Update
Family Law Service

Service 202 — May 2021

Legislative amendments

Child Support Amendment Act 2021 (2021 No 6)

This Act amended ss 25, 35A, 89B, 89Z, 116, 134, 134B, 135, 135A, 135AB, 135DA, 135FA, 135G, 135GA to 135N, 135O, 137, 151AA, 218 and sch 1 of the Child Support Act 1991, effective 1 April 2021.

Land Transport (NZTA) Legislation Amendment Act 2020 (2020 No 48)

This Act amended s 294 of the Oranga Tamariki Act 1989, effective 1 April 2021.

Case commentary

Adoption — affidavit from natural mother required — s 7, Adoption Act 1955

In *Re Harvey* [2020] NZHC 3275 the Family Court Judge had insisted on an affidavit from the natural mother deposing to matters concerning the child's parentage. Clark J in the High Court likewise held that there should be affidavit evidence from the natural mother. See [6.707].

Care and protection — non-disclosure orders — s 15, Oranga Tamariki Act 1989 (reports of concern to chief executive)

In *Attorney-General v J* [2019] NZCA 499, [2020] 2 NZLR 176, the Court of Appeal held that the High Court's inherent power to control the use of information in its proceedings is not ousted by s 15 of the Oranga Tamariki Act 1989. See [6.559].

Care and protection — ss 65A to 66Q, Oranga Tamariki Act 1989 (information sharing)

Sections 65A to 66Q of the Oranga Tamariki Act 1989 set out a comprehensive inter-agency information sharing scheme. The Court of Appeal in *Attorney-General v J* [2019] NZCA 499, [2020] 2 NZLR 176 observed that this new regime of information sharing is fundamentally different from the looser procedure in s 15 (making a report of concern). See [6.559.02] and [6.568A].

Day to day care and contact — interim day-to-day care — supervised contact for mother

In *McLeod v Nepe* [2020] NZFC 3141, the mother unsuccessfully sought to discharge the interim parenting arrangement where the father had day-to-day care and the mother had supervised contact. The mother's life was too instable and so Judge de Jong determined that supervised contact with the mother remained appropriate. See [6.103F.01(a)(iii)].

Day to day care and contact — parental alienation

In *Armstrong v Mann* [2020] NZFC 1319 a nine-year-old boy was very clear that he no longer wanted to see his father as it would upset his mother. After the Judge ordered unsupervised contact, the boy immediately became enthusiastic about that contact. This confusion of what to think was a symptom of parental alienation and the Judge decided to place no weight on the boy's views. See [6.108B] and [6.108E].

Day to day care and contact — final parenting order — parental alienation

In *Sharp v Sharp* [2019] NZFC 1184, Judge SJ Coyle made a final order continuing the mother's day-to-day care for two teenage girls but granting the father six weeks contact in Australia a year. The previous year, the Judge found that the mother had alienated the girls from their father. See [6.108C].

Day to day care and contact — costs for appeals — reduction in costs

In *Baker v Harding* [2020] NZHC 1859, Gordon J awarded the mother costs of just over $6,000 relating to the father's unsuccessful appeal to High Court. The mother was awarded the actual costs of the appeal, reduced by 50 per cent due to delay caused by mother's failure to comply with a court direction. See [6.135.02].

Family law practice and procedure — threshold for without notice applications — Property (Relationships) Act 1976 — r 220, Family Court Rules 2002

In proceedings under the Property (Relationships) Act 1976, you must satisfy the Court that making the application on notice would or might entail "irreparable injury" under r 220 of the Family Court Rules 2002: *O'Donnell v O'Donnell* [2020] NZFC 3041, [2020] NZFLR 469. See [FPP3.5].

Family law practice and procedure — application for rehearing — r 209, Family Court Rules 2002

Smith v Smith [2020] NZHC 3031 was an unsuccessful application for a rehearing. Wylie J identified three factors that counted against there being a miscarriage of justice: (1) both parties had ample time to prepare for the hearing; (2) the applicant was given "every opportunity" to present his case; (3) the applicant was represented by experienced Counsel throughout. See [FPP9.1].

Family law practice and procedure — appeals — dissolution of marriage — s 174, Family Proceedings Act 1980

Section 174(1) of the Family Proceedings Act 1980 allows a right of appeal to the High Court from a Family Court order for dissolution of marriage. The Court has no jurisdiction to extend time for appeals against dissolutions of marriage: *Boyd v Kendrick* [2020] NZHC 849 (costs appeal). See [FPP9.2].

Family Protection Act 1955 — jurisdiction

While any provision in an agreement that purports to contract out of the Act will be void or voidable, as contrary to public policy, the existence and terms of a contracting out agreement can be relevant in assessing the extent of the moral duty and the quantum: *Matthews v Phochai* [2020] NZHC 3455. See [7.902].

Family Protection Act 1955 — estate

Judicial reaffirmation that the Court cannot deal with assets disposed of during the deceased's lifetime: *Johns v Lord* [2021] NZHC 281. See [7.905.03].

Family Protection Act 1955 — surviving partner's claim

Judicial discussion on the assumed primacy of the surviving partner's claim: *Matthews v Phochai* [2020] NZHC 3455; *Re Upritchard (dec'd); Dymond v Upritchard* [2020] NZHC 3274. See [7.904.01].

Family Protection Act 1955 — son's claim — percentages

A claimant son is awarded 46 per cent of a relatively modest estate: *Farquharson v Farquharson* [2021] NZHC 222. See [7.904.03].

Family Protection Act 1955 — capital awards for surviving partners

Where a surviving partner is in competition with children of an earlier relationship, then the courts may still prefer not to make a capital award of the house to the claimant partner: *Matthews v Phochai* [2020] NZHC 3455. See [7.905.02].

Family Protection Act 1955 — right of appeal

Judicial reaffirmation that an appeal on the question of quantum is to be considered as an appeal from the exercise of discretion: *Re Upritchard (dec'd); Dymond v Upritchard* [2020] NZHC 3274. See [7.912].

Family Protection Act 1955 — costs

If a plaintiff has succeeded in her claim, then it is not in the interests of justice if she has to apply all the award towards her legal costs (*Bennett v Percy* [2020] NZFC 3223); in terms of determining who is the successful party, success on limited terms is still "success": *Hamilton v Kirwan* [2021] NZHC 19. See [7.915].

Guardianship — consent for de facto relationship — s 46A, Care of Children Act 2004

In *Re Hopkins and Stokes* [2020] NZFC 8575 the Court granted consent for two 17 year olds with a young child to be in a de facto relationship. See [6.202.01].

Guardianship — disputes between guardians — vaccinations

In *Lawson v Pugh* [2019] NZFC 5092 Judge DA Burns concluded that the general preponderance of reputable medical opinion favoured vaccination, including the MMR (measles, mumps and rubella) vaccination, and the mother did not prove the son had any particular risks that outweighed the proven benefits. See [6.206.03(a)].

Guardianship — disputes between guardians — vaccinations

In *Bullock v Elliston* [2019] NZFC 10254, Judge PR Grace determined that it was appropriate for the child to receive the MMR vaccine. The mother was a vocal anti-vaxxer and she considered it wrong to inject a foreign substance into a child. See [6.206.03(a)].

Guardianship — disputes between guardians — vaccinations

In *GF v Chief Executive of Oranga Tamariki* [2020] NZFC 8449, Judge RJ Russell ordered that the four year old child receive their childhood immunisations. The child was subject to care and protection orders in Oranga Tamariki but the father objected to a "forced vaccination programme". See [6.206.03(a)].

Hague Convention — preventing removal of children from New Zealand — s 77, Care of Children Act 2004

In *Small v Small* [2020] NZFC 5435, Judge DG Smith discharged an order preventing the removal of two Canadian children from New Zealand. Both parties were Canadian.

The children were to fly with their mother to Canada. The risk of Covid-19 during travel could be managed by wearing masks, social distancing and following hygiene practices. See [6.153].

Hague Convention — return of child abducted to New Zealand — "habitual residence" — applicant consented to or acquiesced in the removal — ss 105(1)(d), 106(1)(b)(ii), Care of Children Act 2004

In *Owens v Hamilton* [2020] NZFC 7097, the father successfully applied for his daughter to be returned to Australia. The mother claimed the child's habitual residence changed to New Zealand as the father consented to the relocation. The father disputed this, claiming the mother only intended a short visit. Ultimately the father did not acquiesce and so the child's habitual residence was Australia. See [6.162.05], [6.165.03] and [6.165.04].

Hague Convention — return of child abducted to New Zealand — "habitual residence" — applicant consented to or acquiesced in the removal — ss 105(1)(d), 106(1)(b)(ii), Care of Children Act 2004

In *Bernacki v Himona* [2020] NZFC 3586, the father sought the return of his child to Australia after the mother and child had travelled to New Zealand for a holiday and never returned. The mother claimed the father acquiesced in the wrongful retention. Judge SJ Coyle determined that no final decision was made to which the father could have acquiesced. A return order was made. See [6.162.02], [6.162.05] and [6.165.03].

Hague Convention — return of child abducted to New Zealand — grave risk defence — child objection defence — s 106(1)(c), s 106(1)(d), Care of Children Act 2004

In *Holmes v Carlson* [2019] NZFC 2180, the father sought the return of his son to Australia after the mother escaped to New Zealand with the child after family violence concerns. The mother unsuccessfully argued the grave risk defence. Judge DG Smith attached considerable weight to the son's views and the child objection defence was satisfied. No return order was made. See [6.165.04] and [6.165.05].

Intellectual disability — regular clinical reviews of care patients — s 77, Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 — s 11, New Zealand Bill of Rights Act 1990

The Court of Appeal in *M (CA677/2017) v Attorney-General* [2020] NZCA 311 determined that an assessment under s 77 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 does not amount to medical treatment for the purposes of s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA). See [9A.12].

Intellectual disability — extension of compulsory care order — s 85, Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

In *R v MT* [2020] NZHC 1490 Brewer J summarised the relevant factors to be considered when deciding an application under s 85 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The Family Court must make its own assessment of whether supervised or secure care is required. See [9A.13].

International — relationship property — foreign immovables

In *Stone v Stone* [2019] NZFC 3298, Judge Brown held that Australian superannuation entitlements were foreign immovables. See [11.44.03].

International — jurisdiction — forum non conveniens — estate case

The Court of Appeal in *Christie v Foster* [2019] NZCA 623, [2020] 2 NZLR 238 held that an Irish court handling an estate case should have jurisdiction over New Zealand land. See [11.44.09] and [11.68.03(d)].

International — overseas maintenance orders — costs of international travel

In *Cole v Hartman* [2020] NZFC 263, the mother sought confirmation of a UK maintenance order. The order was confirmed but was modified. The Judge used the child support formula to work out the modification, including the costs of travel to the UK to have contact with the children. Arrears were reduced by 50 per cent. See [11.88].

International — overseas maintenance orders — costs of international travel during Covid-19

In *Hall v Hall* [2020] NZFC 8896, the provisional UK maintenance order was confirmed but reduced because of the father's means. Judge Callinicos took account of the uncertainties of Covid-19, including the costs associated with quarantine if the father travelled to the UK or the children to New Zealand. See [11.88].

Paternity — time limits in paternity proceedings — s 49, Family Proceedings Act 1980

In *Gaur v Padhya* [2020] NZFC 6553, the six-year time limit did apply. The parents were married at the time their youngest child was born. The mother had applied for a paternity order as the father was not listed on their birth certificate and he refused a paternity test. It was held that a paternity order was unnecessary as s 5 of the Status of Children Act 1969 creates a presumption of parenthood to a woman's husband. See [6.503D].

Relationship property — jurisdiction — inherent powers

Wihongi v Broad [2020] NZFC 7746 considered whether the Family Court has inherent powers. An application to set aside a final order made in relation to a relationship property dispute was declined. See [7.305.01].

Relationship property — jurisdiction — breach of Treaty of Waitangi

In *Bailey v Rerekura* [2019] NZFC 8996, a man argued that the Family Court had no jurisdiction on the basis of tikanga and te tino rangatiratanga as found in te Tiriti o Waitangi. Judge Harrison rejected the jurisdictional argument, holding that s 8 of the Property (Relationships) Act 1976 applied. See [7.307].

Relationship property — "de facto relationship" — whangai — s 2D, Property (Relationships) Act 1976

In *Sears v Franks* [2020] NZFC 7474, a relationship lasted 15 years and produced a son. The man argued that the relationship was not a de facto one but a case of whāngai, loosely understood as a customary adoption. Judge Cook concluded that, although the parties largely lived separately, there was an ongoing sexual relationship, which made it "starkly different from the traditional concept of whāngai". However, he held that it was not a de facto relationship within s 2D of the Property (Relationships) Act 1976. See [7.309].

Relationship property — joint debts — s 20E, Property (Relationships) Act 1976

In *Dina v Nevin* [2019] NZFC 10469, a mother incurred legal costs against her child's father. They were held to be joint debts between the mother and her recent partner,

acquired in an effort to enable them to offer shared care for the child. Each party was entitled to half share of child support that each party paid for their children to other people. See [7.345.01].

Relationship property — post-separation contributions — occupation rental — s 18B, Property (Relationships) Act 1976

In *Dina v Nevin* [2019] NZFC 10469 a party was required to pay $20,000 occupation rental for three reasons: he had been recompensed for outgoings; various expenses after his partner left the place were disallowed; and he had received board payments from his daughter. See [7.387].

Relationship property — disposition of property to trust — s 44C, Property (Relationships) Act 1976

In *Golden v Herring* [2020] NZFC 6031 a party bought the family home from his parents' trust and later sold it back. The Judge used the power in r 133 of the Family Court Rules 2002 for striking out and adding parties. She had to decide whether there had been a disposition of relationship property under s 44C of the Property (Relationships) Act 1976 and then whether an award of trust income could be made. It was thus appropriate for the trust to be joined. See [7.390].

Relationship property — sale order

In *Stone v Stone* [2019] NZFC 3298 a sale was ordered partly because the husband's superannuation fund could not be used for 10 years. The Judge concluded that it would be wrong for the house to remain in the occupation of one party indefinitely. See [7.403].

Relationship property — agreements — formalities of agreements — s 21H, Property (Relationships) Act 1976

In *Cross v Cook* [2020] NZFC 5586, Judge Walker refused to uphold an agreement under s 21H of the Property (Relationships) Act 1976. The non-compliance with s 21H was "substantial and fundamental", "not technical or minor". See [7.421].

Relationship property — agreements — challenging validity of agreements — s 21J, Property (Relationships) Act 1976

In *Remnant v Mills* [2020] NZHC 3414, the question arose of the enforcement of a mediated agreement reached at a time when the husband had terminal cancer with brain effects. The Judge held that the evidence did not establish incapacity and the agreement was not unfair. Its provisions were reasonable. See [7.422.03].

Relationship property — nuptial settlements — trusts — s 182, Family Proceedings Act 1980

A cautionary approach to nuptial settlements is found in *Preston v Preston* [2020] NZCA 679. There, although there was jurisdiction, the Court of Appeal upheld a nil award mainly on the grounds that the raison d'être of the trust was to support the husband's children from an earlier marriage. See [7.423.04].

Relationship property — nuptial settlements — trusts — s 182, Family Proceedings Act 1980

In *Olliver v Sparks* [2021] NZHC 220, it was held that the husband's divestment of interests under the trust did not debar him from making a claim as he could retain a reasonable expectation of indirect benefits but this could be relevant to the exercise of the discretion under s 182 of the Family Proceedings Act 1980. See [7.423.04].

Relocation — cultural identity — Te Ao Māori

In *Larson v Mosley* [2019] NZFC 386, the mother had applied to relocate with her three children to Australia, which the father successfully opposed. Judge Raumati placed importance on the children's "unique rural Kiwi identity". The children were not Māori but had been exposed to and involved in Māori practice as part of their upbringing. See [6A.5] and [6A.12.06].

Relocation — cultural advantages

In *Barnett v Cline* [2020] NZFC 7624, the father successfully applied to relocate the daughter from New Zealand to the United States (the father's home country). The parents were both foreign nationals. Judge Black found that the daughter would have greater access to her culture and wider family relationships in the United States. See [6A.12.03] and [6A.12.07].

Relocation — relocation too adult-focused

In *Larson v Mosley* [2019] NZFC 386, the mother had applied to relocate with her three children to Australia, which the father successfully opposed. The mother's application was exposed as being too adult-focused, in part because the mother did not prove any benefits that would not otherwise be in New Zealand. See [6A.21].

Relocation — relocation too adult-focused

In *Wilder v Keith* [2020] NZFC 5074, Judge DA Blair refused the mother's application to relocate with her children to Australia. The mother had received a job offer that would significantly increase her take home pay. This relocation would detrimentally affect the father's relationship with his children. It was found that the increased salary for the mother in Australia did not outweigh the detriments caused. See [6A.16], [6A.21] and [6A.22].

Relocation — status quo should be maintained

In *Fleming v Hibbart* [2019] NZFC 340, the mother unsuccessfully applied to relocate with her son three hours' drive away, rather than remain living in a town near to where the father lived. See [6A.22].

Sexual abuse cases in the Family Court — finding of no sexual abuse

In *Sinclair v Oliver* [2020] NZHC 592 Judge Walsh in the Family Court found there was no reliable evidence to substantiate the mother's assertion that the father had sexually abused their daughter. The mother appealed both Family Court decisions to the High Court, but both appeals were dismissed. See [6.476].

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

The Court of Appeal in *R v MacKinder* [2020] NZCA 539 overturned the District Court's dismissal of three sexual violation charges on a young girl by her teenage neighbour. He was charged in the District Court on charges that would have originally been filed in the Youth Court, were it not for the delay. That delay was calculated to be at most 21 years between the earliest possible date of offending and the likely date of hearing, but there was an acceptable explanation for almost all of this delay. See [6.660I].

