NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004 AND SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980, ANY REPORT OF THIS PROCEEDING MUST NOT INCLUDE ANY NAME OR PARTICULARS LIKELY TO LEAD TO THE IDENTIFICATION OF BABY W. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2237
[2022] NZHC 3283

IN THE MATTER	of an application pursuant to s 31 of the Care of Children Act 2004 to place a child under the guardianship of the Court
BETWEEN	TE WHATU ORA, HEALTH NEW ZEALAND, TE TOKA TUMAI Applicant
AND	C and S Respondents

Hearing: 6 December 2022

Appearances: P White and S Tune for the Applicant
S J Grey, assisted by K Murfitt, for the Respondents
A Ross KC and L C Sizer for New Zealand Blood and Organ Service, Intended Third Party

Judgment: 7 December 2022

JUDGMENT OF GAULT J

This judgment was delivered by me on 7 December 2022 at 5:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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[1] Baby W needs an urgent heart operation. His loving parents want the best for him. They accept the need for surgery but have not consented to blood transfusion because of concerns that the blood will contain COVID-19 mRNA vaccine with spike proteins that are not safe for Baby W. Instead, they seek the use of blood from directed donors, that is selected donors who are not vaccinated with the mRNA vaccine. The medical specialists at Starship Children's Hospital and the New Zealand Blood and Organ Service (NZBS) do not support the use of directed donor blood in this case.

[2] Given the urgent need for surgery despite this impasse as to what blood products Baby W should receive, Te Whatu Ora, Health New Zealand, Te Toka Tumai (Te Toka Tumai) applies to the Court for an order that Baby W be placed under the guardianship of the Court.[1] It seeks to have the medical specialists appointed as agents of the Court for the purpose of consenting to surgery and related medical issues, and the parents otherwise appointed as general agents of the Court.

[3] The parents (as respondents) oppose the application. They have also filed interlocutory applications to join NZBS as a third party and seek an interim order against NZBS that it provide a direct donor service to facilitate the collection of blood from compatible unvaccinated individuals and process it so it may be used in Baby W's treatment. NZBS opposes those applications on procedural and substantive grounds. Given the urgency, they were heard together with the originating application and I address them in this single judgment.

Factual background

[4] Baby W is a six month old boy. He has been diagnosed with a congenital heart defect. He has a severe obstruction to the outflow tract of his right ventricle (the pulmonary valve allowing blood to flow from the heart to the lungs). This severe obstruction is causing increased thickening, known as hypertrophy, of his right ventricle. His heart condition has become more severe over his six months of life. He has a gradient in his right ventricular outflow tract that is over three times the normal pressure.

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1 Health New Zealand was established under s 11 of the Pae Ora (Healthy Futures) Act 2022. Te Toka Tumai is its Auckland District, responsible for Starship Children's Hospital.

[5] In order to survive, Baby W needs surgery to relieve the right ventricular outflow trapped obstruction and enable free flow of blood. His right ventricle will continue to deteriorate without surgery. He has been started on medication to slow his heart rate and help manage the thickened heart muscle, but the underlying heart defect can only be managed through surgery. With this treatment, Baby W has a long-term survival prognosis in excess of 90 per cent.

[6] In late October 2022, clinicians performed a catheter balloon dilation of Baby W's pulmonary valve in an attempt to open it. After the procedure, Baby W's parents were distressed to hear that clinicians had needed to give Baby W "a top up" of blood. Although they had consented, Baby W's parents told the team that if any further procedures were to be done going forward, they would have to find an alternative as the parents' wish was not to have any blood other than blood that did not contain the Pfizer vaccine, mRNA, the spike protein or any other associated contaminants that may cause myocarditis or clotting. When clinicians reviewed Baby W a fortnight after this procedure, it was clear that the right ventricle was still pressurised, and that thickening was also developing of the left ventricle.

[7] NZBS manages the donation, collection, processing and supply of blood and controlled human substances in New Zealand. Baby W's mother communicated with NZBS as she wanted to start the process for directed donor blood. On 9 November 2022, NZBS responded saying that directed donation is not supported by NZBS, except in rare circumstances (such as for patients with very rare blood types or antibodies). For this reason, any request for directed donation can be made only by the specialist doctor or surgeon undertaking the procedure to the local transfusion medicine specialist.

[8] Baby W's parents are concerned that it would not be safe for Baby W to receive a blood transfusion from a COVID-19 mRNA vaccinated blood donor. At a clinic visit at Starship Hospital on 16 November 2022, the parents were warned that surgery would likely be required. They informed the clinicians that they believed there were spike proteins in the blood of people who have been vaccinated and that these proteins were causing unexpected deaths relating to transfusions. They emphasised the need

to use only blood from unvaccinated donors. Dr Finucane,[2] Paediatric Cardiac Surgeon in Chief at Starship Hospital, agreed to address the issue again with the NZBS director and asked the parents to send through data they had so she could better understand their concerns. Baby W's mother explained that she was a midwife with nursing training.

[9] A further meeting was held on 21 November 2022. The clinicians conveyed that their careful review of the data had not convinced them that they should, or could, recommend unvaccinated blood transfusion. By that stage, Dr Finucane had discussed Baby W's need for blood and blood products with the director of NZBS, Dr Cho, who was also unconvinced.[3] Dr Finucane noted that Baby W is almost undoubtedly going to require albumin and other plasma products during his post-operative course, and these products are formed from the pooling of various donors. She says it is simply impractical to have a directed donor for these products.

[10] Dr Finucane had also checked, prior to this meeting, whether there was any possibility of performing the surgery on Baby W using cardiac bypass without blood or blood products. Having consulted with cardiac anaesthetists and perfusionists, they confirmed Dr Finucane's view that this was not an available option.

[11] On 23 November 2022, the medical specialists at Starship Hospital agreed that they should press on with a surgical date as soon as possible given Baby W's cardiac condition. They wanted to meet with the parents as soon as possible. Unfortunately, Dr Finucane's commitments meant she could only give 15 minutes' notice of the meeting, only Baby W's mother was available, and they were unable to connect with his father by cellphone. The specialists explained to Baby W's mother that they could not spend more time considering the parents' request for special donors. They informed her that the parents would need to make a decision soon on whether to consent to surgery or not. The specialists also explained that, while the parents could consent to surgery without signing for blood if they preferred, they would need to understand that donation of blood would be inevitable given Baby W's condition.

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2 Despite being a surgeon, I use Dr in this context.

3 Dr Finucane said that Dr Cho was already familiar with the theories being advanced by the parents, which they regard as conspiracy theories, around vaccinated donor blood and Dr Cho was unconvinced by them.

Baby W's mother became extremely upset and criticised the specialists for cornering her without any support present. The specialists apologised for this and explained that, given a legal process was going to commence, that would take some time and Baby W's condition did not allow many days before his risks of surgery would increase.

[12] On 25 November 2022, having not heard back from Baby W's parents formally, another meeting was organised. Dr Finucane said this meeting was hijacked by the parents' support person who proceeded to pressurise the specialists with her theory about conspiracies in New Zealand and even said that deaths in infants getting transfusions were occurring in Starship Hospital. Dr Finucane said that after some minutes, the specialists asked to leave and ended up walking out of the meeting with the support person continuing to try to talk to them. As a result, they were unable to explain their position to the parents.

Proposed surgery

[13] Dr Finucane says the surgery would involve the use of a bypass pump. Blood and blood products are required to prime that pump as the clinicians start the operation and again as they come off bypass and reverse anticoagulants that have been administered while on bypass. The exact quantity needed is impossible to predict, but the clinicians normally tell the blood bank to provide three units of blood, along with platelets, fresh frozen plasma and albumin for a case like this. They may order more blood products if bleeding does not settle in the first hour.

[14] Post-operatively, it is expected there would be around five to seven days in intensive care for recovery and a further stay in the ward to recover. During the post-operative stay, there may be a need for further albumin transfusions to minimise the requirement for chest fluid drainage (a common complication following this type of surgery). There will also be a need for decisions to be made around different drugs and feeding supplements, especially for the four weeks post-operatively, to promote faster respiratory weaning, help wound healing and avoid infection. Often these decisions will need to be made swiftly and any delays would compromise Baby W's interests.

[15] Dr Finucane confirms that, as an agent of the Court, she would endeavour to consult with the parents to the maximum extent before any decisions are made (provided there is sufficient time). The agents would also keep the parents informed of what is happening. Where possible, without compromising Baby W's interests, the agents will take the parents' views into consideration.

[16] Dr Finucane says the surgery would take place as soon as possible following consent – the necessary steps prior to surgery will likely take about 48 hours to complete. She says that Baby W is currently stable, but he remains in urgent need of an operation, and every day that the operation is delayed his heart is under strain. Delay will cause a deterioration in his right ventricle, and increased risk of post-operative complications.

Guardianship orders – applicable principles

[17] Section 31 of the Care of Children Act 2004 provides as follows:

> **31 Application to Court**
>
> (1) An eligible person may make an application to a Court with jurisdiction under this section for—
>
> (a) an order placing under the guardianship of the Court a child who is not married, in a civil union, or in a de facto relationship:
>
> (b) an order appointing a named person to be the agent of the Court either generally or for any particular purpose.
>
> (2) In this section, eligible person, in relation to a child, means any of the following persons:
>
> (a) a parent or guardian of the child:
>
> (b) a grandparent or an aunt or an uncle of the child:
>
> (c) a sibling (including a half-sibling) of the child:
>
> (d) a spouse or partner of a parent of the child:
>
> (e) the child himself or herself (who may apply without any litigation guardian):
>
> (f) the chief executive:
>
> (g) any other person granted leave to apply by the Court.

[18] The High Court and the Family Court have concurrent jurisdiction under s 31.[4]

[19] Section 33(1) provides:

> **33 Orders of Court**
>
> (1) A Court to which an application is made under section 31 may—
>
> (a) make an order described in section 31(1)(a); or
>
> (b) make orders described in section 31(1)(a) and (b); or
>
> (c) make—
>
> (i) an order described in section 31(1)(a); and
>
> (ii) an order appointing any person whom the Court thinks fit to be the agent of the Court either generally or for any particular purpose.

[20] Section 36(3) relevantly provides:

> (3) If the consent of any other person to any medical, surgical, or dental treatment or procedure (including a blood transfusion) to be carried out on a child is necessary or sufficient, consent may be given—
>
> (a) by a guardian of the child; or
>
> …

[21] Importantly, s 4(1) provides:

> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

Issues

[22] The overriding issue is whether the proposed treatment is in Baby W's best interests. Despite the procedural complexity, two interrelated factual issues underpin the dispute:

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4 Care of Children Act 2004, s 30.

(a) whether the clinicians' proposed use of NZBS blood products is safe; and

(b) whether the parents' proposed use of directed blood is a safe and viable alternative.

[23] It is necessary, however, to address these issues within the constraints of this urgent proceeding. Te Toka Tumai commenced this proceeding on 28 November 2022. At the first call on 30 November 2022, an urgent half day hearing was allocated for Te Toka Tumai's application. The parties filed affidavit evidence, including Te Toka Tumai's rebuttal evidence envisaged in the timetable directions. The respondents then filed a further affidavit from Dr Bridle, Associate Professor of viral immunology at the Ontario Veterinary College, University of Guelph in Ontario, to which I will refer below.

Permission to proceed by originating application

[24] I first address the procedural order sought by Te Toka Tumai for permission to commence this proceeding by origination application.[5] This is not opposed. By consent, I make an order permitting this proceeding to be commenced by originating application. That is in the interests of justice.

Guardianship orders sought

Leave to apply

[25] Te Toka Tumai seeks leave, pursuant to s 31(2)(g), to apply for an order placing Baby W under the guardianship of the Court. Ms Grey, for the parents, submitted that caution is required before granting leave to the clinicians since they have competing duties to others. She submitted that here there are strong reasons against granting leave since the clinicians have dismissed the parents' concerns.

[26] Section 31(2) specifies persons who are eligible to apply for an order placing a child under the guardianship of the Court and requires any other person to seek leave

5 High Court Rules 2016, r 19.5(3).

to apply. The leave requirement is an additional safeguard. The focus is on the standing or interest of the person seeking leave rather than the merits of the application which must be considered if leave is granted. Here, the applicant is Te Toka Tumai (not the clinicians proposed to be appointed as agents of the Court if an order placing a child under the guardianship of the Court is made). Te Toka Tumai is charged with Baby W's medical care and treatment and has a bona fide interest in his welfare. This is a sufficient basis to be granted leave to apply for an order placing Baby W under the guardianship of the Court. I grant Te Toka Tumai leave under s 31(2)(g).

Substantive orders sought

[27] The substantive orders sought are as follows:

(a) Placing Baby W under the guardianship of the Court from the date of the order … until completion of his surgery and post-operative recovery to address obstruction to the outflow tract of his right ventricle and at latest until 31 January 2023.

(b) Appointing Dr Annabel Kirsten Finucane and Dr Alan Magee as agents of the Court for the purpose of consenting to surgery to address obstruction of Baby W's outflow tract of his right ventricle and all medical issues related to that surgery including the administration of blood and blood products to Baby W, where the administration of blood and blood products is in accordance with good clinical practice and in the best interests of Baby W as assessed by Dr Finucane and/or Dr Magee.

(c) Other than the matters covered in (b) above, appointing Baby W's parents as general agents of the Court for all other purposes.

(d) Directing Dr Finucane and Dr Magee to keep the respondents informed at all reasonable times of the nature and progress of Baby W's condition and treatment.

(e) Reserving leave to the parties to apply to the Court for a review of these orders should this be warranted.

Joinder of NZBS

[28] The respondents apply to join NZBS as a third party. While headed as an application, the document is really a third party notice. There is no separate statement of claim or cause of action articulated against the proposed third party. The respondents' memorandum in support relies on r 4.4(1)(c) of the High Court Rules 2016, which allows a defendant to issue a third party notice if the defendant claims that a question or issue in the proceeding ought to be determined not only between the plaintiff and defendant but also between one or both of them and the third party. However, that rule is inapt in the context of this originating application seeking a guardianship order in respect of Baby W. The guardianship issue is distinct from an issue as to whether NZBS should change its approach in relation to directed blood. This proceeding is not the appropriate vehicle to determine that issue. The powers of the Court under s 35 of the Care of Children Act to make orders about the role of providing day-to-day care of a child do not assist. As Mr Ross KC for NZBS submitted, the need for urgency in a guardianship application such as this is another interests of justice reason why joinder of third parties would not be appropriate. If there is a case against NZBS, it should be heard separately.

[29] Further, the purpose of joinder is to enable the respondents to seek an order against NZBS requiring it to (cooperate to) provide a direct donor service to facilitate the collection of blood from compatible unvaccinated individuals (that is, unvaccinated with mRNA vaccine) and process it so it may be used in Baby W's treatment. This highlights that Te Toka Tumai cannot require NZBS to provide directed blood against NZBS' clinical judgment. NZBS blood is the only blood available to Te Toka Tumai. It is not, as Ms Grey suggested, a matter of balancing the risk of delaying surgery against the risk of using blood with residual mRNA on the basis that selected donors can provide blood (whether within days or two weeks). Without joinder and an order against NZBS to change its position, there is no viable alternative to Te Toka Tumai's proposed surgery using NZBS blood products. It follows from this, and acceptance that Baby W needs urgent surgery, that an order

enabling the surgery to proceed using NZBS blood products without further delay is in Baby W's best interests.

[30] As NZBS also opposes the interim order sought on substantive grounds, I will also address that application rather than declining joinder on solely procedural grounds.

Interim order

[31] Despite the respondents' procedural difficulty, Mr Ross fairly seeks to address the substantive grounds by reference to public law judicial review principles. While no such claim has been articulated, if the respondents were applying for judicial review against NZBS, the Court could make an interim order if it were necessary to preserve the respondents' position pending substantive determination of the judicial review. Here, however, the order sought is not in the nature of an interim order preserving their position or the status quo. It is a mandatory order that is effectively final in nature.

[32] Further, judicial review is focused on the lawfulness of decisions. The fact that Te Toka Tumai cannot require NZBS to provide directed blood against NZBS' clinical judgment exposes a further difficulty with the order sought against NZBS. In *Shortland v Northland Health Ltd*,[6] the Court of Appeal held that a clinical decision could not be unlawful if it was made in good faith and in accordance with good medical practice.

[33] Despite Ms Grey's characterisation of NZBS' refusal to agree to directed donor blood and criticism of its approach to informed consent, there can be no doubt that NZBS has exercised its clinical judgment in good faith. Subject to considering the evidence as to whether that clinical decision was in accordance with good medical practice, which I will address below, it is not a clinical decision that is amenable to review by the Court.

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6 *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA) at 441-443.

Jurisdiction for guardianship order

[34] Unlike other cases cited, this case does not concern parental refusal to consent to medical treatment on religious grounds and no such balancing of this right and the right to life is required. The parents' concerns may be as characterised as a belief (and Ms Grey submitted it was much more than that) but it is a belief as to the medical risk involved in blood products from vaccinated people rather than a belief in terms of s 15 of the New Zealand Bill of Rights Act 1990. The parties are all concerned to act in Baby W's best interests to protect his life. The dispute is as to what blood products he should receive in order to do so.

[35] There is no doubt the Court has jurisdiction to place a child under the guardianship of the Court and appoint a doctor as an agent of the Court for the giving of consent to medical treatment involving blood transfusion.[7] The Court's jurisdiction is unaffected by the recent restructuring of the hospital system such that the applicant is Te Toka Tumai instead of the District Health Board. The Court's jurisdiction is not ousted by s 37 of the Care of Children Act which governs urgent blood transfusions.[8] Section 37 can assist in establishing what must be shown when seeking intervention by the Court – the reasonable opinion of the medical practitioner that a blood transfusion is necessary to save the life of the patient, to prevent injury to physical or mental health or to save the patient from prolonged and avoidable pain and suffering.[9] Where it is unnecessary for the child to have a blood transfusion at the time of the application, but there is a risk this need would arise in the course of treatment, the Court engages in a two-step analysis:[10]

> At the first stage it is necessary to assess the likelihood that the condition of the patient will become such that a blood transfusion is to be considered. The second stage is when that condition has developed and the appropriate medical treatment is to be determined.
>
> … on such applications … there must be a real or substantial risk that the patient's condition will in the course of medical care be such as, on accepted medical practice, would call for blood transfusion and that in the event that condition develops a blood transfusion will be necessary.

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7 Section 33(1); and *Re J (An infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) (under s 9 of the Guardianship Act 1968). *Fitzgerald v R* [2021] NZSC 131, referred to by Ms Grey, does not suggest otherwise.

8 At 142 (relating to the predecessor of s 37, s 126B of the Health Act 1956).

9 At 142.

10 At 143.

[36] On one view, the two step analysis is not required in this case as at the time of the application it is necessary for Baby W to have heart surgery and it is necessary for him to have a blood transfusion in the course of that surgery. In any event, there is at least a real or substantial risk that in the course of that surgery, on accepted medical practice, Baby W will need a blood transfusion. As indicated, the issue is as to the blood products used in such a transfusion.

The parents' concerns and proposed alternative

[37] Ms Grey characterises the applicant as having refused an important additional blood screening protection that the parents have requested to avoid an identified risk for Baby W. She submits the applicant has refused to consider directed donor blood not because it is impossible or impracticable but apparently based on their own ideological reasons and because they claim the blood in the blood bank should be assumed to be safe until proven otherwise. She submits the law requires NZBS to base its decisions on the best evidence. She also characterises this as the first case where an applicant for guardianship for medical reasons is asking for a guardian to be appointed so it can offer a lower level of medical care than is sought by the parents.

[38] Ms Grey submits that the best way to protect against the spread of disease through transfused blood is to carefully screen blood to avoid the contaminant in the first place (citing the approach to Mad Cow disease).

[39] I turn to the two factual issues underpinning the dispute.

Whether the proposed use of NZBS blood products is safe

[40] Baby W's parents are concerned not to use blood that may be contaminated with residual artificial mRNA spike protein that is not safe because it can cause myocarditis and death. Baby W's mother says that spike protein will be present in the blood of those who receive the vaccine – the only question is how much will be present and for how long. She says their concerns have been dismissed by Dr Finucane by labelling the parents as conspiracy theorists without addressing their concerns. She says that Dr Finucane claims no expertise about the Pfizer vaccine or residues in that vaccine and provides no evidence to justify her opinion. Baby W's mother

describes her understanding about "emerging" concerns, and Ms Grey sought to draw an analogy with the delayed acceptance of risk relating to blood unscreened for Hepatitis C in the early 1990s.[11] Baby W's mother is also concerned that another baby who received blood from NZBS for a heart operation has been coughing up blood clots. She is concerned this may be associated with spike protein or other contamination in the blood.

[41] I note that Baby W previously received blood in October, but I place no real weight on this. It was not relied on as proof of safety. Nor do I consider that previous consent undermines the genuineness of the parents' current concerns.

[42] The parents' concern about using blood is based on the concern that mRNA vaccine is not safe. A good deal of the evidence filed on the parents' behalf related to concerns about the safety of Pfizer (Comirnaty) vaccine generally rather than the safety of blood transfusions. This included Ms Murfitt's affidavits and Dr Bridle's first affidavit. Ms Murfitt is a solicitor and is not qualified to give expert medical evidence.[12] Dr Bridle's affidavit attached his evidence filed in a different proceeding. In that proceeding, Cooke J preferred other evidence that the Pfizer vaccine is safe.[13]

[43] At the hearing, Ms Grey pointed to the provisional consent to the distribution of the Pfizer (Comirnaty) vaccine, legislative changes to facilitate its distribution, the warnings in its New Zealand data sheet, its updated summary of risk management plan, the adverse events safety report as at 31 August 2022,[14] the statement in that report that the protective benefits of vaccination against COVID-19 far outweigh the potential risks of vaccination, and the Coroner's finding dated 15 September 2022 that Rory Nairn's cause of death was myocarditis due to vaccination.

[44] The affidavits of Ms Hertzler and Dr Catherwood, and Dr Bridle's further affidavit, addressed blood transfusions. Ms Hertzler's evidence provided her account

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11 Department of Health *Report of Inquiry into Matters Relating to the Safety of Blood Products in New Zealand* (December 1992).

12 Ms Murfitt says she is vaccinated but not with the mRNA vaccine, and is willing to donate blood for Baby W. She attaches lengthy open letters she has sent to the Government in relation to concerns with the Pfizer vaccine.

13 *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716 at [115]-[119].

14 Ms Grey submitted that adverse events are underreported.

of her child's tragic death in the USA but provides no evidence as to what has objectively been determined as the cause of death. Dr Catherwood did not confirm that her evidence is within the scope of her expertise or experience. She cited a study which found that vaccine-associated synthetic mRNA persists in systemic circulation for at least two weeks. As Mr White for Te Toka Tumai pointed out, however, that study stated that vaccines using mRNA technology "to date remain safe".

[45] I only received Dr Bridle's further affidavit on the morning of the hearing. Te Toka Tumai and NZBS had no opportunity to reply to it. Dr Bridle was critical of the affidavits of Dr Morley (Chief Medical Officer of NZBS) and Dr Finucane for not including citations to support their opinions. Dr Bridle referred to the risk of myocarditis. He included evidence that one study demonstrated mRNA vaccine-derived spikes could be detected in blood up until at least two weeks post-inoculation and another study demonstrating a vaccine-induced spike in plasma 10 days post-inoculation at a concentration that Dr Bridle said was "disconcertingly high". He said that spike proteins from mRNA vaccines can circulate in the blood for at least four months post-inoculation. He recommends the precautionary principle, that an action should not be taken if there are legitimate scientific questions about the impact of the action. In this regard, Ms Grey submitted that Baby W's clinicians and NZBS should be looking for proof of safety, not proof of harm.

[46] Dr Morley's evidence (including her reply affidavit) is that there is no scientific evidence there is any COVID-19 vaccine related risk from blood donated by donors previously vaccinated with any New Zealand approved COVID-19 vaccine, and there are no known or suspected harmful vaccine related effects of blood from a vaccinated individual to a recipient of any age, after millions of transfusions around the world. There is no evidence that trace amounts of vaccine in blood or blood products could cause myocarditis. If there is any spike protein at all in blood, it will be in the picogram range (one trillionth of a gram).

[47] Professor Turner, Medical Director of the Immunisation Advisory Centre at the University of Auckland, also filed an affidavit in reply. She says that there is no evidence of harm from antibodies being present in blood, which are produced in response to both natural infection and vaccination. She says that, although unlikely to

be present in blood products, any components or products of the vaccine (nanoparticles, mRNA or the spike protein) would not be harmful if they were transferred through blood transfusion.

[48] No cross-examination was sought in this urgent proceeding and so the evidence of these deponents was not tested. It would not be appropriate to make conclusive findings on contested matters of expert opinion evidence based on affidavits. However, it appears to be common ground and I do accept that mRNA vaccine-derived spikes could be detected in blood up until at least two weeks post-inoculation. It is also common ground that NZBS only asks blood donors to wait until the day after COVID-19 vaccination. I accept too that Baby W is vulnerable given his age and condition. Even so, I accept Dr Morley's evidence that after millions of transfusions around the world since mRNA vaccines have been administered, there are no known harmful vaccine related effects of blood from a vaccinated individual to a recipient of any age. This is consistent with Professor Turner's affidavit that there is no evidence of harm from antibodies being present in blood. I also accept the evidence that using NZBS blood is consistent with established medical practice.

[49] Even if I could conclude that there is a real risk to safety with blood transfusions using blood from mRNA vaccinated donors, that risk would need to be balanced against the risks of the alternative (if available), namely using blood from directed donors not vaccinated with mRNA vaccine.

Whether the proposed use of directed blood is a safe and viable alternative

[50] The respondents propose an alternative treatment strategy involving the use of directed blood. Their submissions are based on their belief that requiring the use of blood from donors not vaccinated with mRNA vaccine is a safe and viable alternative. Baby W's mother says that ample donors are on stand-by waiting to give their pre-screened blood.

[51] Even assuming that the respondents have 20 to 30 supporters who have been pre-screened in accordance with the NZBS handbook and who are not vaccinated with

mRNA vaccine,[15] the respondent's expert evidence supporting directed blood is limited to the evidence of Dr Bridle. His opinion is that it would be in the best interests of Baby W to have his surgery conducted with blood products used for transfusion that have been derived exclusively from donors who did not receive a COVID-19 vaccine. Indeed, he says:

> Having learned how much misinformation is being presented to the public by the NZBS also compels me to recommend that a moratorium be placed on the use of their blood products from people who have received a COVID-19 'vaccine'. This should occur until such time as they can prove, with robust scientific evidence, that these blood products do not represent any risk of contaminating anyone with bioactive and potentially toxic LNPs, mRNAs and/or spike proteins that have been associated with known cardiovascular side-effects such as myocarditis, pericarditis, and blood clots.

[52] But Dr Bridle does not claim expertise in blood transfusion services and does not address the necessary balancing of risks.

[53] Dr Bridle's opinion does not overcome the clear evidence of Dr Morley. As Mr Ross submitted, Dr Morley's evidence is not properly characterised as based on administrative convenience. Mr Ross described it as a more fundamental concern that the use of directed donation blood would damage an excellent blood service for all New Zealanders.

[54] Dr Morley says that NZBS has had several cases where it has received advice from Starship clinicians that parents of children are requesting directed donation blood to avoid receiving blood products from donors that have been vaccinated against COVID-19. Dr Morley explained NZBS's position to Baby W's parents by letter dated 25 November 2022. Her affidavit confirms her view, consistent with the NZBS position, on why directed donation blood products are not a safe nor viable option for Baby W. She explains that NZBS does not separate blood according to donor COVID-19 vaccination status because (as indicated above) there is no scientific evidence that there is any COVID-19 vaccine related risk from blood donated by donors previously vaccinated with any New Zealand approved COVID-19 vaccine. She is not aware of any blood provider that separates blood based on vaccination status.

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[15] Dr Morley states that at a meeting on 30 November 2022 the parents were unable to provide information as to the screening processes undertaken in connection with their volunteers.

[55] Dr Morley says that directed donation offers no advantage to the recipient and has been shown, in some studies, to increase transfusion risk. It also introduces unnecessary complexity into well-established blood collection and processing systems that increase the risk of errors and inadequate supply for the patient.

[56] Dr Morley says that Baby W has the potential need for rapid access to the full range of blood and plasma products to support his complex cardiac surgery, which NZBS may not be able to supply through directed donation. Some NZBS products (including albumin that Baby W is expected to require) are collected using specialised collection techniques, from carefully qualified donors and then manufactured using regulated procedures. Some products are manufactured in bulk in Australia. The only way to ensure Baby W has access to the right transfused therapies at the times he needs them is through the safe and comprehensive portfolio of blood and blood products donated by, and manufactured from blood collected from, NZBS' voluntary donors. Ms Grey indicated the parents understand that directed blood products would be limited to red blood cells and platelets, accepting the use of other NZBS blood products and the possible need in an emergency to source further NZBS blood products (that could not be obtained from donors unvaccinated with mRNA vaccine).

[57] Dr Morley states that directed donation is not recommended in international expert consensus guidelines and that most national blood providers, including the UK, Australia and Canada, do not support them. NZBS has not recently changed its policy. NZBS has detailed procedures which govern how it collects, tests, processes, stores, releases and delivers blood and blood products. These are carefully designed to comply with good clinical practice and evidence-based guidelines, including the guidance documents issued by the European Directorate for the Quality of Medicine and Healthcare (EDQM). This is accepted as being international best practice. The EDQM guide addresses both "designated donations" and "directed donations". Designated donations should only occur where there is a clear medical indication (for example, a patient with a rare blood type where no compatible anonymous donations are available). Dr Morley says this does not apply to Baby W's case. In relation to directed donations, the EDQM states:

> Directed donations are those intended for named patients, where the request for the donation has been made by patients, relatives or friends. The public

> often believes that directed donations are safer than anonymous, voluntary, non-remunerated donations. However, this is not the case, even if directed donations are screened and tested in the same manner as voluntary non-remunerated donations.
>
> Directed donations are not considered good practice and should be discouraged.

[58] Dr Morley says that in the last six to nine months NZBS has noted a significant increase in potential blood recipients asking for blood from unvaccinated donors or asking about directed donation. Similar trends have been noted in other countries, as recorded in a recent article in the British Journal of Haematology, "Refusing blood transfusions from COVID-19-vaccinated donors: are we repeating history?".[16] Mr White indicated a concern that enabling recipients to select blood from different donors is inconsistent with best practice guidelines. Dr Morley says that the current situation (of increased requests for blood from unvaccinated donors) is a cause of concern because it is placing a significant burden on hospital teams caring for both adults and children, as well as NZBS. NZBS is also concerned about the potential risks to the national blood supply that may result from negative impacts on its staff and donors.

[59] The respondents' evidence does not support their belief that requiring use of blood from donors not vaccinated with mRNA vaccine is a safe and viable alternative. Their alternative is not supported by a clinician's opinion nor peer reviewed articles pertaining to Baby W's condition. Dr Bridle is not a clinician. In this sense, the case is similar to *Canterbury District Health Board v L*.[17] In that case, Fogarty J said that the parents had not established an alternative supported by a clinician's opinion or peer reviewed articles pertaining to the young boy's condition. The Judge also did not accept that the state agency had to eliminate the availability of alternative strategies. But he noted that clinical judgment is fact intensive and not assisted by trying to define a legal test.

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[16] Jeremy W Jacobs and others "Refusing blood transfusions from COVID-19-vaccinated donors: are we repeating history?" (2022) 196 BJHaem 585. This refers to the controversial history of blood transfusion in the USA, beginning with the barring of African-Americans from donating blood, followed by segregating and labelling such blood, before official de-segregation of the nation's blood supply occurred.

[17] *Canterbury District Health Board v L* HC Christchurch CIV-2005-409-001832, 15 August 2005 at [15]-[20].

[60] Further, the requirement in the Convention on the Rights of Persons with Disabilities for state parties to prohibit discrimination on the basis of disability has no relevance here. The obligation to ensure that "reasonable accommodation" is provided does not require approval of directed donor blood to overcome an identified risk to a disabled baby. It is also misconceived to suggest there is discrimination on the grounds of the parents' opinion about vaccinated blood. In addition, I do not accept the characterisation of the use of blood products from vaccinated donors as experimentation.

Conclusion

[61] I accept that Baby W's parents have genuine concerns about the risk of using blood from vaccinated donors that are very different from the views of Baby W's clinicians and NZBS. As Mr Ross acknowledged, adult patients (with capacity) are entitled to decline to consent to medical treatment. However, the issue here is what is in Baby W's best interests. NZBS practice in relation to directed donors is in accordance with standard medical practice in the UK, Australia and Canada, and the EDQM guidance. The parents' alternative proposal is not an available alternative offered by NZBS. It is not supported by a clinician's opinion knowing Baby W's state, nor by peer reviewed articles. I cannot conclude it is a safe alternative that is in Baby W's best interests.

[62] For these reasons, and given that Baby W needs urgent surgery, an order enabling the surgery to proceed using NZBS blood products without further delay is in Baby W's best interests.

Scope of orders

[63] The orders sought by Te Toka Tumai are wider than simply enabling consent to Baby W receiving blood products. Te Toka Tumai seeks to extend the clinicians' agency to all medical issues related to the surgery, but acknowledges that it is appropriate that Baby W's parents be appointed as general agents of the Court for all other purposes.[18] Te Toka Tumai seeks to extend the clinicians' agency to medical

[18] See for example *Auckland District Health Board v Z* (2007) 26 FRNZ 596 (HC); and *Auckland District Health Board v W* [2012] NZHC 1563.

issues related to the surgery given the difficulty medical staff has faced in relation to nutritional supplements, the removal of Baby W from the hospital ward (to attend Court) against medical advice in Baby W's best interests and the fractured treatment relationship between clinicians and Baby W's parents. At the hearing, Mr White also sought ancillary orders to ensure that Baby W stays in the hospital in accordance with medical advice and that there is no obstruction of the clinicians. Dr Finucane says it is not safe for Baby W to be taken off the ward. Ms Grey submitted the parents have the right to balance this risk against the benefit of Baby W being with his mother who is breastfeeding in his best interests.

[64] In the circumstances, I consider the scope of the orders sought should extend the clinicians' agency to medical issues related to the surgery. That includes enabling the clinicians to make a medical assessment as to whether it is safe for Baby W to leave the ward before and after surgery. It should not be necessary to make more explicit ancillary orders to ensure compliance with the Court's primary order.

[65] I accept the relationship between the parents and the clinicians has suffered. Both parties will be incentivised to improve the relationship before and after the surgery and be respectful of one another. As to the identity of the clinicians appointed as agents of the Court, Dr Magee is Baby W's consultant cardiologist. Whether Dr Finucane carries out the surgery depends on timing. Even if she does not, her role as Paediatric Cardiac Surgeon in Chief at Starship Hospital makes her an appropriate agent. However, I reserve leave to appoint an alternative agent if more appropriate given availability and relationship issues.

Result

[66] I make an order permitting this proceeding to be commenced by originating application.

[67] The respondents' applications for joinder of NZBS and an interim order are declined.

[68] I grant Te Toka Tumai leave to apply for an order placing a child under the guardianship of the Court under s 31(2)(g).

[69] I make the following substantive order:

(a) Placing Baby W under the guardianship of the Court from the date of the order until completion of his surgery and post-operative recovery to address obstruction to the outflow tract of his right ventricle and at latest until 31 January 2023.

(b) Appointing Dr Annabel Kirsten Finucane and Dr Alan Magee as agents of the Court for the purpose of consenting to surgery to address obstruction of Baby W's outflow tract of his right ventricle and all medical issues related to that surgery including the administration of blood and blood products to Baby W, where the administration of blood and blood products is in accordance with good clinical practice and in the best interests of Baby W as assessed by Dr Finucane and/or Dr Magee.

(c) Other than the matters covered in (b) above, appointing Baby W's parents as general agents of the Court for all other purposes.

(d) Directing Dr Finucane and Dr Magee to keep the respondents informed at all reasonable times of the nature and progress of Baby W's condition and treatment.

(e) Reserving leave to the parties to apply to the Court for a review of these orders should this be warranted.

[70] Costs are reserved.

Gault J

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