

# Update Family Law Service

## Service 199 — August 2020

### Legislative amendments

#### **Family Court (Supporting Families in Court) Legislation Act 2020 No 17**

The Family Court (Supporting Families in Court) Legislation Act 2020 amended ss 7A, 143 and sch 1AA of the Care of Children Act 2004, effective 1 July 2020.

This legislation reinstates legal representation in the early stages of Care of Children Act proceedings and allows legal aid for eligible parties.

After the 2014 family justice system reforms, lawyers were excluded from the beginning of Family Court proceedings there were disputes between parents over the care of children. This approach has now been reversed.

The Family Court (Supporting Families in Court) Legislation Act 2020 is part of a \$62 million package to support families through the Family Court, see

<https://www.beehive.govt.nz/release/62-million-package-support-families-through-family-court>

It is expected that a second Bill focused on strengthening the Family Court will follow later in 2020.

#### **Family Court Amendment Rules 2020 (LI 2020/135)**

The Family Court Amendment Rules 2020 amended rr 80, 83, 87, 88, 416C, 416F, 416W and 416ZD of the Family Court Rules 2002, effective 1 July 2020.

These amendments reflect the repeal, effective 1 July 2020, of s 7A of the Care of Children Act 2004 (by s 4 of the Family Court (Supporting Families in Court) Legislation Act 2020).

#### **Family Court (Emergency) Amendment Rules 2020 (LI 2020/105)**

The Family Court (Emergency) Amendment Rules 2020 amended rr 8, 12, 76, 107A, 127A, 162A, 198, 416C and 416U of the Family Court Rules 2002, effective 5 June 2020.

The purpose of these rules is to facilitate the continuation of Family Court business during the outbreak of COVID-19 or any other emergency.

These rules amend the principal rules to insert definitions of electronic address and emergency, and to provide that during an emergency—

- documents may be electronically filed;
- personal service of documents may be effected by transmitting them to an electronic address that the person effecting service knows to be regularly used by the person being served;
- unsworn affidavits may be filed and used in proceedings;
- Registrars may electronically sign orders and seal judgements;
- Judges have a discretion whether to hold a directions conference in proceedings filed without notice under the Care of Children Act 2004.

**COVID-19 Response (Further Management Measures) Legislation Act 2020 (2020 No 13)**

This Act amended ss 2AA, 2B, 6B, 7B, 8C, 9A, 10A, 11A, 38A, 41A, 42A, 45A, 96A, 97A, 109A, 110AA, 110BA, 110D, 111A, 127A, 134A, 137A and sch 1, cl 3A and 8A of the Mental Health (Compulsory Assessment and Treatment) Act 1992, effective 16 May 2020.

**COVID-19 Public Health Response Act 2020**

This Act amended s 272 of the Oranga Tamariki Act 1989, effective 13 May 2020.

**COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 (2020 No 10)**

This Act amended ss 2, 9, 27, 35A and 142 of the Child Support Act 1991, effective 20 April 2020.

**Family Court Practice Note****Lawyer for the Child: Selection, Appointment and other Matters**

This revised Practice Note was issued by Principal Family Court Judge Jacquelyn Moran on 19 June 2020. See [PSPN1].

**Revised chapter****Civil unions**

The Civil Unions Chapter has been completely rewritten and revised by Ruth Ballantyne, lecturer, University of Canterbury. See [1.100] and following.

**Case commentary****Hague Convention — return of child order — one year threshold — s 106(1)(a), Care of Children Act 2004**

*Simpson v Hamilton* [2019] NZCA 579, [2019] NZFLR 338 the daughter was removed from Germany without knowledge of the father after the father had been awarded parental custody in Germany. At the time of the appeal, the daughter had already been away from her place of habitual residence in Germany for two years which is over the one year threshold in s 106(1)(a) of the Care of Children Act 2004. The Court took the view that since the child had spent a third of her life in New Zealand, there was “a significant change of circumstances” that gave rise to an exercise of discretion to decline to return the child to Germany. The Supreme Court rejected the father’s leave to appeal in *Simpson v Hamilton* [2020] NZSC 42. See [6.165.01].

**Hague Convention — return of child order — defence of acquiescence in the removal — s 106(1)(b)(ii), Care of Children Act 2004**

In *Akau v Tilo* [2019] NZFC 5746, a father successfully applied for the return of his three children to Australia. The mother raised a defence of acquiescence, having submitted a series of text messages she interpreted as the father giving permission for the children to remain in New Zealand. Judge Fleming held that the mother did not provide sufficient evidence to prove acquiescence. See [6.165.03].

**Hague Convention — return of child order — grave risk to the child if returned — s 106(1)(c), Care of Children Act 2004 — family violence**

*LRR v COL* [2020] NZCA 209 declined an application to return a child to Australia on the basis that there was grave risk to the child if returned and that such a return would place the child in an intolerable situation. The Court held that the impact of return on the abducting parent may be relevant. In addition to the financial strain, moving back to Tasmania would require the mother to live close to the father, whom has previous family violence convictions. The Court found that all these circumstances together would likely render the mother incapable of providing effective care to the child, a situation that would be intolerable for the child. See [6.165.04].

**Hague Convention — return of child order — child objects to being returned — s 106(1)(d), Care of Children Act 2004**

*Simpson v Hamilton* [2019] NZCA 579, [2019] NZFLR 338 found that the child's objections were "vitiated by the undue influence of her mother and were founded on an entirely false premise". The Court found that the child objected to being separated from her family, not to the return with her family to Germany. See [6.165.05].

**International — family violence**

In *I v I [Domestic violence — variation]* [2018] NZHC 327, [2018] NZFLR 372, the appellant wanted to vary a protection order to cover a variety of persons and to apply in the United States and Fiji. The variation was unsuccessful. Moore J also held that it was not right to deal with the enforcement overseas of a protection order by extending the order to cover people or conduct overseas. See [11.38].

**International — enforcement of overseas order — payment of dowry**

In *Almarzooqi v Salih* [2020] NZHC 1049 a marriage contract in the UAE included the deferred payment of "dowry" to the wife of 500,000 Dirhams. The wife had NZ residency and the husband NZ citizenship. They intended to live in NZ and actually got a divorce in NZ. A UAE court ordered the husband to pay the dowry. In NZ, the wife sued for enforcement of the foreign judgment and, additionally, a claim for breach of the marriage contract. The wife's application was denied. See [11.85], [11.93] and [11.104].

**Maintenance — liability to maintain**

In *Lobb v Ryan* [2020] NZHC 834, the husband sought maintenance from his wife. He was an accountant earning nearly \$150,00 per annum. It was held that the claim was "fundamentally misconceived" and was a ruse to get the wife to pay debts and for him to continue living in the home. See [5.6].

**Relocation — children's views**

In *Morton v Baxter* [2019] NZFC 8123, Judge Brown refused an application by the father to relocate his two children to Australia. Ultimately, the Judge was not convinced there was much depth to the son's desire to move to Australia or a real appreciation for the consequences. See [6A.18].

**Relocation — employment opportunities overseas**

In *Morgan v Palmer* [2016] NZFC 10544, Judge Barkle allowed a mother to relocate from New Zealand to Brisbane to pursue "a good number of employment opportunities". She was unemployed in New Zealand and had two job offers in Brisbane. See [6A.12.01].

**Relocation — uncertainty of new environment**

In *YY v CC* [2016] NZHC 2493, Justice Dobson upheld Judge Russell’s refusal to allow a mother to relocate from the Golden Bay region to the Tasman region. One factor highlighted by both is the fact that the child would be moving into a small one-bedroom environment that would also require her to move schools. See [6A.19].

**Relocation — uncertainty of new environment**

In *Gull v Smart* [2016] NZHC 2566, Justice Gendall rejected an application to relocate to Australia noting that the mother’s decision was “perfunctory, sketchy and uncertain”. The mother was on a limited income. See [6A.19].

**Relocation — uncertainty of new environment**

In *Lyon v Wilson* [2017] NZFC 1908, [2017] NZFLR 885, the application by the mother to relocate from Auckland to Waikato was declined. One factor was that there were uncertainties over the mother’s employment and income over the next year. See [6A.19].

**Relocation — too adult-focused**

In *Malcolm v Lloyd* [2015] NZHC 1483, the mother shifted from Auckland to Wellington to pursue her “dream job” in the film industry. Muir J refused relocation, noting that the mother relied heavily on the “happy mother, happy child” principle. See [6A.12.01], [6A.21].

**Relocation — relocation by Oranga Tamariki**

In *Chief Executive of Oranga Tamariki — Ministry for Children v Lien* [2018] NZFC 2784, Judge Mahon considered Oranga Tamariki’s application to relocate a child in their care to his natural parents in South East Asia. The child’s natural parents had been deported from New Zealand being imprisoned for importing methamphetamine. The application was declined on the basis that it was not in the child’s best interests to relocate overseas. See [6A.24].

**Relocation — relocation by Oranga Tamariki**

In *MR v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2017] NZHC 757, the Family Court initially placed an order limiting the area the children could be placed to Waikato near their mother. However, a subsequent Family Court and the High Court found it was in the best interests of the children to place them in Nelson with extended family. See [6A.24].