

Update

Family Law Service

Service 198 — June 2020

Current developments

COVID-19 and Family Law

The following information has been added:

- CODIV-19: Guidance from Principal Family Court Judge on shared care
- Ministry of Justice: Guidance for managing shared custody during Alert Level 4
- Family Law Section: COVID-19 FAQs and Email bulletins

Legislative amendments

Protection of Personal and Property Rights Act 1988

Schedule 1 of this Act was amended by the Regulatory Systems (Economic Development) Amendment Act 2019 No 62, effective 13 January 2020.

Child Support Act 1991

Sections 9 and 122 of this Act was amended by the Social Assistance Legislation (Budget 2019 Welfare Package) Amendment Act 2019 No 13, effective 1 April 2020.

Revised chapter

The Marriage Chapter has been completely rewritten and revised by Ruth Ballantyne, lecturer, University of Canterbury. See [1.1] and following.

Case commentary

Adoption — child's whakapapa — publication of report of proceedings

In *Re GM* [2018] NZFC 3915, [2019] NZFLR 291 Judge Otene held that it was constitutionally impermissible for the Court to restrict a professional or technical publication of a report containing a child's whakapapa, anonymised or otherwise, when such a report is permitted by statute. See [6.701E.02].

Adoption — surrogacy — dispensing with surrogate mother's consent

In *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91 a child was born in the Ukraine as the result of a gestational surrogacy arrangement. Judge Ryan granted dispensation of consent of the surrogate mother, and dispensation of service of the application. A final adoption order was granted. See [6.701J], [6.707G], [6.708] and [6.708B.05].

Adoption — appeal — revocation

In *S v W* [2019] NZHC 525, [2018] NZFLR 990 Ms S appealed against a judgment made by Judge Somerville in the Family Court dispensing with her consent and granting a final adoption order. Gault J held that it was in the welfare and interests of the child for the consent of Ms S to be dispensed with and that a final adoption order should be made. See [6.708Q].

Adoption — discharge of adoption order

In *Edwards v Houghton* [2018] NZFC 2716, [2019] NZFLR 1 the applicants had been abused by their adoptive father and sought to discharge the adoption order made in 1971, some 47 years later. Judge Black noted that had the Court known about the man's propensity for violence and sexual abuse, no adoption order would have been made. See [6.717A].

Care and protection — child or young person's views — s 11, Oranga Tamariki 1989

In *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50 one of the parent's grounds for appeal was that the Family Court had not taken account of her evidence as to the children's wishes. Hinton J held that the Family Court Judge had not made an error and that the Judge was not obliged to take account of the parent's evidence. See [6.556F] and [6.563E].

Care and protection — parent of a subsequent child — s 18B, Oranga Tamariki 1989

In *Chief Executive of Oranga Tamariki, Ministry for Children v Hei* [2019] NZHC 3011 Powell J allowed the chief executive's appeal of a Family Court decision and held that there was no realistic possibility that the child would return to the care of either parent. See [6.558F] and [6.563E].

Care and protection — support order — s 91, Oranga Tamariki 1989

In *Brown v Byrne* [2019] NZFC 8312 Judge DG Smith concluded that a wardship order under s 31 of the Care of Children Act 2004 cannot substitute for a support order under s 91 of the Oranga Tamariki Act. See [6.583Q].

Care and protection — interim custody orders — habeas corpus

In *H v Family Court at Tauranga* [2018] NZHC 3459 the applicant unsuccessfully sought a writ of habeas corpus on behalf of her children. Downs J held that the interim custody order made by the Family Court was lawful and its terms unequivocal. See [6.589].

Care and protection — interim access orders — judicial review

In *JM v Family Court* [2018] NZHC 1716, [2018] NZAR 1401 the applicant sought interim orders under s 15 of the Judicial Review Procedure Act 2016 staying an order of the Family Court varying access arrangements in respect of his daughter. The High Court declined to grant an interim order under s 15 of the Judicial Review Procedure Act 2016, staying the interim access order. See [6.589].

Care and protection — evidence— s 12A, Family Court Act 1980

In *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50 Hinton J held that the Family Court Judge had made no error in hearing the evidence from a social worker relying on information recorded in CYRAS, the chief executive's business record. In that case the social worker who recorded the information in CYRAS was unable to attend the hearing. See [6.624] and [6.625].

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

In *P (SC 120/2019) v Commissioner of Inland Revenue* [2020] NZSC 22 the mother asked the Supreme Court to grant her leave to appeal. However, the Supreme Court rejected the application. See [5.206.04], [5.208] and [5.215].

Family protection — moral duty — parental abuse

A claim for increased provision can arise where family abuse was perpetuated by a family member other than the deceased parent; any percentages awarded in previous cases provide only a comparative yardstick (*TD v Executors of Estate of Mrs T* [2019] NZHC 2490); where there has been parental abuse it is arguable the parent owes a fiduciary duty to provide for the child’s economic interests that extend beyond the child’s age of majority: *A v D* [2019] NZHC 992, [2019] NZFLR 105. See [7.903.04].

Family protection — striking out

In assessing the prospects of success in a striking out application, the Court will extrapolate the plaintiff’s “best case” from his or her substantive application and affidavit and then apply relevant legal principles: *TD v Executors of Estate of Mrs T* [2019] NZHC 2490. See [7.905.06].

Family protection — striking out for want of prosecution

Judicial discussion on the relevant factors that are to be taken into account when determining a striking out application for want of prosecution: *Clements v Clements* [2017] NZFC 7791. See [7.908.04].

Family protection — costs

Judicial discussion on the continuing rationale for costs to be borne by the estate in appropriate circumstances: *Ormsby v van Selm* [2016] NZHC 484. See [7.915].

Family violence — protection order at time of sentencing — objection to protection order

The rule under s 123B of the Sentencing Act 2002 that a victim must not object to the imposition of a protection order at the time of sentencing was discussed in *Ray v New Zealand Police* [2019] NZHC 2958. Fitzgerald J held that a positive objection was necessary to remove the Court’s jurisdiction to grant a protection order. See [7.612].

Family violence — grounds for protection order — necessary for protection — undertakings

Undertakings played a key role in *SDN v RAS* [2019] NZHC 2905, [2019] NZFLR 426 where a protection order was set aside on appeal “upon the strict condition that, before this is to occur, there is to be in place to the satisfaction of the Family Court a firm and binding written undertaking given by the appellant . . .”. See [7.615.02].

Family violence — offence — reasonable excuse defence

The reasonable excuse defence was rejected in *Mitchell v New Zealand Police* [2019] NZHC 3264 where a woman had an unhealthy fixation on the victim and his wife. She visited their home while they were on holiday and claimed that it was to visit the cats. Cooke J rejected this in light of the woman’s extensive history of breaching the protection orders and causing the protected persons distress. See [7.619.04] and [7.627].

Guardianship of the Court — notice to be given to the chief executive of Oranga Tamariki

In *Parker v Heath* [2018] NZFC 1952, [2018] NZFLR 1000, the father made an application for his two children to be placed under the guardianship of the Family Court. This followed years of litigation over shared parenting arrangements and allegations of abuse. Judge Coyle held that requiring the applicant to give reasonable notice to the Chief Executive would result in undue hardship for the children. See [6.304].

Guardianship of the Court — blood transfusion

In *Auckland District Health Board v S* [2020] NZHC 300, Venning J granted the Auckland District Health Board leave to apply for an order for a six-year-old leukemia patient to be placed under the guardianship of the Court. The child's parents were Jehovah's witnesses who consented to chemotherapy, but not blood transfusions. See [6.306] and [6.314.01].

Maintenance — reasonable needs — contribution to legal costs

In *Able v Able* [2020] NZHC 177, the Family Court had awarded the wife \$1,200 per week, payment of monthly expenses as listed, and \$12,000 per month as a contribution to her legal costs. Gault J upheld these awards and noted that the wife's legal costs were a continuing expense. See [5.7].

Marriage — application by minor for Court's consent to marriage

In *Simpson v Contreras* [2018] NZFC 9115, [2019] NZFLR 65 a 17 year old woman sought permission from the Court under s 18 of the Marriage Act 1955 to marry her 27 year old partner, stating that it was unacceptable in her culture for the parties to live together before marriage. Judge Burns granted her application noting that she was "an intelligent young woman who understands the meaning of what marriage is". See [1.2].

Marriage — prohibited degrees of affinity

In *Re Warahi* [2017] NZHC 115, the High Court permitted a former daughter-in-law and father-in-law to marry after both their former spouses died several years prior. See [1.4].

Marriage — absence of consent — duress

In *Fuller v Draper* [2016] NZFC 7294, [2017] NZFLR 142 a female applicant sought a declaration that her marriage was void. She claimed she had only consented to taking part in a fake marriage ceremony with her partner (who was also her employer) in a love chapel in the United States to "assist him in pleasing his sick mother". In dismissing the application, Judge A Somerville held that there was no evidence to establish that the marriage was void. See [1.11.05].

Marriage — agreement to marry

In *Zhao v Huang* [2014] NZHC 132, [2014] NZFLR 782 a number of factors led Woolford J to hold that there was an agreement to marry, including a newspaper advertisement inserted by the applicant seeking a marriage partner and the opening of a joint account into which the applicant deposited his life savings and to which the respondent had access. See [1.15.01].

Paternity — declaration as to paternity

In *Beckett v Moroney* [2018] NZFC 8468, [2019] NZFLR 390, Judge Grace made a declaration of paternity naming the applicant the father of an 11-year-old girl. Judge Grace inferred paternity on the basis that the respondent mother refused a DNA test of the child. See [6.502C.02].

Protection of personal and property rights — lack of capacity

In *EB v Southern District Health Board* [2018] NZFC 6374 the person concerned was held to be “not fit to be released” from compulsion, but quite independently of this, the person had a welfare guardian and property manager. See [7.813].

Protection of personal and property rights — lack of capacity — sexual relations — residence

In *B v A Local Authority* [2019] EWCA Civ 913, [2019] 3 WLR 685 a woman with disabilities wanted to cohabit with a man convicted of multiple sexual offences. Declarations were made by the trial Judge that the woman had capacity to decide where she lived but not to make decisions about her care or about her contact with others. The Court of Appeal upheld the decision in regard to sexual relations, taking into account the woman’s understanding of sexually transmitted diseases and the use of condoms. The Court of Appeal held that the woman lacked capacity with regards to residence as well. See [7.813].

Protection of personal and property rights — appointing litigation guardian

In *MT v Public Trust* [2019] NZFC 8368, Judge Southwick used r 90E of the Family Court Rules 2002 to appoint a son as a litigation guardian for his mother in proceedings under Part 8 of the Property (Relationships) Act 1976, which followed the death of the mother’s de facto partner. See [7.821].

Protection of personal and property rights — legal representation — costs

In *Flavell v Campbell [Costs]* [2019] NZHC 2993, Moore J examined ss 65, 65A and 65B of the Protection of Personal and Property Rights Act 1988 in relation to appellate proceedings. He held that the wording meant that it was the Family Court that had to assess the reasonableness of counsel’s costs in an appellate proceeding and therefore he had no jurisdiction to award costs. See [7.873].

Testamentary promises — nexus between promise and reward for services

It is insufficient that statements are merely made at the time of the relevant services or work, the requisite nexus must be made out: *Bryan v Jack* [2016] NZFC 10499. See [7.934.02].

Testamentary promises — value of services or work

In determining the value of the work and services, the principal focus will be on the value to the recipient, but there is some difficulty in placing a retrospective value on such work and services: *Hill v Waddingham* [2019] NZHC 3505. See [7.935.04].

Youth justice — 13 year old child offender — aggravated burglary — doli incapax

In *Police v HJ* [2018] NZYC 286, [2018] DCR 867 Judge Recordon held that also held that what a 13 year old child said or did before or after offending might be sufficient to rebut the presumption of *doli incapax*. In this case fleeing police may infer sufficient knowledge of guilt or that the burglary was contrary to law. See [6.653E.01].

Youth justice — warrantless arrest of 15 year old

In *Police v SJ* [2019] NZYC 127, Judge Walsh held that the Police were justified in the warrantless arrest of a 15 year old boy under s 214 of the Oranga Tamariki Act 1989. See [6.655A].

Youth justice — admissibility of statements — duties of nominated person

In *Police v HC* [2017] NZYC 375, [2018] DCR 105, Judge Fitzgerald found an interview of a fourteen-year-old girl facing burglary and aggravated robbery charges was inadmissible. The Judge observed that the failure of the Police to properly seek her preferred nominated person alongside the Justice of the Peace's failure to properly support the child resulted in a significant breach of her rights. See [6.657C.04(e)] and [6.657E.03(b)].