

**PURSUANT TO SECTION 139 OF THE CARE OF CHILDREN ACT 2004  
ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SECTIONS  
11B-11D OF THE FAMILY COURTS ACT 1980**

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2004-404-3116**

IN THE MATTER OF JSB (A CHILD)

BETWEEN CHIEF EXECUTIVE, MINISTRY OF  
SOCIAL DEVELOPMENT  
Plaintiff

AND TS AND SB  
Defendants

Hearing: 15 October 2009

Counsel: A Brown, Lawyer for Child  
E Parsons, Counsel to Assist the Court  
R F von Keisenberg for Defendants  
C M Earl for HB  
C R Gwyn for Attorney-General  
L M Fong for Ministry of Social Development  
G Bingham for BOP District Health Board

Judgment: 4 November 2009

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**JUDGMENT OF HEATH J**

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*This judgment was delivered by me on 4 November 2009 at 11.45am pursuant to Rule 11.5 of the  
High Court Rules*

***Registrar/Deputy Registrar***

Solicitors/Counsel:

A Brown, PO Box 13284, Tauranga  
Crown Law Office, PO Box 2858, Wellington  
BOP District Health Board, Private Bag 12024, Tauranga (G Bingham)  
E Parson, PO Box 46 318, Herne Bay, Auckland  
R F von Keisenberg, PO Box 42258, Orakei, Auckland  
C M Earl, PO Box 9337, Hamilton

CHIEF EXECUTIVE, MINISTRY OF SOCIAL DEVELOPMENT V TS AND SB HC AK CIV 2004-404-3116  
4 November 2009

[1] JSB is a young boy, aged five years, who is currently under the guardianship of this Court. The Chief Executive of the Ministry of Social Development is the general agent of the Court.

[2] JSB was born on 29 April 2004. Sadly, he suffered a serious injury on 15 June 2004, when his higher brain functions were severely damaged. Those injuries were inflicted by his mother, TS. She pleaded guilty to a charge of causing grievous bodily harm to him, with intent to do so, and was sentenced, on 23 September 2005, to an effective term of imprisonment of six years. TS has since been released from custody, on parole.

[3] On 24 September 2009, Lawyer for the Child, Ms Brown, made a without notice application to appoint someone to deal with hospital authorities in the event of JSB's death, to resolve any conflict that might arise between family members on his death. Not long before the application was made, JSB had suffered a life-threatening medical episode.

[4] I made orders, after hearing Ms Brown by telephone on the evening of 24 September 2009. They were recorded in a Minute issued at that time:

[11] I am satisfied that some interim orders are required and that the issues raised by Ms Brown require to be dealt with promptly. To achieve that end, I make the following orders:

- [a] I shall appoint Counsel to Assist the Court. I shall make an appointment tomorrow, that the Registrar shall notify to Ms Brown. The role of Counsel to Assist the Court will be to provide submissions as to the rights of biological parents, in the circumstances disclosed in this case.
- [b] Ms Brown shall arrange for service of her memorandum, together with all supporting material and cases and all orders of the Court relating to its guardianship of [JSB] by midday on Monday 28 September 2009. Service shall be effected on the four entities listed in para [7] above and the paternal grandmother, [HB].
- [c] Counsel to Assist the Court shall be responsible for contacting the biological parents to explain the process to be undertaken, to explain their position and to indicate the steps he or she will be taking to safeguard their interests. That

will include their right to instruct their own lawyer and to be heard on Ms Brown's application.

[d] Pending further order of the Court, Ms Brown and the paternal grandmother, [HB] are appointed as the Court's agents, with exclusive power, subject to Court directions, to deal with representatives of the Bay of Plenty District Health Board and to give any instructions in respect of [JSB's] body, if he were to die. If any difficulties were to arise, they may make an urgent application for directions to the Court.

[5] After a contested hearing, on 15 October 2009, I reserved judgment on whether those orders should be discharged and, if so, whether alternative orders should be made. There is some urgency in providing an answer to the issues raised by Ms Brown as, although his prognosis is better, it is unclear for how long JSB may continue to survive. Counsel for the Bay of Plenty District Health Board has indicated to the Court the need for some certainty in relation to the disposal of JSB's remains, should he die in the near future. A particular problem involves the loss of a public morgue facility at the hospital at the end of this year.

[6] Two issues were debated at the hearing on 15 October 2009:

- a) The first was whether I had jurisdiction to make the order set out at para [11](d) of my Minute of 24 September 2009.
- b) The second was whether, if jurisdiction were to exist, the discretion to make such orders ought to be exercised.

[7] I have formed the view that jurisdiction was available. I have also concluded that, on the evidence before me at the contested hearing, an order that puts into place a process by which contested issues can be resolved on JSB's death is justified.

[8] Because of the need for prompt disposition of the application and the absence of sufficient time to complete reasons for my judgment within the next two to three weeks, I give judgment now and will provide full reasons as soon as practicable.

[9] On Lawyer for the Child's application, the order set out at para [11](d) of my Minute of 24 September 2009 is discharged. In substitution, I make the following orders:

- a) Lawyer for the Child (presently, Ms Brown) is appointed as this Court's agent for the specific purpose of liaising with relevant personnel at the Bay of Plenty District Health Board or the Chief Executive about removal of JSB's remains and their disposal on his death. In fulfilling that role, Lawyer for the Child is appointed to act as a custodian, to take control of JSB's body and to arrange for him to lie at a funeral home or morgue, pending resolution of any disputes, between his biological parents and his paternal grandmother, as to disposal of his mortal remains.
- b) Upon JSB's death, Lawyer for the Child shall immediately consult with JSB's biological parents and his paternal grandmother to determine:
  - i) The mode of disposal of his body; ie burial or cremation;
  - ii) The service or services that should be held;
  - iii) The location of any service to be held;
  - iv) Whether any person or persons should be excluded from attending a particular service;
  - v) Who should have the ability to see or touch the body pending burial or cremation;
  - vi) The place at which JSB's remains should be laid to rest.
- c) In the event that there were conflict on all or any of the issues set out in order (b) above, Lawyer for the Child shall apply to this Court, within 36 hours of JSB's death, on notice to the biological parents, the

paternal grandmother, the Bay of Plenty District Health Board and Counsel Assisting the Court for directions on any issue in dispute. Each of those parties shall be served at their current address for service or at any address subsequently notified in accordance with the High Court Rules. Any such application will be considered by this Court as a contest between the biological parents and the paternal grandmother, with other counsel only being heard on issues directly affecting their individual clients or, in the case of Counsel Assisting the Court, on any issues on which this Court may seek submissions from her. The application will be heard promptly and, if filed, should be referred directly to me or (in my absence) the Duty Judge at Auckland. If no dispute were to exist, at the time of JSB's death, Lawyer for the Child is authorised to release JSB's body to family members to implement their agreement.

- d) Lawyer for the Child (after consultation with the Chief Executive, as the Court's general agent) shall file and serve a report each three months, on the last Friday of the months of November, February, May and August, until JSB's death. The first such report shall be filed and served on or before Friday 27 November 2009. The report shall set out:
  - i) brief medical information as to the current state of JSB's health
  - ii) any relevant changes of circumstances, relating to the current views held by the biological parents and the paternal grandmother (respectively) on the issues raised in order (b) above,
  - iii) any other factor Lawyer for Child considers relevant to any direction this Court may be asked to make on JSB's death.

That report shall be served on the parties to whom I refer in order (c), above, at their respective addresses for service.

- e) Leave to apply, on 24 hours notice to the parties to whom I refer in order (c) above, is reserved to Lawyer for the Child, the biological parents and the paternal grandmother for any of these orders to be varied or discharged.
- f) An interim injunction shall issue to restrain the biological parents or the paternal grandmother from taking any steps inconsistent with orders (a) and (c) above, without the prior leave of this Court.
- g) No order as to costs, save that:
  - i) Costs and disbursements incurred by Lawyer for the Child (in relation to attendances in connection with the application and subsequent attendances required by these orders, including any costs involved in having JSB's body transported to and lying at a funeral home or a morgue) shall be paid out of moneys appropriated by Parliament for the purpose.
  - ii) Costs and disbursements incurred by Counsel Assisting the Court (in relation to attendances in connection with the application and any subsequent attendances the Court may require to be undertaken) shall be paid out of moneys appropriated by Parliament for the purpose.

[10] In consequence of the orders made, on Lawyer for the Child's application, the paternal grandmother's application for orders in her favour is dismissed, with no order as to costs.

[11] I have deliberately referred to Lawyer for the Child as the person upon whom obligations are cast to perform certain functions in terms of these orders, rather than the individual currently holding that office. My intention is that, if there were any

change to the holder of that office, the obligation would pass to the substituted appointee.

[12] I express my considerable gratitude to all counsel (particularly in the short time available for them to conduct research) for the excellent submissions made at the hearing on 15 October 2009 and to Ms Gwyn, for the Attorney-General, for her most helpful memorandum filed (at my request) after the conclusion of the hearing.

[13] I thank Ms Parsons for her services as Counsel Assisting the Court. In case any unexpected matters arise, her appointment shall continue, pending further order of this Court.

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P R Heath J

Delivered at 11.45am on 4 November 2009