important to them that they were comfortable with someone of the same cultural background. One applicant had Counsel for the Child who was not Māori but who worked very effectively with her and the child concerned. In one situation where Counsel for the Child was not Māori, the applicant considered that his lack of knowledge of Māori whānau dynamics and naiveté put her mokopuna at risk. Counsel interviewed expressed concern about low levels of cultural competence and cross-cultural communication skills among Counsel for the Child generally. They believed that this contributed to poor analysis of what constituted risk for children, and an inability to understand whānau dynamics. The Iwi Social Services CEO interviewed also expressed strong dissatisfaction with the inability of many Counsels for the Child to work safely and effectively with Māori.

13.6 Cost Issues

All applicants interviewed qualified for legal aid, but those who were not parents often found the process of gaining legal aid to support their applications more difficult to work through. Most were extremely positive about the availability of legal aid, and considered that the contribution they had to make was reasonable. Several suggested that other whānau they knew did not engage with Family Court because they had a perception that it would be expensive.

Costs that did pose a barrier for some were related to transport and phone calls for those in remote rural locations. Another key financial issue was to do with the relationship between benefits and drawn-out court proceedings. This meant that applicants were often involved in lengthy and complex negotiations with WINZ and respondents with WINZ and Inland Revenue. Those who had been invited to make custody applications by CYFS felt that they did not receive adequate support over this period.

Respondents who were in paid employment expressed concern about cost. In two cases this meant that respondents did not seek legal representation. Although this was because they did not intend to contest custody, they subsequently believed they were disadvantaged in terms of access arrangements. It is a matter of concern that these respondents saw no avenue for getting advice or support that was not costly.

---

[203] Few respondents made any comment about Counsel for the Child.

13.7 Other Services

In several instances, applicants and respondents were involved with both the Family Court and Child Youth & Family Services. Some experienced frustration and confusion due to poor communication between Courts, CYFS and themselves. Where there was Child Youth & Family Services involvement, it was because the child or young person had come to the attention of CYFS due to care and protection issues. As illustrated in some of the case profiles, this meant whānau members such as aunts or grandparents were encouraged by CYFS to apply for custody and/or guardianship. Working across agencies often resulted in time delays when a range of reports and specialist services became involved. At times respondents and applicants were unsure whom the person they were engaging with actually worked for and what their role was. Frequently the written communication they received made little sense to them, and they did not know whom to contact about this. This raises significant issues about the development of effective interagency protocols. They should serve both to minimise delays, and to ensure that communication is clear and effective between agencies, and with whānau.

The need for Kai Tiaki who are able to communicate effectively with Māori applicants and respondents has already been discussed.[204] It is likely that if sufficiently resourced and supported this could contribute significantly to increasing the effectiveness of Māori participation in the Family Court. It could also provide counsel and the judiciary with a source of significant cultural advice. Counsel, social service providers and several of the applicant/respondent interviewees all identified whānau hui and mediation processes as being of value. Such hui could occur both at an early stage to avoid matters escalating, and after proceedings have been completed. Early hui provide the opportunity for wider whānau participation, and may assist in identifying safe options for the child. Such hui may also be useful for those respondents who are reluctant to seek legal advice, in order to allow them to participate more fully in understanding the implications of their decisions. Hui after proceedings were seen as important in negotiating 'reasonable access' within a safe environment, and in ensuring that all parties were clear about the outcomes of proceedings. C2 also believed that such hui were important to ensure that parties planned how they would communicate the outcome of the court proceedings to their tamariki, and to other whānau members. As already noted, any development of Kai Tiaki should involve further discussion of the range of roles they could carry out, and how these would be prioritised.

Respondents who were also respondents to protection orders had some difficulty understanding how the protection order and violence impacted on their custody and access. It is evident that high-quality DVA programmes should continue to be provided to help respondents understand the effects of violence on their children. Respondents also need clear advice from counsel regarding the relationship between the Domestic Violence Act 1995 and the Guardianship Amendment Act 1995.

[204] See page 94.

A lack of culturally-appropriate specialist services continues to be problematic. There is still a shortage of Māori Family Court counsellors and specialist report writers. This means that in many instances Māori applicants and respondents effectively receive no service at all. Those who did have access to Māori professionals commented positively about this.

It is also important that there is consistency across Family Court legislation in acknowledging the legitimacy of the principles pertaining to childcare and upbringing that have been discussed in this report. These principles are reflected to some degree in the Children, Young Persons, and Their Families Act 1989.

Section 13(b) states:

> *The principle that the primary role in caring for and protecting a child or young person lies with the child or young person's family, whānau, hapū, iwi and family group and that accordingly –*
>
> *(1) A child or young person's whānau, hapū, iwi and family group should be supported, assisted and protected as much as possible; and*
>
> *(2) Intervention into family life should be the minimum necessary to ensure a child or young person's safety or protection.*

In considering possible changes to the Guardianship Act 1968, it would therefore be useful to consider the principles pertaining to whānau, hapū and iwi incorporated in the Children, Young Persons, and Their Families Act 1989, and ensure that the principles of any new law are consistent with these. The specialist role of Iwi Social Service agencies, approved under the Children, Young Persons, and Their Families Act should also be recognised and further explored. Adequate resourcing and the development of clearer relationships between Iwi Social Services, Family Court and Child Youth & Family Services would allow whānau and children access to culturally-appropriate services.

In summary, it is suggested that the following options be explored for further recognising Māori perspectives on guardianship, custody and access, and facilitating effective Māori participation in Family Court proceedings. These options have all been described in the preceding discussion.

- Consistency across Family Court legislation to recognise Māori principles pertaining to the care and upbringing of children.
- Legislative provision for wider whānau participation in Family Court processes.
- Early use of whānau hui and mediation.
- Provision for whānau hui after proceedings have been completed.
- Exploring the options for having paid Māori advocates[205] or Kai Tiaki available to whānau, children, and possibly the Court.
- Further information for the judiciary and training for Counsel for the Child.

[205] Note that the word advocate is being used in its broadest sense.

- Increasing the availability of culturally-appropriate Family Court Counsellors and specialist report writers.
- Recognition of the special role of Iwi Social Services, and building of productive working relationships with them.

14 Hei Whakamutunga

The stories of the applicants and respondents recorded in the case profiles provide rich descriptions of their experiences. The strong emotions that accompanied the telling – the tears, the pain, and in some cases, the anger – may not be visible to the reader. At the centre of each story are those whose voices are not heard in this report – the tamariki mokopuna. The stories and the tears of the children have not been gathered, no reira he mihi tino nui ki a koutou tamariki ma. Tangi ana te ngākau i te aroha.

15 Glossary of Māori Terms

Atawhai	to treat with kindness; to look after
Haka	chant, the performance of which achieves collective preparedness and unity of purpose
Hapū	extended kin group, consisting of many whānau; pregnant
Hē	wrong; incorrect
Kākahu	clothing
Kapa haka	cultural performance group
Karakia	prayer; incantation
Kaupapa	purpose; idea
Kererū	pigeon
Kōhanga reo	language nest (literal): total immersion Māori language pre-school Centre
Koroua	elderly man; elderly male relative; ancestor
Kuia	elderly woman; elderly female relative; ancestress
Kura kaupapa Māori	total immersion Māori primary school
Iwi	people; descent group, consisting of many hapū
Mana	prestige; standing; authority
Mauri	life principle, life force
Mokemoke	lonely
Mokopuna	grandchild, descendant
Ōhākī	speech made on one's deathbed, often making statements as to rightful successors to land and position
Tamariki	children
Tangata Whenua	people of the land

Tangi	wailing
Tapu	restricted; sacred
Taua muru/he taua	ritual plunder; the extraction of compensation
Tautoko	support
Teina	younger sibling/cousin of the same gender
Tiaki	to look after
Tika	correct
Tikanga	Māori law; Māori philosophies
Tipuna/tupuna	grandparent, ancestor
Tohi	purification ceremony
Tohunga	traditional expert and keeper of knowledge
Taurima	to treat with care
Uri	descendant/s
Utu	reciprocity
Waiata	song, chant
Waka ama	outrigger canoe
Whakapapa	genealogy
Whakatipu	to make grow
Whānau	kin group
Whanaungatanga	collectivism; caring for and maintaining contact with one's relatives
Whāngai	to feed; to rear
Whare ngaro	literally a lost house, a descent line that has died out
Whare wānanga	house or school of learning
Whenua	land; placenta

16 Bibliography

Cases

B v M]1997] NZFLR 126

BP v Director-General of Social Welfare [1997] NZFLR 642

P v L (unreported, Family Court, Gisborne FP 016/080/00, 22/12/00, Judge JG Adams)

Re Applications Concerning H (1986) 4 FRNZ 312

Re Hohua (Māori Appellate Court, 21/5/01, Chief Judge Williams, Judges Carter and Wickliffe)

Rikihana v Parson (1986) 4 NZFLR 289

T v F (1996) 14 FRNZ 405

Statutes

Guardianship Act 1968

New Zealand Settlements Act 1863

Native Land Act 1865

Oyster Fisheries Act 1867

Books

Biggs, B., Hohepa, P. & Mead, H. (1967) *Selected Readings in Māori*, AH & AW Reed, Wellington.

Binney, J. & Chaplin, G. (1986) *Ngā Mōrehu – the Survivors: the life histories of eight Māori women,* Oxford University Press, Auckland.

Brailsford, B. (1994) *Song of Waitaha: The Histories of a Nation,* Ngatapuwae Trust, Christchurch.

Buck, P. (1958, 2nd ed) *The Coming of the Māori,* Whitcombe & Tombs, Wellington.

Edwards, M. (1990) *Mihipeka: Early Years,* Penguin Books, Auckland.

Else, A. (1991) *A Question of Adoption,* Bridget Williams Books, Wellington.

Kahukiwa, R. & Grace, P. (1984) *Wahine Toa,* William Collins, Auckland.

Makereti (1986) *The Old-time Māori,* Women's Press Ltd, Auckland.

Metge, J. (1995) *New Growth from Old: the Whānau in the Modern World,* Victoria University of Wellington Press, Wellington.

Murchie, E. (1984) *Rapuora,* Māori Women's Welfare League, Wellington.

Pere, R. (1982) *Ako: Concepts and Learning in the Māori Tradition,* Te Kōhanga Reo National Trust Board, Wellington.

Pool, I. (1991) *Te Iwi Māori: A New Zealand Population Past, Present and Projected,* Auckland University Press, Auckland.

Stirling, A. & Salmond, A. (1976) *Amiria: The Story of a Māori Woman,* Reed Books, Auckland.

Stirling, E. & Salmond, A. (1980) *Eruera: The Teachings of a Māori Elder,* Oxford University Press, Auckland.

Simpson, T. (1986) *Te Riri Pākehā: White Man's Anger,* Hodder & Stoughton, Auckland.

Walker, R. (1990) *Ka Whāwhai Tonu Mātou: Struggle Without End,* Penguin Books, Auckland.

Chapters

Cairns, T. (1991) "Whāngai – Caring for a Child" in Maxwell, G., Hassall, I. & Robertson, J. *Toward a Child and Family Policy for New Zealand,* Office for the Commissioner for Children, Wellington.

Durie-Hall, D. & Metge, J. (1992) "Ka Tū te Puehu, Kia Mau: Māori Aspirations and Family Law" in Henaghan, M. & Atkin, W. (eds) *Family Law Policy in New Zealand,* Oxford University Press, Auckland.

Haig, I. (1998) "Titiro, Moko! Whakarongo, Moko!" in Ihimaera, W. *Growing up Māori,* Tandem Press, Auckland.

Marsden, M. (1992) "God, Man and Universe" in King, M. *Te Ao Hurihuri: Aspects of Māoritanga,* Reed Books, Auckland.

McCarthy, M. (1997) "Raising a Māori Child", Te Whaiti, P. & ors (eds) *Mai I Rangiatea: Māori Wellbeing and Development,* Auckland University Press with Bridget Williams Books, Auckland.

Orbell, M. (1978) "The Traditional Māori Family" in Koopman-Boyden, P. *Families in New Zealand Society,* Methuen Publishers, Wellington.

Vercoe, W. (1994) "A Self-Sufficient Māoridom" in Ihimaera, W. *Kaupapa New Zealand: Vision Aotearoa,* Bridget Williams Books, Wellington.

"Whānau, Hapū, Iwi" in Coney, S. (1993) *Standing in the Sunshine: A History of New Zealand Women Since they Won the Vote,* Penguin Books, Auckland.

Articles

Mikaere, A. (1994) "Māori Women: Caught in the Contradictions of a Colonised Reality", *Waikato Law Review* 125.

Conference Papers

Durie, E.T. "Ethics and Values" (paper presented at Te Oru Rangahau Māori Research and Development conference, Massey University, 7-9 July 1998)

Mead, H. "The Nature of Tikanga" (paper presented at Mai i te Ata Hapara conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000)

Williams, J. "He Aha Te Tikanga Māori", (paper presented at Mai i te Ata Hapara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000)

Official Reports and Publications

Advisory Committee on Legal Services (1986) *Te Whainga I Te Tika: In Search of Justice.*

Gray, A. & Martin, P. (1988) *The Role of Counsel for the Child: Research Report,* Department for Courts.

Henare, M. "Ngā Tikanga me ngā Ritenga o Te Ao Māori" in *Report of the Commission on Social Policy* (1988) Vol III 5.

Law Commission (2001) *Māori Custom and Values in New Zealand Law,* Study Paper 9.

Law Commission (1999) *Justice: The Experiences of Māori Women.*

Law Commission (1999) *Adoption: Options for Reform.*

Ministry of Justice (2001) *He Hinatore ki te Ao Māori: A glimpse into the Māori world - Māori Perspectives on Justice.*

Rangihau, J. (1988) *Puao-te-atatu* (Ministerial Advisory Committee on a Māori perspective for the Department of Social Welfare.

Report of the Commission of Inquiry into Native Land Laws (1891) AJHR, G-1, xi.

Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (2001: Wai 64).

Unpublished

Jenkins, K. "Reflections on the Status of Māori Women (unpublished paper, 1986).

Jenkins, K. "Working paper on Māori women and social policy" written for and quoted in the *Report of the Royal Commission on Social Policy* (1988) Vol II, 163.

Metge, J. *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 3; cited in Law Commission *Māori Custom and Values in New Zealand Law* (Wellington, Study Paper 9, 2001).

Mikaere, A. "Racism: Alive and Kicking in the Colony – an examination of racism and colonisation in Aotearoa/New Zealand" (Faculty of Law Seminar Series on Racism, University of British Columbia, January 2001).

Mikaere, A. "The Balance Destroyed: The Consequences for Māori Women of the Colonisation of Tikanga Māori" (1995: Thesis, University of Waikato).

Rangihau, J. *Address to High Court Judges* (3 April 1987).

Other References

Ihimaera, W. (1988) *Growing up Māori,* Tandem Press.

Ministry of Justice (2001) *He Hinatore ki te Ao Māori.*

Smith, Linda T. (1999) *Decolonising Methodologies – Research and Indigenous People,* Zed Books Ltd.

Walker, R. (1990) *Ka Whāwhai Tonu Mātou – Struggle Without End,* Penguin Books.