Update

Family Law Service

Service 201 — March 2021

Legislative amendments

Privacy Act 2020 (2020 No 31)

This Act amended the following Acts, effective 1 December 2020:

- ss 2(1), 75E, 78A, 78B and sch 1A of the Births, Deaths, Marriages, and Relationships Registration Act 1995;
- s 22 of the Children's Commissioner Act 2003;
- s 66 of the Human Assisted Reproductive Technology Act 2004; and
- ss 66 and 66Q of the Oranga Tamariki Act 1989

Arms Legislation Act 2020 (2020 No 23)

This Act amended the following legislative instrument, effective 24 December 2020:

- r 20.13 of the District Court Rules 2014

Trusts Act 2019 (2019 No 38)

This Act amended the following Acts and legislative instruments, effective 30 January 2021:

- s 14 of the Care of Children Act 2004;
- s 2 of the Law Reform (Testamentary Promises) Act 1949;
- ss 95, 107 and sch 1 of the Protection of Personal and Property Rights Act 1988;
- r 16.27 of the District Court Rules 2014; and
- form 1, sch of the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.

Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 (2020 No 51)

This Act amended the following Acts, effective 6 February 2021:

- s 3A of the Family Protection Act 1955; and
- s 5 of the Law Reform (Testamentary Promises) Act 1949.

Case commentary

Adoption — Māori — whakapapa — administration of estate

In *Re Estate of Berghan* [2020] NZHC 1399, [2020] 2 NZLR 585 the High Court held that there were "special circumstances" under s 6(2)(a) of the Administration Act 1969 to allow the applicant letters of administration. The applicant had been adopted out of her whanau. Cull J referred to the Māori Land Court's reinforcement of the significance of

whakapapa, and the Māori Land Court's holding that neither the Adoption Act 1955 nor the Te Ture Whenua Māori Land Act 1993 severed a person's blood connection. See [6.701E.02].

Child support — child who qualifies for child support — s 2(1), Child Support Act 1991

A child aged 18 who still attends school is included as a qualifying child under the Child Support Act 1991. In *Vinson v Commissioner of Inland Revenue* [2019] NZFC 10329 the girl was studying Spanish part-time and online. It was held that she was not attending school under the Act when her enrolment was in one correspondence school subject unrelated to her previous education. See [5.202.01].

Child support — "carer" — s 2(1), Child Support Act 1991

In *Vinson v Commissioner of Inland Revenue* [2019] NZFC 10329 a girl was living with another couple apart from her parents. They received the unsupported child benefit and as a result had to seek child support from the parents. It was held the couple were carers and not employees, being volunteers, not providing care on a commercial basis. See [5.202.03].

Child support — proportions of care — variables in parenting order

The importance of parenting orders that are easy for the Commissioner to interpret arose in a case where there were several variables affecting the outcome, for example when care time was triggered by playing sport which was not always possible to predict: *Butler v Commissioner of Inland Revenue* [2019] NZFC 3663. See [5.215].

Child support — appeal against child support assessment

In *Cleveland v Commissioner of Inland Revenue* [2020] NZFC 6950 the claimant appealed on the basis that he was not the child's father. The Judge dismissed the proceedings under r 194 of the Family Court Rules 2002. The man had acknowledged paternity in prior parenting litigation and DNA testing strongly supported the claimant being the father. The Judge also held that the appeal was frivolous or vexatious under r 194(b). See [5.223].

Day to day care and contact — relocation — parent has used violence — sibling relationships — cultural factors

In *Henderson v Henderson* [2019] NZFC 9936, [2020] NZFLR 53 Judge Lindsay relocated three children back to Australia with their mother and fourth sibling after her successful application for day-to-day care. They had been taken by their father and transitioned into Gloriavale Christian Community. The father had inflicted serious violence on them, including with weapons, and had psychologically abused them seriously. Judge Lindsay ultimately found that the mother was the parent best positioned to extend her children's knowledge of tikanga, being children of Māori and Samoan descent. See [6.104C.01(a)], [6.104F], [6.104G.02(b)] and [6.104H.01(a)].

Day to day care and contact — practice and procedure — leave to appeal

In *K v Z* [2020] NZSC 116 applications to appeal procedural decisions made in the Family Court were dismissed by the High Court, Court of Appeal and Supreme Court. See [6.108B.05].

Guardianship — disputes between guardians — education

In *Keen v Bradford* [2020] NZHC 2213, Gault J allowed an appeal of a Family Court guardianship direction that the child attend a Catholic primary school. Gault J concluded

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the short-term advantage for the child of the status quo, attending the same school as her stepsister, was outweighed by attending a school where both parents could comfortably participate and be actively and fully involved in the child's education. See [6.206.04].

Guardianship — disputes between guardians — religion

In *Collins v Franks* [2020] NZHC 1329, a 12 year old child named Evan was affiliated with the Seventh Day Adventist Church. The Family Court had required the mother to allow Evan to play sport on Saturdays, despite the Sabbath. Whata J on appeal determined that playing sport was in Evan's best interest — having regard to his age, circumstances and preferences. See [6.104H.02] and [6.206.05].

Family violence — protection order — special condition

In *Smith v Smith* [2020] NZHC 3031 the parties lived apart in a gated community. A protection order was granted with a condition that the husband wind his car window up when passing his wife's house. The husband unsuccessfully appealed the condition. See [7.621].

Family violence — sentencing — breach of protection order

In *Kingi v New Zealand Police* [2020] NZHC 1896 the appellant was found guilty of breach of a protection order and breach of release conditions. He was sentenced to imprisonment with the right to apply for home detention. The sentence was upheld. See [7.627].

International — forum non conveniens — relationship property — s 7, Property (Relationships) Act 1976

In *Johnston v Johnston* [2020] NZHC 2887, the husband argued that Texas should determine the property dispute as a one-stop shop. Downs J rejected this except for movable property in the United States. See [11.44.02] and [11.44.09].

Protection of Personal and Property Rights — wills — approving a will retrospectively — ss 54 and 55, Protection of Personal and Property Rights Act 1988

In *Re Weathers (deceased)* [2019] NZFC 10092, Judge Burns held that a will could be approved retrospectively, even where the subject person had died. By an oversight the Registrar had sealed the will without authorisation under s 54 or s 55. The Judge approved the will retrospectively. See [7.850].

Relationship property — valuation — personal goodwill

In *Piccadilly v Piccadilly* [2019] NZFC 3695, [2019] NZFLR 393, the valuation of a company excluded personal goodwill, as it was not property to be valued. The husband was a sole trader, similar to a surgeon or barrister. See [7.341].

Relationship property — "relationship debt" — s 20(1), Property (Relationships) Act 1976

The purpose of a loan may be spelled out in a loan agreement, but the Court is not bound by this: the Judge can look at the practical realities of the situation: *Penn v McQueen* [2019] NZHC 2192, [2019] NZFLR 241. See [7.345] and [7.345.04].

Relationship property — "relationship debt" — s 20(1), Property (Relationships) Act 1976

Litigation debts incurred by the husband as a real estate agent have been held to be personal: *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293. See [7.345.02].

Relationship property — "relationship debt" — tax liability — s 20(1), Property (Relationships) Act 1976

In some cases income may not all be used for the benefit of the household. Where this issue is raised, the evidential burden shifts to the debtor, and the Court may conclude that only a portion of the tax liability is relationship debt: *Hewson v Deans* [2020] NZHC 1465, [2020] NZFLR 262. See [7.345.04].

Relationship property — orders of the court — occupation order — s 25, Property (Relationships) Act 1976

An occupation order can be granted as a stand-alone procedure: It is not dependent on the existence of a general application for property division, to which it would otherwise be ancillary: *Lobb v Ryan* [2020] NZHC 834, [2020] NZFLR 211. See [7.400] and [7.403].

Relationship property — orders of the court — interim distribution — s 25, Property (Relationships) Act 1976

In *Biggs v Biggs* [2020] NZCA 231, [2020] NZFLR 87, the Court of Appeal allowed a further interim payment of $700,000. The second interim payment in effect came from the husband's separate property. See [7.401].

Relationship property — orders of the court — interests of children — s 26, Property (Relationships) Act 1976

In *Radley v Radley* [2019] NZFC 10326, the Judge indicated that he planned to settle $15,000 on the daughter in a situation where the mother had a significant drug issue and used the home to manufacture methamphetamines. See [7.404].

Relationship property — orders of the court — occupation orders — warrant to enforce — s 27, Property (Relationships) Act 1976

Under s 27(4), an occupation order is enforceable as if it were an order for recovery of land under s 79(2)(c) of the District Court Act 2016. The issue arose in *O'Donnell v O'Donnell* [2020] NZFC 3041. See [7.403.04].

Relationship property — orders of the court — effect on maintenance and child support — s 32, Property (Relationships) Act 1976

In *Quinn v Quinn* [2019] NZFC 10552, Judge Otene accepted that the jurisdiction under s 32 was not unfettered but s 32 placed no restriction on the period for which past maintenance could be awarded. On the facts, such maintenance was not awarded, but the possibility should surely exist. See [7.404].

Relationship property — orders of the court — effect on maintenance and child support — s 32, Property (Relationships) Act 1976

In *Cotton v Marriott* [2019] NZFC 7588, [2020] NZFLR 329 no order was made under s 32 in relation to child support because it was decided that the Commissioner of Inland Revenue should be served first. See [7.404].

Relationship property — orders of the court — ancillary orders — s 33, Property (Relationships) Act 1976

With regard to s 33(3)(e) and the power to vest "any property", Judge Wills in *Romanes v Mikro Holdings Ltd* [2020] NZFC 211 held that this does not apply to property owned by a company. See [7.402].

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Relationship property — orders of the court — ancillary orders — s 33, Property (Relationships) Act 1976

In *Higgins v Higgins* [2019] NZFC 3703, s 33(3)(m) was used to change the terms of a trust and facilitate the sale of the home. See [7.402].

Relationship property — dispositions to trusts — disposition of shares — ss 44 and 44C, Property (Relationships) Act 1976

In *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 both parties had transferred shares to a trust that the wife had set up for her son pre-relationship. The husband gained some benefits from the trust, but it was held that the reasons for relief under s 44C outweighed the benefits. The Court accepted that there were challenges in valuing the amount of s 44C compensation, but decided to award the husband half the increased value of the shares, and half the dividends paid on the shares since separation. See [7.390] and [7.414].

Relocation — strength of relationship with parent — child's views — education

In *Mullen v Mullen* [2020] NZFC 6567, Judge Grace allowed a father's application for his 15-year-old son to relocate with him to the United States. The son only saw his mother once a month. Son had been consistent in his view to live with his father. It was his NCEA year but his son could still complete his schooling virtually and exams remotely. See [6A.8], [6A.10] and [6A.12.05].

Relocation — parent has used violence — sibling relationships — Te Ao Māori

In *Henderson v Henderson* [2019] NZFC 9936, [2020] NZFLR 53, Judge Lindsay ordered that three children taken by their father and transitioned into the Gloriavale Christian Community be relocated back to Australia with their mother and fourth sibling. The father had a history of seriously abusing the three children, including with a weapon. Judge Lindsay ultimately found that the mother was the parent best positioned to extend her children's knowledge of tikanga, being children of Māori and Samoan descent. See [6A.11], [6A.12.03] and [6A.12.06].

Relocation — cultural identity — Te Ao Māori — relationship with non-relocating parent

In *Benson v Schwartz* [2019] NZFC 8144, Judge Black refused both parents' relocation applications in part because of their son's Māori cultural identity on his paternal side. His Honour agreed that relocating the child to the United Kingdom with his mother would be "a poor substitute" both for living te ao Māori in Aotearoa. See [6A.12.06], [6A.16] and [6A.20].

Youth justice — family group conference — s 249, Oranga Tamariki Act 1989

Police v FM [2020] NZYC 399 saw the dismissal of a number of charges after a family group conference was not convened no later than seven days after the making of the order directing the conference. The young person, a 14 year old, had been in custody for 18 days. See [6.652J].

Youth justice — hierarchy of court's responses if charge against young person proved — s 283(l), Oranga Tamariki Act 1989

Under s 283 of the Oranga Tamariki Act 1989, when a charge is proved, the Youth Court may, subject to ss 284 to 290, make one or more responses grouped in levels of restrictiveness. For instance, *Police v DI* [2020] NZYC 195 concerned a young person who offended despite a pre-existing supervision order. Judge Russell varied that

supervision order, dismissed remaining charges under s 283(b) and imposed that reparations be made under s 283(l). See [6.653E.02].

Youth justice — hierarchy of court's responses if charge against young person proved — supervision with residence order — s 283(n), Oranga Tamariki Act 1989

In *R v DV* [2020] NZYC 249, Judge Matheson refused to transfer the young offender to the District Court under s 283(o) — a group 7 response — and instead imposed a group 6 supervision with residence order. This was the same group response imposed in *Police v ZJ* [2020] NZYC 170. See [6.653E.02].

Youth justice — hearing unnecessarily or unduly protracted — s 322, Oranga Tamariki Act 1989

H v R [2019] NZSC 69, [2019] 1 NZLR 675 related to sexual offending from when the defendant was 16 and 20 years old in the 1950s. He was convicted in 2017 at the age of 62. It was accepted that s 322 applied as the defendant was a young person at the time of the alleged offending. Youth justice principles still applied. The time elapsed was unduly protracted. See [6.660I].

Youth justice — hearing unnecessarily or unduly protracted — s 322, Oranga Tamariki Act 1989

R v ES [2020] NZYC 434 concerned an application under s 322. An alleged rape occurred in mid-2018, when the defendant was 16 years old. The defendant had since turned 18. It was contended that, had the charge been laid earlier, the defendant would have had access to the Youth Court youth justice regime, or at least greater focus on applicable youth provisions. The Judge decided it was appropriate to grant the application and dismiss the charge. See [6.660I].

Youth justice — unfit to stand trial — Criminal Procedure (Mentally Impaired Persons) Act 2003

In *Police v RP* [2020] NZYC 214, Judge Moala determined the youth defendant was, on the balance of probabilities, unfit to stand trial given his presentation and diagnosis. See [6.662].

Youth justice — unfit to stand trial — s 8A, Criminal Procedure (Mentally Impaired Persons) Act 2003

In *Police v JM* [2020] NZYC 273, Judge Mackintosh determined the youth defendant was unfit to stand trial for the purposes of s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003 due to his challenged executive functioning and other disabilities. See [6.662].

Youth justice — unfit to stand trial — Criminal Procedure (Mentally Impaired Persons) Act 2003

Nonu v R [2017] NZCA 170 stated when considering the issue of fitness to plead: "A defendant must have the capacity to participate effectively in his or her own trial." See [6.662].

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