Update
Family Law Service

Service 200 — November 2020

Current developments

Family Court Covid-19 Protocol for the Adoption of New Zealand Surrogate Babies born overseas

This protocol was issued by Principal Family Court Judge Moran on 20 August 2020.

This protocol is discussed in the Assisted Reproductive Technology and Surrogacy chapter at [10.4.02].

New legislation

Oranga Tamariki (Youth Advocates) Regulations 2020 (LI 2020/157)

These regulations were effective 13 August 2020. They prescribe the amounts payable to a youth advocate appointed under s 248A or s 323 of the Oranga Tamariki Act 1989. They also prescribe eligibility criteria for a youth advocate appointed under s 248A of the Act, which align with the criteria for eligibility under s 323 of the Act.

Legislative amendments

Education and Training Act 2020 (2020 No 38)

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

- s 5 of the Child Support Act 1991;
- ss 5, 15 and sch 1 of the Children's Act 2014;
- s 19 of the Family Violence Act 2018;
- ss 2 and 66Q of the Oranga Tamariki Act 1989;
- regs 36 and 42 of the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018; and
- reg 2 of the Oranga Tamariki (Residential Care) Regulations 1996.

Public Service Act 2020 (2020 No 40)

This Act amended the following Acts, effective 7 August 2020:

- s 2 of the Adoption Act 1955;
- s 2 of the Adult Adoption Information Act 1985;
- ss 79, 80 and 81 of the Births, Deaths, Marriages, and Relationships Registration Act 1995;
- s 8 of the Care of Children Act 2004;
- s 24 of the Children's Act 2014;
- ss 8 and 11B of the Family Court Act 1980;
- s 2 of the Family Proceedings Act 1980;
- ss 8, 65 and 66 of the Family Violence Act 2018;

- s 91 of the Mental Health (Compulsory Assessment and Treatment) Act 1992;
- ss 2, 7, 7A, 7B, 7C, 7D, 7E, 7G, 214, 296K, 423, 425 and 438 of the Oranga Tamariki Act 1989;
- s 2 of the Protection of Personal and Property Rights Act 1988;
- ss 437, 438, sch 2, sch 7 and sch 9 of the Social Security Act 2018;
- ss 4 and 86 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017;
- r 32 of the Child Support Rules 1992;
- r 106 of the Family Court Rules 2002;
- r 41 of the Family Proceedings Rules 1981;
- regs 2 and 30 of the Oranga Tamariki (Residential Care) Regulations 1996; and
- r 36 of the Oranga Tamariki Rules 1989.

Contempt of Court Act 2019 (2019 No 44)

This Act amended the following Acts, effective 26 August 2020:

- s 15A of the Family Court Act 1980; and
- s 41 of the Harassment Act 1997.

Family Court Amendment Rules (No 2) 2020 (LI 2020/150)

These rules amended rr 20A, 22, 72, 276, 279, 281, 284, 289, 294, 295, 296, 297, 299, 300 and sch 4 of the Family Court Rules 2002, effective 13 August 2020.

Oranga Tamariki (National Care Standards and Related Matters) Amendment Regulations 2020 (LI 2020/156)

These regulations amended regs 5, 16, 24, 26, 32, 38, 54, 55, 65, 71, 73, 80 and sch 1 of the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018, effective 13 August 2020.

Oranga Tamariki Amendment Rules 2020 (LI 2020/158)

These rules amended rr 8, 12, 16, 20, 27, 29, 46, 46A, 46B, 46C, 69 and sch 1 of the Oranga Tamariki Rules 1989, effective 13 August 2020.

Rewritten commentary

The following chapters have been rewritten and updated by new author Anna Chapman, Senior Associate, Morrison Kent:

- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
- Family Law Practice and Procedure

Case commentary

Care and protection — duties of chief executive in relation to Treaty of Waitangi — s 7AA, Oranga Tamariki Act 1989

In *Chief Executive of Oranga Tamariki–Ministry for Children v ZM* [2020] NZFC 2 Judge Otene said of the legislative amendments to the Oranga Tamariki Act 1989 that took effect on 1 July 2019 "They unquestionably call for interpretation of care and protection laws with a Te Ao Māori lens." See [6.556A].

Care and protection — interim custody order — s 78, Oranga Tamariki Act 1989

In *Chief Executive of Oranga Tamariki—Ministry for Children v RR* [2019] NZFC 9888 Judge E Smith declined to make a s 78(1) interim custody order, and instead continued a

s 92 interim support order, amending a condition of the order to allow access between the child and her father. Her Honour directed that the s 78 application remain extant, with leave reserved to the Ministry to bring the application for the s 78 interim custody order back on 12 hours' notice. See [6.574] and [6.580.01].

Child support — enforcement — community service — s 196, Child Support Act 1991

A sentence of 40 hours community service was imposed in *Commissioner of Inland Revenue v Winfield* [2019] NZFC 10162 per Judge Smith. The respondent had paid off other debts, prioritising them over child support. See [5.279].

Day to day care and contact — personal jurisdiction of the court — s 126, Child Support Act 1991

In *SG v DSG* [2019] NZHC 2579, Fitzgerald J held that the High Court had jurisdiction to make an order under s 31 to place the child under the guardianship of the court. The High Court had personal jurisdiction under s 126 to make such an order. See [6.103A.02(a)].

Day to day care and contact — paramountcy of child's welfare — psychological well-being

In *KP v AZ* [2020] NZHC 1366, in making final orders for the return of a fifteen year old boy to the day to day care of his mother in New Zealand, after orders had been made for the boy to be placed with his father in Australia because of parental alienation concerns, Grice J placed primary emphasis on the psychological well-being of the boy. See [6.104A.01] and [6.105C.01].

Day to day care and contact — parents primarily responsible for the child — s 5(b), Care of Children Act 2004 — child's identity — s 5(f), Care of Children Act 2004

The child was of Māori descent and had from an early age been brought up by whāngai parents and birth parents. In *Nikau v Tatchell* [2018] NZFC 1239, [2018] NZFLR 276 the child was placed by the Family Court in the primary care of the whāngai parents so the child would be exposed to Te Ao Māori and her wide family. The High Court in *Nikau v Nikau* [2018] NZHC 1862 overturned the decision of the Family Court, giving primary emphasis to the responsibility of birth parents to bring up their child under s 5(b) over the principle of the child's identity in s 5(f). An application by the whāngai parents for leave to appeal to the Court of Appeal was declined: *Nikau v Nikau* [2018] NZCA 566, [2018] NZFLR 826. See [6.104D], [6.104H.01(a)] and [6.107C].

Day to day care and contact — views of young children — s 6, Care of Children Act 2004

The High Court held in *GF v EF* [2019] NZHC 3140 and *Carter v Scott* [2020] NZHC 1447 that even children of a young age should be given an opportunity to express a view on issues relating to their welfare. See [6.105B.01(f)].

Day to day care and contact — obtaining child's views before ordering s 133 report on child

DN v Family Court [2020] NZHC 210 raised the important issue of whether or not the children's views should be obtained before a Court orders a psychological report on the children and their relationship with the parties who are in contention with them. Duffy J held that Judge Burns in *KQ v DN* [2018] NZFC 9614 was bound by the earlier decision

of Courtney J in *AA v Family Court at Auckland* [2018] NZHC 1638, [2018] NZFLR 543 and was required to ascertain the views of the children before seeking a psychological report on them. See [6.105H].

Day to day care and contact — parental alienation — return from Australia

A fifteen year old boy, M, was removed from his mother's care in New Zealand by the Family Court in *Z v K* [2019] NZFC 8290 based on findings that the mother had severely alienated him from his father. Once living with his father in Australia, the boy ran away to his maternal aunt's home. Interim orders were made in *K v Z (as litigation guardian for M)* [2019] NZHC 3350, [2019] NZFLR 467 staying the execution of the Family Court orders. In *KP v AZ* [2020] NZHC 1366 the Court appointed psychologist said that if M was not allowed to return to New Zealand to his mother, he was likely to run away again. This was the crucial evidence in Grice J making an interim order that M be returned from Australia to the care of his mother in New Zealand. See [6.108B.05].

Day to day care and contact — judicial review — s 16, Judicial Review Procedure Act 2016

Bell v Family Court at Auckland [2019] NZHC 3156 emphasised the discretionary nature of public law remedies. This includes those available under s 16 of the Judicial Review Procedure Act 2016, as illustrated by its permissive language. See [6.141.02].

Day to day care and contact — judicial review — s 17, Judicial Review Procedure Act 2016

Duffy J in *DN v Family Court at Auckland* [2020] NZHC 210 noted that the effect of s 17 of the Judicial Review Procedure Act 2016 is to require the decision-maker to adhere to the reasoning of the Court who remitted the decision. This makes the reviewing court's decision binding. See [6.141.03].

Day to day care and contact — judicial review — applications by intervenors

In *DN v LN* [2019] NZHC 2028, [2019] NZFLR 150 Palmer J granted leave for the New Zealand Law Society to intervene using its inherent jurisdiction. The boundaries of the Law Society's best practice guidelines for lawyers for children were at issue in the judicial review proceedings. Palmer J held that it was in the overall interests of justice for the New Zealand Law Society to assist the Court. See [6.141.05].

Family violence — forced marriage protection order

In the UK, the Court can grant a forced marriage protection order, which may include conditions such as ones relating to travel and passports: *In re K (Secretary of State for Justice and another intervening)* [2020] EWCA Civ 190, [2020] 2 WLR 1279. This is not available in New Zealand. See [7.607.03].

Family Protection Act 1955 — Māori

Where there had not been a long whānau connection to the land, the retention of that land within the whānau could not be given precedence over the obligation of the testatrix to discharge her moral duty to her children: *Koroheke v Te Whau* [2020] NZHC 863. See [7.901.05].

Family Protection Act 1955 — moral duty

The moral duty gloss is too deeply embedded to be reconsidered: *Bean v Bean* [2019] NZHC 20. See [7.903].

Family Protection Act 1955 — moral duty — estrangement

Where there has been previous estrangement with the applicant, the Court's concern is not with punishing the deceased or righting past wrongs: *Carson v Lane* [2019] NZHC 3259. See [7.903.04].

Family Protection Act 1955 — moral duty — entitlements under a trust

Any possible entitlements under a trust are less significant where there are other beneficiaries and where the applicant has had a difficult relationship with the trustee upon whom she is dependent for a distribution: *Pollock v Pollock* [2020] NZHC 648. See [7.903.05].

Family Protection Act 1955 — moral duty — changed circumstances

The moral duty is assessed with reference to the circumstances existing at the date of death, irrespective of whether those circumstances were known to the deceased: *TD v Executors of Estate of Mrs T* [2019] NZHC 2490. See [7.901.05].

Family Protection Act 1955 — persons entitled to claim — widow

A widow has the strongest claim against the deceased's estate, even where she has opted to claim half of the relationship property under the Property (Relationships) Act 1976: *Lang v Flowers* [2020] NZFC 3126. See [7.904.01].

Family Protection Act 1955 — persons entitled to claim — children of the deceased

The continuing nature of the duty owed to children means any financial or emotional support received by the child during the deceased's lifetime would not usually result in the discharge of the moral duty; unfairness of treatment in the will does not provide a tenable basis for a family protection claim: *Pollock v Pollock* [2020] NZHC 648. See [7.904.02].

Family Protection Act 1955 — persons entitled to claim — percentages

The High Court has held that the percentage approach to family protection awards is more appropriate for smaller estates with a number of disadvantaged claimants rather than for large estates: *Carson v Lane* [2019] NZHC 3259. See [7.904.03].

Family Protection Act 1955 — persons entitled to claim — grandchildren of the deceased

The deceased's sexual offending against a grandchild heightened the moral duty owed to that grandchild; judicial discussion on the situation where a parent of the grandchild elects not to make a family protection claim: *Knight v Hunt* [2019] NZFC 4406. See [7.904.04].

Family Protection Act 1955 — costs

Judicial discussion on awarding costs on a scale basis out of the estate: *Cartwright v Joseph* [2019] NZHC 1093. See [7.915].

Hague Convention — grave risk defence — intolerable situation — s 106(1)(c), Care of Children Act 2004

In *Robinson v Robinson* [2020] NZHC 1765 Gordon J held that there was a grave risk that the three children subject to the proceedings would be placed in an intolerable situation if returned to Australia. It was held that ordering the youngest child to return to Australia whilst allowing the older children to stay in New Zealand would put them in an intolerable situation. The older children were found to meet the test on the grounds that

due to their mental health vulnerabilities, returning the children to Australia and separating them from their two adult siblings that lived in New Zealand would place them in an intolerable situation. See [6.165.04].

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 — purpose of Act

In *J v Attorney-General* [2018] NZHC 1209 Cull J said this in relation to the purpose or legislative scheme of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003: it provides a "humane, fair and compassionate system for their care and rehabilitation." See [9A.5].

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 — compulsory care order

A compulsory care order can be for less than three years where there is likelihood of improvement: *Wilder v Martin* [2015] NZFC 6337. See [9A.13].

International — confirmed maintenance order — leave to appeal out of time

In *Suthers v Schofield* [2020] NZHC 1634 an application for leave to extend time to appeal was denied where Grice J was not satisfied with the reason for the substantial delay (15–18 months) and considered that the respondent would be prejudiced, having organised his finances on the basis of the maintenance order as confirmed. See [11.88].

Law Reform (Testamentary Promises) Act 1949 — "services"

The forgoing of a family protection constituted the rendering of services for the purposes of a testamentary promises claim: *Whyte v Breen* [2019] NZFC 9224. See [7.933.01].

Law Reform (Testamentary Promises) Act 1949 — implied promise

A variance in the terms of the promise is not of itself problematic: *Whyte v Breen* [2019] NZFC 9224. See [7.934.01].

Law Reform (Testamentary Promises) Act 1949 — implied promise

A statement made by the father to his son was too loose to amount to a relevant promise: *Pollock v Pollock* [2020] NZHC 648.

Maintenance — application for spousal maintenance — against deceased partner's estate

In *Guzman v Estate of Osborne* [2020] NZFC 1983, it was accepted that a claim for spousal maintenance could be made against an estate, but it was argued that it was subject to an agreement under Part 6 of the Property (Relationships) Act 1976. The Court held however that the agreement in question did not cover maintenance, and thus was not a bar to an award of maintenance. It was also held that a final order could be by way of lump sum. See [5.5] and [5.13.02].

Practice and procedure — costs for lawyer for child — s 135A, Care of Children Act 2004 — s 45, Legal Services Act 2011

If a party is legally aided, the court can only make an order for costs against that party if the court is satisfied that there are "exceptional circumstances": *Re Karaka* [2016] NZHC 183, [2016] NZFLR 64. See [FPP5.12].

Protection of Personal and Property Rights Act 1988 — review of attorney's decisions — s 103, Protection of Personal and Property Rights Act 1988

In the case of *EL v TG* [2020] NZFC 1248 where attorney decisions were being reviewed, Judge Doyle ordered disclosure of banking, medical and legal information after the death of the donor. See [7.894].

Youth justice — United Nations Convention on the Rights of the Child (UNCROC)

Judge Fitzgerald in *Police v FG* [2020] NZYC 328 discussed the applicability of the UNCROC and other UN instruments in relation to the Oranga Tamariki Act. Section 5 of the Act now requires the rights under the UNCROC to be "respected and upheld". See [6.651D] and [6.657B.03].

Youth justice — age is a mitigating factor

R v Cameron [2020] NZHC 1488 notes that *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 does not recognise that youth means their actions are excusable, but only partly explicable by their state of neurological development. See [6.652E].

Youth justice — power of Youth Court to discharge charge — s 282, Oranga Tamariki Act 1989

Section 282 of the Oranga Tamariki Act 1989 allows the Youth Court to discharge a charge for a category 1, 2, or 3 offence after inquiring into the circumstances of the case: *Police v RT* [2020] NZYC 7 and *Police v LV* [2020] NZYC 117. See [6.653E.02].

Youth justice — informing young persons of their rights — manner and language of explanation — United Nations Convention on the Rights of the Child (UNCROC) — s 218, Oranga Tamariki Act 1989

In *Police v FG*, Judge Fitzgerald found the conduct of obtaining the defendant's statement inappropriate under s 218 of the Oranga Tamariki Act 1989 which requires not only the language used in giving the explanation to be appropriate, but the manner in which it is explained. It was held that the manner in which it was explained was inappropriate as his nominated person was cooking and looking after a child at the same time his rights were explained at his home. The statements were inadmissible in light of article 40 of the UNCROC. See [6.656B].

Youth justice — whether young person understood their right to legal representation — United Nations Convention on the Rights of the Child (UNCROC) — s 221, Oranga Tamariki Act 1989

The recent introduction of a statutory requirement to uphold the UNCROC and greater recognition of neurodisabilities has altered the manner in which the courts have assessed whether children have understood their rights to legal representation under article 37. In *Police v FG* [2020] NZYC 328 Judge Fitzgerald has determined that this right should only be considered upheld if the police have taken a "Netherlands Approach". See [6.657B.03].

