Update
Family Law Service

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Case commentary

Adoption — surrogacy

An illustration of the adoption process where intending parents used a surrogate is *Re Dumont (adoption)* [2019] NZFC 2529, Judge Partridge found the applicants to be "fit and proper" to adopt and raise a child who was their biological child conceived via gestational surrogacy. The surrogate parents consented to the adoption and attended the adoption hearing. See [6.710A] and [10.4F].

Adoption — whether divorced couple can adopt — spouse

In *Re Gordon* [2018] NZFC 3355, [2018] NZFLR 695 the applicants applied to adopt an 18-year old young person who had been placed in their care by Child Youth and Family Services since she was a young child. The couple subsequently separated, and their marriage was dissolved. Judge Collin declined to make an adoption order, holding that the definition of "spouse" did not include parties whose marriage has been dissolved.

On appeal in *Re Gordon* [2019] NZHC 184 the High Court considered the qualitative nature of the relationship and accepted that it appeared no different from that in *Re May* [2016] NZFC 3575 involving a married couple who had separated. See [6.704A].

Care and protection — interim custody orders — s 102, Oranga Tamariki Act 1989

In *Chief Executive, Oranga Tamariki — Ministry for Children v JM* [2018] NZFC 5835, Judge Coyle made a s 102 interim custody order in favour of the chief executive rather than the s 101 custody order in favour of a whānau member sought by the social worker. See [6.582F] and [6.589].

Care and protection — plans —s 128, Oranga Tamariki Act 1989

In *Morgan v Chief Executive of the Ministry for Children, Oranga Tamariki* [2018] NZCA 592 the applicant applied under s 347 of the Act for leave of the Court of Appeal on the basis that the decision to confirm the no return home goal in the s 128 plan was wrong. The Court of Appeal declined the application for leave to appeal. See [6.590C].

Child support — cessation of liability — temporary changes in caring arrangements — "ongoing daily care" — s 25, Child Support Act 1991

On the question of temporary changes in caring arrangements and in particular the period over which percentages are to be determined, see *P (CA85/2019) v Commissioner of Inland Revenue* [2019] NZCA 531 and the High Court judgment: *P v Commissioner of Inland Revenue* [2019] NZHC 98, [2018] NZFLR 956. See [5.206.04], [5.208] and

[5.215].

Child support — ground for departure orders — parent's own necessary commitments — s 105(2), Child Support Act 1991

In *Pratt v Horne* [2019] NZFC 4550, the parties had a relationship business debt and hardly any relationship property. The father (the liable parent) took on the whole payment of the debt. Judge Strettell accepted that the situation amounted a good ground for a departure and that the circumstances were special. See [5.235.02], [5.235.04], [5.237.02] and [5.245].

Family protection — grandchildren

Sexual offending against a grandchild will heighten the moral duty owed by the deceased to that grandchild: *Knight v Hunt* [2019] NZFC 4406. See [7.904.04].

Family protection — extension of time

An extension of time was allowed for the filing of proceedings where a claimant had previously been sexually abused the deceased: *Knight v Hunt* [2019] NZFC 4406. See [7.908.02].

Family protection — costs

A refusal to mediate cannot necessarily be attributed to an unreasonable attitude on the part of a litigant in the determination of appropriate costs: *Le Couteur v Norris* [2019] NZHC 2075. See [7.915].

Family violence — breach of protection order — psychological abuse

Kavanagh v R [2019] NZHC 1747, [2019] NZFLR 115. In a breach of protection order case, the father visited his sons' school to talk to the principal and teachers. The visit was held not to amount to psychological abuse. The father was however convicted and discharged for visiting the school where his sons were present without their permission. See [7.608.01] and [7.627].

Family violence — breach of protection order — psychological abuse — Hague Convention

Police v Hawley [2019] NZDC 11552 was a breach of protection order case. The defendant took the children back to their overseas country of origin for two months and returned only when the mother began Hague Convention proceedings. It was held that, as the mother had not been given an opportunity to agree to the trip, "she would clearly have been distressed by the circumstances". This amounted to psychological abuse. See [7.608.01].

Family violence — grounds for protection order — necessary for protection

In *KFW v KBW* [2019] NZHC 2621 Jagose J the following matters into account in granting a final protection order: the previous pattern of violence, the turbulent relationship, the applicant's vulnerability, ongoing contact with the children, and the respondent's resistance to attending a programme. While "finely balanced", he concluded that the order was necessary. See [7.615.02].

Family violence — direction to attend non-violence programme

In *A v G* [2019] NZHC 2404, [2019] NZFLR 195, a protection order had been granted by consent but the respondent objected to attending a programme. The only real ground that the respondent advanced was a denial of the allegations. According to the Judge, this should have been dealt with by way of appeal rather than challenging the direction to attend a programme. See [7.624].

Family violence — Police safety order — habeas corpus

In *Re Soroka* [2019] NZHC 2618, a man unsuccessfully invoked the Habeas Corpus Act 2001 after having been issued with a Police safety order. However, Powell J rejected the claim saying that the Act is concerned with detention or imprisonment, which are not present in respect of a Police safety order. See [7.629.07].

Family violence — evidence — overlap with Care of Children Act 2004

In *Taylor v Taylor* [2019] NZHC 1095, the father appealed against a final protection order claiming that the mother was using the order to alienate the children from him and to frustrate contact. Churchman J refused to admit evidence such as a psychological report under s 133 of the Care of Children Act 2004 on the basis that it was more relevant to 2004 Act proceedings than family violence. See [7.648].

Guardianship — appointment of guardian — biological parent

In *Watt v Tindall* [2016] NZFC 3280, Judge Black appointed the biological father a guardian and his ex-partner an additional guardian. See [6.202.01].

Guardianship — removal of guardian

In *Brooks v Ropata* [2016] NZFC 1385, Judge Brown refused to remove the father as a guardian of a four-year-old boy, despite the father agreeing to the removal. See [6.204.02].

Guardianship — disputes between guardians — education

In *Cavanagh v Cavanagh* [2017] NZHC 1546, Judge Hinton ruled that a seven-year-old child attend a third school not considered by either parent. See [6.206.04].

Guardianship — disputes between guardians — education

In *Mangan v Rossborough* [2019] NZFC 157, Judge Partridge held that the children of intermediate-school age should attend a non-denominational school. See [6.206.04].

Guardianship — contempt of Court for disregarding guardianship order

In *Horton v Burke* [2018] NZFC 5094 a mother was held to be in contempt of Court for disregarding a guardianship order, applying the principles in *KLP v RSF* [2009] NZFLR 833. See [6.208].

Guardianship of the Court — newborn born overseas

In *S v Family Court of Auckland* [2018] NZFC 2313, a newborn was placed under the guardianship of the Court due to the mother's long-standing mental health issues and substance abuse. The mother has already had five children removed by Oranga Tamariki. The mother and her partner had fled to Guam prior to the sixth child's birth. The child was

subsequently born in Guam, however obtained New Zealand citizenship by virtue of her parent's citizenship. This status gave the Family Court the right to place the child under its guardianship following the child's birth. See [6.310].

Guardianship of the Court — medical treatment

In *Re Dee; A District Health Board v Dee* [2015] NZHC 304 Judge Edwards placed a HIV positive 9-year-old boy under the guardship of the Court until aged 16. The Court ordered daily direct observation of the administration of antiretrovirals by a district health board against the wishes of a father that did not believe his son's illness existed. See [6.206.03], [6.306] and [6.314].

Guardianship of the Court — dental treatment

In *Wyatt v Hall* [2018] NZFC 5926, [2019] NZFLR 45, Judge Courtney placed a nine-year-old girl under the guardianship of the Court regarding her dental treatment until age 16. A wardship order was considered a last resort after the parents were unable to agree on a treatment plan. See [6.206.03] and [6.314].

International — relationship property — expert evidence on German law

In *Burmester v Burmester* [2018] NZHC 47, [2018] NZFLR 206 the appellant had not produced expert evidence of German law and so New Zealand law applied. Leave to appeal was declined: *Burmester v Burmester* [2018] NZCA 608, [2018] NZFLR 970. See [11.44].

Maintenance — interim maintenance — s 82, Family Proceedings Act 1980

In *Beric v Chaplain [Maintenance]* [2018] NZFC 7076, [2018] NZFLR 1072, it was held that interim maintenance can be awarded against a late partner's estate. See [5.30].

Maintenance — s 32, Property (Relationships) Act 1976

In *Arthur v Wood* [2017] NZFC 1072 (in the appeal *Wood v Arthur* [2017] NZHC 1745, Muir J made minor amendments to the award), Judge Coyle accepted that it did not matter that no formal application had been made under s 32 of the Property (Relationships) Act 1976. See [5.38].

Protection of personal and property rights — welfare guardian — euthanasia or assisted suicide

Although not expressly stated, it is submitted that a welfare guardian cannot act on an instruction or preference expressed by the subject person to bring about their death by euthanasia or assisted suicide: *Public Guardian v DA* [2018] EWCOP 26, [2019] Fam 27. The Court of Protection held to this effect, even where the instruction or preference was contingent upon a change in the euthanasia law. See [7.826].

Protection of personal and property rights — property orders — wills — testamentary capacity

On testamentary capacity generally, see *Loosley v Powell* [2018] NZCA 3, [2018] 2 NZLR 618, *Dodssuweit v Olivier* [2019] NZHC 1226, and B Atkin "Will-making and Capacity" in I Reuvecamp and J Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019). See [7.614].

Protection of personal and property rights — privacy of Family Court hearings

In *Galuska v Barber* [2018] NZFC 6020, [2019] NZFLR 59 a person under management was seeking election to public office. A journalist sought access to files relating to the person and was granted this request but only to documents in a redacted form. See [7.875].

Protection of personal and property rights — enduring powers of attorney — capacity to grant enduring power

In *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18 per Moore J and *Toms v IC* [2017] NZFC 9322, [2018] NZFLR 1045 it was held that the donor lacked capacity to grant an enduring power. See [7.890], [7.891], [7.892] and [7.893].

Protection of personal and property rights — revocation of enduring powers of attorney

In *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18, Moore J held that the donor had no capacity to grant an enduring power, but nevertheless noted that the attorney, a sister, was not a fit and proper person to manage property (eg she had dishonesty convictions) and revocation was therefore justified. See [7.894].

Sexual abuse cases in the Family Court — day to day care and contact

In *Ford v Evans* [2016] NZFC 4092, Judge Collin concluded that the father had not sexually abused his three-year old daughter. There were no identified factors indicating that the father was a risk to children, nor was the mother deemed a credible witness following demonstrable examples of lying under oath. See [6.462].

Sexual abuse cases in the Family Court — day to day care and contact — standard of proof

In *RMJ v BJG* [2017] NZHC 1159, Judge Davidson concluded mother had not provided sufficient evidence to establish that the child's father had sexually abused her on the balance of probabilities. See [6.462].

Sexual Abuse Cases in the Family Court — day to day care and contact

In *Bailey v Lyle* [2016] NZFC 3764 Judge DM Partridge was satisfied beyond a reasonable doubt that the child was not sexually abused. Supervised contact was ordered for the father, to eventually lead to unsupervised contact. See [6.466], [6.474] and [6.476].

Testamentary Promises — costs

Costs were ordered to lie where they fell in a case where the plaintiff was only partially successful, having pitched the claim at an unrealistically high level and having unreasonably rejected a settlement offer: *Annett v Nurmela* [2019] NZHC 1219. See [7.940.03].

Youth justice — admissibility of statements — duties of nominated person

In *R v KG* [2018] NZYC 278, [2019] DCR 546, Judge O'Driscoll found the statement of a 12-year-old boy confessing to two sexual offence charges was inadmissible. The child had not received adequate support from his nominated person as she was both mother of the child and mother of the complainant. See [6.657C.04(e)].

