

Update

Family Law Service

Service 204 — October 2021

Case commentary

Child support — commencement of liability

In *Lindsay v Commissioner of Inland Revenue* [2021] NZHC 830, Cooke J held that liability for child support was from the time of the new application for child support, when the child was 16, with the accompanying paternity order. The Judge held that the declined application at the time of the child's birth could not be re-activated. See [5.206.03].

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

In *Family Court v AA* [2021] NZCA 189 the Court of Appeal, in granting an extension of time to appeal, noted that the “proposed appeal raises seriously arguable issues in relation to whether s 133(7) or other provisions of COCA require that the views of a child be ascertained before directing a psychological report under s 133.” See [6.105H].

Day to day care and contact — lawyer for child — right of audience

DN v Family Court at Auckland [2021] NZHC 1116 found there was a right of audience for a lawyer for child in the related stay proceedings. See [6.108C.02].

Day to day care and contact — supervised contact — intoxicated parent

In *Robson v Barker* [2019] NZFC 280, Judge Maude refused to allow the father unsupervised contact with his 10-year-old son. The father had previously been arrested while intoxicated when the son was in his care, which led to supervised contact. See [6.110F].

Day to day care and contact — costs — appeal against order of costs

In *Ross v Stanley* [2021] NZHC 1125, Whata J dismissed most of a father's appeal against costs relating to Family Court proceedings for parenting orders. See [6.132E.02].

Family Protection Act 1955 — moral duty — contribution to the deceased's estate

A son's significant contributions to the accumulation of family assets were recognised: see *Brosnahan v Meo* [2021] NZHC 79. See [7.903.03].

Family Protection Act 1955 — moral duty — trusts

The assessment of the deceased's moral duty will be assessed in the context of any relevant trusts: *Brown v Brown* [2021] NZHC 1045. See [7.903.05].

Family Protection Act 1955 — only son

Fifty per cent of the estate awarded to an only son to recognise his filial loyalty and contributions to the estate: *Brosnahan v Meo* [2021] NZHC 79. See [7.904.03].

Family Protection Act 1955 — grandchild

A grandchild can make a “recognition” claim: *Brosnahan v Meo* [2021] NZHC 79. See [7.904.04].

Family Protection Act 1955 — grandchild

Where grandchildren are beneficiaries it is not incumbent on them to justify a bequest made in their favour: *AP v Lucas* [2021] NZHC 1017. See [7.904.04].

Family Protection Act 1955 — variation of orders — s 12, Family Protection Act 1955

The Court’s power to vary orders is essentially confined to periodic payments: *Cartwright v Joseph* [2021] NZHC 145. See [7.910].

Family Protection Act 1955 — right of appeal — s 15, Family Protection Act 1955

On appeal an order will be considered “plainly wrong” where it is irrational or unreasonable: *AP v Lucas* [2021] NZHC 1017. See [7.912].

Family Protection Act 1955 — costs — appeals against costs orders

The Court of Appeal observes that appeals against costs orders seldom succeed: *Kinney v Pardington* [2021] NZCA 174. See [7.915].

Family violence — jurisdiction of High Court

The Family Court is the court intended by the legislature to deal, at first instance, with applications made under the Family Violence Act 2018. The High Court cannot use its inherent jurisdiction to bypass the role of the Family Court: *J v R* [2021] NZHC 2082. See [7.605].

Family violence — “psychological abuse”

Care is needed not to treat every incident as psychological abuse. In *H v R* [2021] NZHC 1144, what appeared to be “verbal abuse” was regarded as “bad language” rather than abuse. See [7.608].

Family violence — “financial or economic abuse”

Confiscation of electronic devices such as the household computer, back-up drives and iPads has been held to be economic abuse: *Higgins v Higgins* [2019] NZFC 1716. See [7.608].

Family violence — protection order — “necessary for protection”

In *H v R* [2021] NZHC 1144, it was “beyond dispute” that the mother had used family violence. However, on appeal Churchman J held that the father did not have a reasonable basis for a subjective apprehension of future abuse. Instead, the father had manipulated the protection order for his own purposes. The application for a protection order was declined. See [7.615.02].

Family violence — discharge of protection order

Denial of a discharge application was upheld on appeal in *Thomas v Kane* [2021] NZHC 1211. See [7.626].

Family violence — discharge of protection order

In *Higgins v Higgins* [2020] NZFC 9785, Judge Parsons struck out the wife's application for discharge of a protection order as an abuse of process and an attempt to relitigate matters already determined. See [7.626].

Family violence — occupation order

In *Higgins v Higgins* [2019] NZFC 1716, Judge Manuel granted an occupation order (along with ancillary furniture orders) even though the home was in trust. See [7.631.03].

Family violence — role of lawyer to assist — cross-examination — s 95, Evidence Act 2006

Finley v Wiggins [2020] NZFC 6481 discussed s 95 of the Evidence Act 2006, where a self-represented litigant is not entitled personally to cross-examine a party who has made family violence allegations. Under subsection (5), the litigant can have questions put by the lawyer to assist. Judge Muir held that s 95(5) of the Evidence Act 2006 does not require that each question that the lawyer puts is literally formulated by the defendant. See [7.649].

Guardianship — additional guardian

In *Wei v Wei* [2021] NZFC 2306, Judge von Keisenberg appointed a 16-year-old's boy's aunt as an additional guardian. The child was born in New Zealand but his parents were living in China. See [6.202.04].

Guardianship — removal of natural parent as guardian

In *Bradley v Kino* [2020] NZFC 7496, Judge Pidwell refused to remove the applicant father as legal guardian, despite neither parent objecting, as it was not in the welfare or best interests of the child. See [6.204.02].

Guardianship of the Court — Oranga Tamariki custody order — enrolment in school for children with disabilities

In *Chief Executive of Oranga Tamariki v Gechan* [2020] NZFC 11494 Judge Moss made the boy a ward of the Family Court where the father had frustrated an Oranga Tamariki custody order by removing his intellectually disabled 15-year-old son from a school tailored for children with disabilities. The High Court has granted leave to appeal: see *Gechan v Chief Executive of Oranga Tamariki* [2021] NZHC 1279. See [6.313.02].

International — domicile — separation order

In *Hanson v Frank* [2021] NZFC 279 the parties had lived overseas for 20 years and were now in Oman. Judge Manuel held that the applicant wife was domiciled in New Zealand, a necessary requirement for obtaining a separation order. See [11.11.04].

International — jurisdiction — pre-marital contract

In *Wooldridge v Kumari* [2021] NZHC 1975 a pre-marital contract had been signed in Fiji but the Judge rejected the argument that Fijian law applied. See [11.44.08].

International — jurisdiction — dowry payment

In *Almarzooqi v Salih* [2020] NZHC 2441, the High Court declined the wife's application for enforcement of the foreign judgment for payment of dowry on the basis that the Dubai (UAE) court did not have jurisdiction over the husband under New Zealand law. In *Almarzooqi v Salih* [2021] NZCA 330 the Court of Appeal upheld the decision. See [11.44.08].

Paternity — declaration as to paternity

In *Ropata v Hohepa* [2020] NZFC 11065, the mother refused to participate in proceedings and refused a DNA test. Judge Coyle made a declaration of paternity naming the applicant the father and that the birth certificate be amended accordingly. See [6.502C.02].

Practice and procedure — litigation guardian

In *Hampton v Rennie* [2021] NZHC 1267 the applicant unsuccessfully appealed a Family Court decision, *Hampton v Rennie* [2020] NZFC 2422, which determined that he could not be a litigation guardian for his son Christopher. See [FPP6.7].

Practice and procedure — publication of proceedings — injunction

In *Solicitor-General v Newsroom NZ Ltd* [2020] NZHC 3441, [2020] NZFLR 784 Cooke J held that the Newsroom publications did involve a report of Family Court proceedings and that the publications included identifying information. The injunction restraining Newsroom from publishing the video and related articles was granted. See [FPP8.4].

Practice and procedure — adjournment of hearing

Clark J in *Dijkstra v Wellington Family Court* [2021] NZHC 1260, discussed the effect of an adjournment on other parties. See [FPP8.5].

Practice and procedure — costs — indemnity costs

Adams v Watcher [2021] NZHC 432 was an appeal against the Family Court's decision to award indemnity costs of \$29,903 against a father in Care of Children Act 2004 proceedings. Cooke J allowed the appeal and the costs award was halved. See [FPP8.6].

Practice and procedure — stay of proceedings — judicial review

In *J v Family Court at Auckland* [2020] NZHC 3429, [2020] NZFLR 870 an interim order staying the protection order proceedings in the Family Court was granted pending a judicial review of the Family Court's decision. See [FPP9.3].

Protection of Personal and Property Rights Act 1988 — residence

In *AF v RC* [2020] NZFC 6759, the parents of an adult daughter needing 24 hour care separated. Judge Coyle ordered the return of the daughter to the care of the mother at the mother's home, with contact for the father. See [7.817].

Protection of Personal and Property Rights Act 1988 — powers of managers — sale of property

In *Public Trust v JT* [2019] NZFC 750 the Public Trust sought the Court's consent to sell the subject person's family home. The Court ordered the sale of the person's home. See [7.848].

Protection of Personal and Property Rights Act 1988 — approval of court required to settle claim of subject person

In *Standring v Evans* [2021] NZHC 1145 the plaintiff, though her litigation guardian, sued her stepdaughter, claiming breach of fiduciary duty. The stepdaughter had been a property attorney under an enduring power. The parties reached a settlement agreement which was approved by the Court. See [7.853].

Relationship property — jurisdiction

In *Cliffe v Vercoe* [2020] NZFC 4332, the respondent unsuccessfully objected to the Family Court’s jurisdiction on the basis of Māori sovereignty. See [7.304].

Relationship property — “de facto relationship” — living together as a couple — s 2D, Property (Relationships) Act 1976

In *Nelson v Codilla* [2021] NZHC 1958, Gordon J accepted that there was a de facto relationship between the 1970s and 2005. The parties continued to associate after that period but that “was out of friendship and loyalty”. Gordon J held that a new de facto relationship had not arisen. See [7.309.03].

Relationship property — property owned by trust — whether rights, powers and interests in trust were relationship property

In *Higgins v Higgins* [2020] NZFC 9654, [2020] NZFLR 898 orders were made that the parties’ powers, rights and interests in the family trust were relationship property. Judge Pidwell had no hesitation in adopting the reasoning of the Supreme Court in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29; [2016] 1 NZLR 551. See [7.320.02].

Relationship property — division of relationship property — “extraordinary circumstances” — s 13, Property (Relationships) Act 1976

The test in s 13 of the Property (Relationships) Act 1976 was met in *Wooldridge v Kumari* [2021] NZHC 1975. Love and companionship were insufficient to outweigh the husband’s capital contribution (his house was 93 per cent of the relationship property), his advanced age (he was 30 years older than his wife), and the short length of the relationship (even though not “a marriage of short duration”). See [7.366.02] and [7.366.05].

Relationship property — division of relationship property — “extraordinary circumstances” — s 13, Property (Relationships) Act 1976

In *Singleton v Schmidt* [2020] NZFC 3439; [2020] NZFLR 825 the equity in the home had disappeared when it was sold at a loss. The parties had failed to get a pre-purchase report, which would have shown issues with the house. Both parties were thus responsible for the loss. Section 13 of the Property (Relationships) Act 1976 was not satisfied. See [7.366.02].

Relationship property — division of relationship property — “extraordinary circumstances” — conduct — s 13, Property (Relationships) Act 1976

The test in s 13 of the Property (Relationships) Act 1976 was met in *Gill v Gill* [2020] NZFC 10231; [2020] NZFLR 954, where the wife, left with three children, was near the poverty line. The husband became bankrupt, left New Zealand, and stole Working for Families money. See [7.366.04].

Relationship property — order for interim distribution of specific property — s 25(3), Property (Relationships) Act 1976

In *T v D* [2021] NZHC 776, although Gordon J held that there was no jurisdiction over property owned by a third party, in this case a company, the respondent had a house that was partly relationship property and partly separate. It was accepted that an order could be made against separate property or where the classification of the property had not been determined. See [7.401].

Relationship property — notice of interest — s 42, Property (Relationships) Act 1976

In *Darby v Haywood* [2019] NZFC 6937, [2020] NZFLR 919 a man had arguable cases of constructive trust over company and trust. There was an order that the notice of claim registered over the property would not lapse pending the substantive decision. See [7.320.02] and [7.412].

Relationship property — notice of interest — s 42, Property (Relationships) Act 1976

In *BW (2004) Ltd v Mlouk* [2021] NZHC 1894 notices of claim were removed against 66 properties owned by companies of which the husband was the sole director and shareholder; the corporate veil was not lifted even accepting *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29; [2016] 1 NZLR 551. See [7.320.02] and [7.412].

Relationship property — surviving spouse may choose option — time limit for making choice — ss 61 and 62, Property (Relationships) Act 1976

An extension for making a choice was granted in *Tao v Malone* [2020] NZFC 10266; [2020] NZFLR 914: the widow had poor command of English and was being expected to make decisions based on unsubstantiated statements from the opposing party. See [7.433].

Surrogacy — COVID-19 international surrogacy protocol

Re Shui [2020] NZFC 8443, [2020] NZFLR 745 is an example of how the COVID-19 international surrogacy protocol is implemented. The child was born in the United States of America and there had been delays in obtaining the usual requisite US passport due to COVID-19. See [10A.9.01].

Youth Justice — discharge of young person — s 282, Oranga Tamariki Act 1989

The Youth Court has discharged charges of: sexual violation by unlawful sexual connection (*Police v WP* [2021] NZYC 2); sexual violation by rape and unlawful sexual connection; indecent act; incest (*Police v BT* [2021] NZYC 92); kidnapping; aggravated robbery; unlawfully taking a motor vehicle; unlawful interference with a motor vehicle; escaping custody (*Police v RT* [2020] NZYC 7); and sexual connection with a young person under 16; doing an indecent act on a young person under 16 (*R v CD* [2021] NZYC 91). See [6.660I].

Youth Justice — discharge of young person — s 282, Oranga Tamariki Act 1989

In *Police v LV* [2020] NZYC 117, Judge Fitzgerald discharged all charges and heavily criticised Oranga Tamariki's failure to live up to its obligations under the Treaty of Waitangi or to protect the young Māori person's mana tamaiti. See [6.660I].