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Ensuring the effective protection of children abducted across international borders: the case for New Zealand's accession to the Child Protection Convention

Sebastien Recordon*

Abstract

The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the CAC) has, for decades, provided an effective and expedient mechanism for returning children wrongfully abducted by a parent across international borders. However, it has become increasingly clear that, particularly in cases of domestic violence, it does not contain adequate mechanisms to guarantee that abducted children are protected from harm, including on return to their country of habitual residence. This gap has been compounded by restrictive judicial interpretation to the exceptions to return, particularly in respect of the "grave risk" exception. In this article, I argue that the current approach to the grave risk exception runs the risk of placing children's safety at risk. I argue that, whilst the recent changes in approach in New Zealand are welcome, they do not go far enough in ensuring children will be protected from harm. I will argue that, if ensuring the safety of children abducted across international borders is to be achieved, New Zealand must accede to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (the CPC). I conclude that accession will serve to promote the best interests of children involved in international parenting disputes.

Introduction

The CAC has, for decades, remained the central private international law mechanism for dealing with international parental child abductions.[1] In most cases, it has provided an effective summary mechanism by which abducted children are returned promptly to their country of origin. However, the approach taken to the exceptions to this summary return mechanism has tended to be overly restrictive and has not adequately addressed the changing dynamics of international child abductions.

In this article, I argue that the CPC would be likely to significantly diminish the problems with the restrictive interpretation to the grave risk exception and to ameliorate the uncertainty relating to the conditions that the child may face on return.[2] In particular, I will argue that New Zealand's accession to the CPC would serve to better ensure that abducted children are not simply being returned to a dangerous environment without any effective measures of protection. I will first set out the background of the CAC and the main problems with the historical interpretation of the grave risk exception, before turning to address some important recent developments. I then consider the potential implications of the CPC in New Zealand and conclude by suggesting that New Zealand should take urgent steps towards accession. This would ensure that the aims of the CAC are better met. In particular, this would ensure that children are protected from the harmful effects of international child abduction, including the harm that can be caused through a subsequent order for return.

Child Abduction Convention: background

History of the Child Abduction Convention: a brief summary

The CAC was originally drafted in order to address the increasing issue of parents — who predominantly were non-primary carer fathers — unilaterally uplifting their children and relocating to another country without the other parent's consent. This unilateral relocation was, in the vast majority of cases, in and of itself considered to be contrary to the best interests of the child.[3] The child would be thrust into a new and foreign environment, without the benefit of meaningful contact with the other parent and without meaningful connections to any family in the country of origin, or that country's culture and traditions. In addition, the abducting parent would be able to reap the potential benefit of being able to "forum shop" in respect of any substantive court proceedings relating to the care of the child. In doing so, the abducting parent would therefore be able to gain a tactical advantage through the abduction.

What is clear from the *travaux préparatoires* of the negotiations of the CAC is that the "typical" abductor was perceived to be a "frustrated" non-custodial parent effectively using abduction as a self-help remedy, particularly in circumstances where "the right of visitation with the child" was denied by the primary carer or where court proceedings were perceived as cumbersome and ineffective.[4] Indeed, the Explanatory Report accompanying the CAC also stated that an abducted child is usually "taken out of the family and social environment in which its life has developed".[5] This assertion does not appear to encapsulate the situation where the child continues to be cared for by the same primary carer, as is the case with primary carer abductions.

Against this background, the CAC was designed to provide a simple mechanism by which a child abducted across international borders could be returned in an expedient manner, subject to a limited number of exceptions to the general rule of

return. The merits of any substantive dispute in relation to the care of the child could then be determined in the forum presumably most closely connected to the child and in which most of the relevant information and interested parties to the substantive dispute would likely be located.

Change in context of abductions

The international context in which the CAC was originally drafted, however, has altered significantly over the 40 years since it first opened for signature. In particular, there has been a distinct change in the trend of the profile of abductors. Increasingly, it is clear that the majority of those who abduct children across international borders are primary carer mothers,[6] many of whom are fleeing from domestic violence.[7] In this changing context, the question of whether the strong presumption of return is truly in the best interests of the child has been the subject of extensive scrutiny.[8] Abducting mothers fleeing from domestic violence will likely seek to rely on the "grave risk" exception to return under art 13(1)(b) of the CAC in any consequent CAC court proceedings. However, art 13(1)(b) has historically been interpreted in a very limited manner by most courts.[9] Judges and commentators, however, have increasingly noted that the way in which the "grave risk" exception has historically been interpreted does not take into account the changed social reality in which international child abductions occur — and that the CAC may, if misused, in fact cause further harm.[10] The oft-quoted comments of Baroness Hale in *Re D (A Child) (Abduction: Custody Rights)* are germane in this context:[11]

> No-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

Grave risk exception: the New Zealand context

In the New Zealand context, the approach to the grave risk exception has had a fraught history, particularly in the context of domestic violence.[12] The Court of Appeal decision of *A v Central Authority for New Zealand*[13] *(A v Central Authority)* was the key leading authority in respect of the grave risk exception for over two decades until that decision was reconsidered recently by the Court of Appeal in *LRR v COL*.[14] Although it did not specifically overrule the decision in *A v Central Authority*, the Court in *LRR v COL* provided a number of comments clarifying the implications of the approach taken in that earlier case. I set out the approach in *A v Central Authority* and the subsequent line of authority below, before turning to consider the clarifying comments provided in *LRR v COL* and the possible implications for future CAC cases.

The restrictive approach to protective measures: A v Central Authority

A v Central Authority illustrates the problematic outcomes that can result from an overly restrictive approach to the grave risk exception. In this case, the mother had abducted the child from Denmark to New Zealand. The Judge in the Family Court below had found that the exception applied as there was a grave risk that return would place the child in an intolerable situation through exposure to physical and/or psychological harm. The mother had specifically alleged, both prior to the abduction and upon arrival in New Zealand, that the child had been sexually abused by her father.[15] This allegation was given further weight through the evidence of the psychologist who had seen the child, as well as statements made by one of the mother's other children.[16] The Family Court judge held that the grave risk exception had been established and return should not be ordered because the child's psychological well-being could not be ensured on return and prior to any substantive hearing in Denmark.[17]

This decision was overturned on appeal to the High Court and the Court of Appeal ultimately upheld the decision of Fraser J in the High Court. In reaching its decision, the Court of Appeal placed significant weight on the ability of the Danish courts and Denmark's Central Authority to take appropriate steps to protect the child on return.[18] In particular, the Court stated that:[19]

> Where the system of law of the country of habitual residence makes the best interests of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.

The Court went on to state that, generally, where the country of habitual residence upheld the welfare principle, "the Courts of that country will be able to deal with any possible risk to a child, thus overcoming the possible defence of the abducting parent".[20] The Court also relied on the provisions in the CAC facilitating co-operation between Central Authorities of contracting states in managing the child's safe return, stating "there is nothing before this Court to indicate the Central Authorities of New Zealand and Denmark will not act in S's best interests".[21] Finally, the Court stated that it considered that Fraser J in the High Court was "entitled" to find that the child was "capable of being protected" by the Danish courts and that it would have been an "implied criticism … for which there is no foundation whatever" to consider otherwise. [22]

Subsequent consideration of the grave risk exception

The approach taken in *A v Central Authority* was considered to effectively sound the "death knell" of the grave risk exception in New Zealand: Caldwell considered it was unlikely that New Zealand would accept the accession of any contracting party that did not uphold the welfare principle and therefore it appeared that the assumption of adequate protection would apply in practically every case.[23] However, the Court of Appeal in *HJ v Secretary for Justice (habitual residence)* subsequently stated that the grave risk exception could be invoked even if the country of habitual residence had a "perfectly acceptable legal system".[24] The Court went on to state, however, that the ability of the courts in that country to protect the child is "likely to be a highly relevant consideration".[25] The Court stated that:[26]

> … the s 106 exceptions are defined so narrowly that there are comparatively few cases in which they apply. … But there is no requirement to approach in a presumptive way the interpretative, fact-finding and evaluative exercises involved when one or more of the exceptions is invoked …

The Court emphasised that the grave risk exception is, through the use of the words it uses, "by its nature, difficult to make out".[27]

Concerns with the A v Central Authority approach

The approach taken in *A v Central Authority* and subsequent cases appears, at first blush, to be appropriate in principle. However, in practice there remain a number of significant issues with the way in which the "interpretative, fact-finding and

evaluative exercises" occur when invoking the grave risk defence. In particular, despite the clarifying comments of the Court of Appeal in *HJ v Secretary for Justice*, its earlier comments in *A v Central Authority* limiting the inquiry into the protective measures available in the country of habitual residence have instead effectively tended to be adhered to in subsequent decisions.[28] It was therefore welcome that leave was granted to appeal to the Court of Appeal for reconsideration of *A v Central Authority* and the proper application of the s 106(1)(c) exception.[29]

LRR v COL: a change of approach?

The substantive Court of Appeal decision

The recent substantive decision in *LRR v COL*, which was issued in June 2020, can therefore be viewed as an appropriate correction of this approach. In *LRR v COL*, the Court of Appeal largely did away with the assumption contained in *A v Central Authority* that a child can be expected to be protected from the relevant grave risks by the state of habitual residence. The Court in *LRR v COL* specifically clarified that it was an incorrect and overly restrictive interpretation of *A v Central Authority* to limit the inquiry into protective measures to "systemic factors affecting all cases in the requesting State".[30] The Court stated that the focus on systemic matters in *A v Central Authority* — as well as subsequent cases, including *Mikova v Tova*[31] — was reflective of the matters at issue in those cases.[32] The Court in *LRR v COL* emphasised that *A v Central Authority* should not be read as removing the need to consider whether there is a grave risk that the systems available in the state of habitual residence "will not *in practice* be able to protect the child from the relevant harm".[33] It is therefore insufficient and inappropriate to make assumptions about the effectiveness of protective measures if a grave risk is otherwise found to exist.[34] The Court's comments effectively clarify that there is no burden of proof on the abductor to prove the ineffectiveness of such protective measures. This is most welcome, given the difficulties that are likely to arise in proving, to the requisite standard, that such measures are ineffective.[35]

In *LRR v COL* the Court of Appeal considered the measures that could be taken in Australia to protect the child and decided that none could effectively do so. This was so even though the Court considered Australia has a perfectly adequate court system.[36] The Court held that the father's persistent breaches of protection orders indicated that court orders were not an effective barrier to the father's continuing abuse. This meant that, in reality, no legal system could effectively protect the child from the father.[37]

Remaining concerns after LRR v COL: the lacuna faced upon return

Although the decision in *LRR v COL* is welcome in terms of its focus on the reality that is likely to be faced by the child on return as opposed to undue emphasis on comity, the decision is also problematic in some respects. For example, the decision does not explicitly state that the decisions in *A v Central Authority* and *Mikova v Tova* were incorrectly decided. In fact, the Court in *LRR v COL* effectively endorses those decisions in its statements suggesting that the focus on systemic matters was reflective of the matters at issue in those cases. With respect, it is difficult to understand how the decision in *A v Central Authority* can be considered appropriate. In particular, it is difficult to reconcile the Court's statements in *LRR v COL* in respect of the importance of considering the effectiveness of protective measures with the approach taken in *A v Central Authority*.

It should be noted at this stage that an important factor in grave risk cases, and one that historically does not appear to have been appropriately addressed, is the period of time between return and when protective measures are taken in the state of habitual residence. For example, in *A v Central Authority*, the Court explicitly acknowledged that:[38]

> … all three New Zealand Courts accept there is evidence before the New Zealand Courts which suggests that, despite the contrary findings by the Danish Courts, S may be at risk from her father and that the New Zealand Courts hope that that issue can be dealt with again, de novo, before he next exercises his present right of custody in respect of her.

In this context, it is relevant and of significance that, although the mother had an outstanding application in the Danish courts to obtain custody of the child, at the time of abduction and return the father had obtained an order granting him custody of the child.[39] It was therefore highly possible — or even likely — that, on return, the father would seek to enforce the order, including prior to the making of any subsequent order or the taking of any other measure protecting the child.

Similarly, in *Mikova v Tova*, Palmer J was faced with conflicting evidence, inter alia, in relation to the father's sexual and physical abuse of the mother in the presence of the child. The mother therefore claimed that there was a risk of the child's exposure to psychological abuse if ordered to return. The mother claimed that the abuse continued after separation and that the father would visit her home and abuse her.[40] Palmer J nevertheless was satisfied that the Bulgarian court system would be able to protect both the mother and the child on return and that there were satisfactory mechanisms for their protection available in Bulgaria.[41] On this basis, Palmer J was not satisfied from the material provided by the mother that the child would be at grave risk if returned to Bulgaria.[42]

With respect, neither of these decisions appropriately addresses the lacuna of the lapse of time between return and the time when any protective measures are obtained and made enforceable. This is highlighted in particular in *A v Central Authority*. In circumstances where there was significant, albeit untested, evidence of sexual abuse against the child and an enforceable custody order in the father's favour, this gap is significant and extremely concerning. The Court in *A v Central Authority* explicitly considered the significant risk of the child's exposure to the father in the exercise of his custody rights on return but ultimately discounted this risk on the basis of comity and trust in the Central Authorities of Denmark to take the appropriate (and immediate) protective measures.[43] I consider that the Court's emphasis on comity — in the absence of at least an interim order to protect the child on return — was inappropriate. No inquiry was made into the powers of the Central Authority to take enforceable protective measures on the child or mother's behalf on return and therefore it is possible that no such protective measures were immediately available on return. Particularly given the gravity of the allegations of abuse made in this case, even the smallest delay in obtaining enforceable measures of protection is unacceptable.

Effectiveness of protective measures

Much has already been written of the frequent difficulties and ineffectiveness of the protective measures available between jurisdictions in CAC proceedings.[44] For example, in some cases where the "left-behind" parent has been accused of abuse, that parent will offer to give undertakings not to engage in any abusive behaviour on the child's return with the other parent.

The return of the child may then either be agreed between the parties or ordered by the court considering the return application on the basis of those undertakings. However, in many jurisdictions such undertakings are simply not recognised; in others, they are recognised but are unenforceable.[45]

Mirror orders and inter-jurisdictional judicial communication are also used occasionally in cases where protective measures are necessary.[46] Mirror orders formalise undertakings into court orders in both relevant jurisdictions so that the undertakings can be effective and enforceable on the child's return. However, mirror orders are not obtainable in all jurisdictions and they depend on the courts of the state of habitual residence agreeing to make the mirror order, which they may not agree is appropriate.[47] Additionally, judicial communication and co-operation in and of itself does not necessarily adequately address the reality that will be faced by the child on return, particularly in the absence of an instrument capable of effectively enforcing any protective measures.[48]

The discussion of conditions in LRR v COL

The Court of Appeal in *LRR v COL* considered the issue of whether conditions may be attached to an order for return in order to remedy any grave risk that may otherwise exist but for those conditions. The Court stated that, contrary to what may be inferred from *A v Central Authority*, such conditions may be ordered to negate what may otherwise be a situation of grave risk.[49] Referring to the possibility of "accepting enforceable undertakings" or requiring a particular application to be made to the courts of habitual residence on return, the Court acknowledged that any such conditions must be "practically effective".[50]

However, given the issues with the enforceability of undertakings mentioned above, in my view it appears unlikely that any such conditions will have the universally protective effect anticipated in *LRR v COL*. In addition, the Court does not refer to the basis on which it has any jurisdiction to "requir[e] an application for certain orders to be made to the court in the child's habitual residence".[51] Such requirements would certainly appear to be beyond the scope of the Court's jurisdiction.

As a final note in the context of protective conditions in return proceedings, the Court of Appeal in *LRR v COL* commented that it was "regrettable" that New Zealand was not yet a party to the CPC, given its mechanisms of protection in CAC proceedings.[52] The implication of the Court's comments appears to be that its decision may have been different in this case had New Zealand acceded to the CPC. I therefore now turn to address the CPC and its possible implications in the New Zealand context, particularly as a potential means of protecting a child ordered to return to a habitual residence in which a grave risk of harm otherwise exists.

The Child Protection Convention

As its lengthy full title makes clear, the CPC relates to a variety of issues and sets out rules in respect of jurisdiction, applicable law, enforcement and co-operation between contracting states. Additionally, the CPC was specifically designed to complement the CAC.[53] In essence, it provides uniform private international law rules in relation to the care and protection of children.

Currently, the New Zealand Family Court has broad jurisdiction to determine matters relating to the care of children.[54] The Family Court may also declare that it is *forum non conveniens* for the purposes of the parenting dispute, based on a number of discretionary criteria.[55] The Care of Children Act 2004 (COCA) contains provisions dealing with the registration of overseas parenting orders in New Zealand. However, as these provisions currently only apply to orders made in Australia, they are of limited assistance.[56]

By contrast, the CPC reinforces the object of the CAC in that it contains a general jurisdictional rule that "protective measures" — which include the determination of substantive matters relating to the care and guardianship of a child — shall usually be determined in the state of the child's habitual residence.[57] That jurisdiction is retained notwithstanding a subsequent international abduction of the child (in terms of the CAC), which would otherwise have the effect of altering the child's habitual residence to the new forum.[58] The two exceptions to this rule are where: (1) all those who have "rights of custody" agree to the removal or retention of the child; or (2) the left behind parent does not file any application for return within a year of discovery of the abduction and the child is settled in its new environment.[59] The law of the state of habitual residence will also generally be the law applicable to any such dispute, subject to certain exceptions.[60]

However, it is those provisions relating to recognition, enforcement and measures of urgency that are the most pertinent for present purposes. Orders made within the ambit of the CPC are automatically recognised in all contracting states,[61] unless recognition is refused on the basis of one of the grounds set out in art 23(2). A party may apply to the courts of a contracting state for a declaration of recognition of an order, including in advance of the order being registered and enforced in that contracting state.[62] Enforcement measures that need to be taken to enforce an order in another jurisdiction will be governed by the law of the jurisdiction in which those measures are taken.[63] Finally, art 11(1) provides an exception to the general jurisdictional rule, providing that any contracting state may take "any necessary measures of protection" in cases of "urgency". Where both states are contracting states to the CAC, the measures of protection lapse once the necessary measures of protection are taken by the state that has jurisdiction.[64] Although the case law as to what constitutes a situation of "urgency" in this context is still developing, measures to ensure the safe return of a child in the context of CAC proceedings has been held by courts in the United Kingdom to come within the ambit of art 11.[65]

As can be seen, the general framework of the CPC appears to appropriately support the CAC and it provides a number of relatively intuitive rules. However, there are a number of issues and potential problems with the interrelationship between the two conventions. In addition, nations have been slow to accede to and implement the CPC and it has not had the same success in take-up that the CAC has had.[66] Despite the fact that 24 years have elapsed since it was first signed, there are currently only 52 contracting states (four of which have not yet incorporated it into domestic law) and in most of those states it only entered into force within the last 10 years.[67] Case law is therefore still developing internationally on the interaction between the two Conventions.

Despite some steps having been taken towards accession, New Zealand has yet to accede to the CPC. It was the subject of a treaty examination process undertaken in 2010 by the Foreign Affairs, Defence and Trade Committee, which also received public submissions in support of accession.[68] The report that was issued as a result of this process suggested that New Zealand should take immediate steps towards accession.[69] Despite this apparent progress, however, no further steps appear to have been taken.[70] The jurisdictional rules in New Zealand therefore continue to leave considerable scope for conflicting orders. A greater degree of consistency with the international community

in relation to conflict of laws rules in the context of parenting disputes would be beneficial. I now turn to address how accession could be particularly useful in the context of international child abductions.

Illustration of implications for New Zealand: case examples

In order to illustrate the potential implications of New Zealand's ratification of the CPC, including the potential benefits and potential problems of its interaction with the CAC, I provide a number of fictional case examples. These case examples proceed on the basis that New Zealand has acceded to the CPC. In addition, in each of the case examples the other contracting state is referred to as "CS", which in all examples is a contracting state in respect of both the CAC and the CPC. Finally, in each of the case examples "PA" is the father of the child and "PB" is the mother of the child.

Case example 1: facts

In case example 1, PA and PB live together as a couple in CS for many years and ultimately have a child together there. However, during the relationship PA becomes verbally — and then increasingly physically — abusive towards PB, which often occurs in front of the child. PB therefore applies without notice to the courts of CS and obtains a temporary protection/restraining order against PA in order to protect herself and the child from PA. PB simultaneously applies for and obtains a without notice order that she is to have the sole day-to-day care of the child and that PA is not to have any contact with the child. PA opposes both on notice applications for final orders. Subsequently, PB informally agrees that PA may have Skype contact with the child two times per week.

PB is originally from New Zealand and most of her family members live in New Zealand. PB begins to feel increasingly isolated in CS, particularly given the protracted, expensive and stressful court proceedings there. She therefore purchases tickets to fly to New Zealand with the child without informing PA and registers the temporary parenting order in New Zealand on arrival. PA subsequently discovers the child's removal when he attempts to have contact with the child by Skype the following week. When the child does not respond, PA becomes frustrated by the lack of contact with the child. He therefore undertakes his own inquiries to locate PB and the child and discovers that PB has taken the child to New Zealand.

PA obtains legal advice in CS as to what steps are available to him in order to ensure that his contact with the child can continue to occur. PA is not particularly concerned about the relocation so long as he is able to continue to have contact with the child. He receives advice that it is likely the courts of CS will make a final parenting order that he is permitted to have contact with the child but that the current informal contact arrangement is unenforceable. PA is advised that he could apply for an order for the return of the child under the CAC or that, alternatively, once the contact order is made in CS he could seek to register and enforce that order in New Zealand in accordance with the CPC. He is further advised that there is a strong possibility that the New Zealand Family Court will order the return of the child in the CAC proceeding, even if PB opposes the application on the basis of the grave risk exception. This is because the measures of protection in CS are similar to those available in New Zealand and because PA has not breached the protection or parenting orders. The measures of protection in CS are therefore likely to be considered by the New Zealand courts to be effective in protecting the child on return.

PA is not yet sure whether he will apply for an order for return of the child. However, at this stage the final parenting order is determined in CS, incorporating the anticipated order for contact. PA therefore decides that he will apply to enforce the parenting order in New Zealand in the meantime. He thinks he may reconsider whether to apply for a return order depending on whether the registered parenting order and any other enforcement measures taken in New Zealand are effective. Once PA registers the parenting order in New Zealand, he attempts to have contact with the child but, once again, PB will not comply with the order.

Frustrated by the lack of contact with the child, PA files applications against PB in the New Zealand Family Court for a warrant to enforce the parenting order and for the payment of a bond. In addition, PA, through counsel, threatens to file an application for return pursuant to the CAC if PB continues her non-compliance with the parenting order. Counsel acting for PB responds by suggesting that a mediation is convened and PA ultimately agrees to attend mediation.

At mediation, PB is able to communicate to PA how she strongly believes it is in the child's best interests to remain in New Zealand and articulates her reasons for this view. She says she will have to return to CS with the child if the New Zealand Court orders the child's return as she would not contemplate being separated from the child. However, PB believes that she will become increasingly mentally unwell if this were to occur. She would also lack the family support she currently has in New Zealand.

PA accepts these reasons and explains that he does not really believe it is in the child's best interests that the child is returned. He explains that he has suggested this out of frustration that he has not been able to have contact with the child. He also explains that he does not really want to pursue the further enforcement steps, including the application for a warrant to enforce or for the payment of a bond. He explains that his sole motivating factor is ensuring that his contact with the child occurs and continues to be respected and supported by PB. PB agrees to this and contact resumes in accordance with the registered parenting order. PA therefore withdraws his enforcement applications. He does not file an application for return.

Discussion of case example 1

This case example illustrates the potentially significant benefits of the introduction of the CPC in the context of international child abduction. In particular, the CPC fills the "gap" in the CAC in respect of the protection of the child between jurisdictions. The parenting order obtained in CS is automatically recognised in New Zealand and is therefore capable of being enforced against PA until substantive matters are resolved in CS, which retains jurisdiction despite the removal of the child.

This case also illustrates how the CPC may serve to remedy the current problems with so-called "rights of access" under the CAC. In particular, the CAC does not provide an effective and enforceable avenue to facilitate contact between a child and the left-behind parent but, rather, leaves this up to the Central Authorities to facilitate.[71] There have been differing views internationally as to whether the mechanism provided for under the CAC is able to take the form of a formal Court order.[72] However, the prevailing view is that measures taken to ensure rights of access are respected between contracting jurisdictions under the CAC are not technically enforceable in this way.[73] Despite views to the contrary having been taken in earlier decisions in

New Zealand, the approach that such measures are unenforceable is also currently taken in New Zealand.[74] Measures taken to enable access under the CAC may therefore be ineffective in ensuring this contact occurs.

The current position is therefore that a left-behind parent will likely need to file an application for contact in New Zealand in the usual way under the provisions of the COCA. In the context of case example 1, this application may give rise to a less favourable outcome for someone in PA's position than the order that is already in place in CS. However, the left-behind parent may also choose to simultaneously file an application for return under the CAC as an alternative means of attempting to ensure contact occurs. In these circumstances, it is likely that the application for contact under the COCA will take a significantly longer period of time to be determined than an application for return pursuant to the CAC. It is therefore likely that a left-behind parent such as PA may elect to apply for and seek to enforce an order for the return of the child to CS rather than wait for the contact proceeding to be determined, particularly if the chances of success in that proceeding appear unlikely. Therefore, the ineffectiveness of the available avenues of pursuing contact where a child is wrongfully removed may result in a return of the child that would not have occurred if the mechanisms for ensuring contact occurs were more powerful and accessible.

A clear advantage in this case is that there is consistency for the child between jurisdictions because the final parenting order that was made in CS is recognised and registered in New Zealand and therefore becomes enforceable by PA against PB. An application for return could also be filed by PA, but in this case the possibility of such an application merely serves as part of the background context against which mediation takes place. Ultimately, the enforceability of the access order in New Zealand is what serves to prevent PA from feeling as though a return order is the only way the contact order will be adhered to by PB. It may be that, if an order for return had been filed and this ultimately succeeded, PB would then have applied to the courts of CS on her return there to relocate to New Zealand with the child. There is a strong possibility that that application would have succeeded, given the particular facts in this case. The CPC therefore serves to prevent unnecessary multiple relocations of the child between different states, which would be likely to be unsettling for the child. Although a cautious approach may need to be taken to mediation in the context of domestic violence, given the dynamics involved, this case also provides a good example of the way in which mediation can be beneficial and serve to ensure a child-focused approach prevails.[75]

Case example 1 also serves to highlight the way in which the CPC could have considerably altered the way in which the dispute in *LRR v COL* proceeded. Although it is not possible to ascertain what the motives of the father were in that case, it is at least possible that the father was motivated by frustration from his lack of contact with the child. If the father in *LRR v COL* had, for example, already obtained an order in Australia granting him regular Skype contact with the child, this could have then been recognised and enforced in New Zealand under the CPC. It may then have been that, if that contact had occurred after the abduction, the father in that case would not have filed the CAC proceeding at all.

The Court in *LRR v COL* made a specific point in its concluding remarks of mentioning the "unfortunate" fact that the father had not had any contact with the child for a period of almost three years.[76] The Court also noted that the Central Authorities in New Zealand and Australia could have facilitated this contact but this did not appear to have occurred.[77] It therefore appears that the access mechanism in the CAC is not always being utilised to facilitate contact, which is particularly concerning when CAC proceedings are as protracted as those in *LRR v COL*.

Another clear advantage in case example 1 from a child-protection perspective is that, because the custody order will be enforceable in New Zealand, this will prevent PA from unilaterally varying the care arrangements. For example, if PA attempted to have physical contact with the child in New Zealand, PB would be able to apply for a warrant to enforce the order and/or would have the benefit of the provisions for addressing the breach, including criminal sanctions against PA.[78] This consistency of approach between jurisdictions must certainly be in the child's best interests.

Case example 2: facts

In case example 2, after living together for several years PA and PB have a child together. Following the parties' separation, PA applies to the courts of CS for an order that he is to have the sole day-to-day care of the child. This order is ultimately made and is upheld on appeal. However, PB believes that the child has been sexually abused by PA and these concerns have only arisen since the appeal decision was issued. The courts of CS have therefore not been provided with any evidence in respect of PB's concerns. Fearing for the child's safety if she remains in CS, PB uplifts the child from her school without PA's knowledge or consent and travels with the child to New Zealand.

PA subsequently discovers what has occurred and applies to register the custody order in New Zealand in accordance with the CPC. He simultaneously applies for an order for return pursuant to the CAC. The CAC proceeding is determined prior to the determination of the proceeding addressing the registration of the custody order, given the priority and speed afforded to CAC proceedings.[79] PB opposes the return application on the basis of the grave risk exception, primarily based on her evidence relating to the sexual abuse of the child. However, the Family Court judge is unable to make any determinative findings of fact in respect of these allegations on the basis of the affidavits that have been filed.

The New Zealand Family Court ultimately makes an order that, so long as certain measures of protection are taken under art 11 of the CPC, the grave risk exception has not been established. In other words, the making of the orders under art 11, which will be effective and enforceable in CS, will have the effect of removing the grave risk that may otherwise exist if the sexual abuse allegations are indeed correct. The judge considers that the requisite level of urgency is present in this case to justify the making of orders of protection pursuant to art 11. The measures of protection taken by the judge include orders that the child is to remain in the sole care of PB and that PA is not to have any contact with the child. These orders are to remain in force until the courts of CS are able to take further measures as required in the circumstances.

Following this decision, however, PB fails to take any steps to comply with the return order. Despite PB's non-compliance, PA decides not to take any steps to enforce the return order. Instead, PA decides to proceed with the application to register the custody order in New Zealand. This application is opposed by PB on the basis of art 23(2)(d) of the CPC, which provides that recognition may be refused on the basis that it would be manifestly contrary to the public policy of New Zealand, taking into account the child's best interests. The basis for PB's opposition is that the order is in direct contravention to the protective

measures already taken in the Child Abduction Proceeding. The Court ultimately refuses to recognise the custody order on the basis of art 23(2)(d).

PA then applies for and is granted a warrant to enforce the return order pursuant to s 119 of COCA. Before taking steps to enforce the warrant, PB voluntarily returns to CS with the child. PA applies to the courts in CS for orders relating to custody and, in particular, to determine PB's allegations relating to sexual abuse of the child. In the meantime, the protective measures taken in New Zealand are recognised and enforceable in CS to protect the child, pending the resolution of the proceedings commenced there. The court in CS ultimately finds that PA has never sexually abused the child. Orders are therefore made that the child is to be in the shared care of PA and PB.

Discussion of case example 2

Case example 2 illustrates the potentially significant benefit of the CPC in protecting a child on return to its country of habitual residence, particularly in the context of the grave risk exception. This example also illustrates how the problematic implications of a return order in circumstances akin to those in *A v Central Authority* could be ameliorated. Although the allegations against PA are at the highest level in terms of their gravity, interim measures of protection are made and are therefore enforceable in both jurisdictions to ensure the safe return of the child to its habitual residence. The child is protected by those orders on return until the courts in CS are seized of the issue and are able to take further steps. In addition, CS retains jurisdiction to determine the substantive parenting dispute, serving to reinforce the objects and purpose of the CAC. By contrast, in *A v Central Authority*, the child was simply returned without any discussion or assurance of the enforceable protective measures that would be in place immediately on the child's return. That outcome is, in my view, extremely concerning.

This case example also illustrates the way in which effective urgent measures of protection can serve to prevent the need for an extensive inquiry into factual matters in a CAC proceeding. In this case example, the CAC proceeding was dealt with on the basis of affidavit evidence alone (as is the case in most such proceedings in New Zealand). The evidence was therefore not tested in the usual way. However, it was unnecessary for the judge to make any determinative factual findings in this case. Rather, the central question to be determined was whether, if PB's allegations of sexual abuse were ultimately found to be true, there were effective protective measures that could be taken to protect the child on her return. The judge in this case was able to make orders under urgency pursuant to art 11 of the CPC to protect the child, given that both nations are contracting states. These measures would then be effective in protecting the child in CS until the allegations were able to be determined in the usual way.

Case example 2 also shows the way in which the recognition and enforcement provisions of the CPC can function effectively alongside the CAC. Article 23(2)(d) can provide an effective mechanism to ensure there is no conflict between protective measures taken in New Zealand and a subsequent registration of an order that directly contravenes those protective measures. It is clear from United Kingdom decisions in the context of a similar provision in the European Union-specific revised Brussels II Regulation that satisfying the test that recognition is manifestly contrary to public policy is a high threshold to meet.[80] However, commentators have argued that it would be "inconceivable" that, where return is refused under the grave risk exception as a result of concerns for the child's safety, this would not also be relevant or in fact decisive in the context of a refusal of that jurisdiction to recognise an order pursuant to art 23(2)(d).[81] I would argue that this logic should also be extended to circumstances such as those in this case, in which the grave risk exception has not been established, so long as protective measures are taken pursuant to art 11. Recognition should then be refused on the basis that the protective measures made in New Zealand have effectively "superseded" the parenting order made in CS, at least temporarily.

In this context, case example 2 illustrates the potential difficulty that may continue to arise in terms of conflicts of orders between jurisdictions. The measures of protection taken in New Zealand do not in and of themselves have the effect of varying the custody order in CS. However, the order made in New Zealand would technically be capable of recognition and enforcement in CS pursuant to art 23. This would require the courts in CS to effectively suspend the custody order and instead give effect to the protective order made in New Zealand until further measures are able to be taken.

In this respect, it would be important for advance recognition of the protective measures to occur in CS prior to the order for return being made. Protective orders should not be made without consideration being given to the reality of their enforceability in the country of habitual residence.[82] It may be that the appointment of a lawyer for the child would assist in proceedings invoking the grave risk exception in order to ensure that proper inquiry is given to the reality the child will face on return.[83]

Case example 3: facts

In case example 3, the facts are similar to those in case example 2. However, in case example 3 the Family Court in New Zealand finds that PA has in fact sexually abused the child and, given PA's history of breaching protection orders, there are no protective measures available to effectively protect the child on return. The New Zealand Family Court therefore finds that the grave risk exception has been established and orders that the child is not to be returned to CS. In addition, at the time the New Zealand CAC proceeding is determined, there is no custody order yet in place in either CS or in New Zealand. The New Zealand Court therefore makes an urgent order pursuant to art 11 that PB is to have the full-time day-to-day care of the child and that PA is not to have any contact with the child.

The other point of difference in case example 3 is that the courts of CS make a custody order after the CAC proceeding is determined in New Zealand. The court in CS finds that, contrary to the findings of the New Zealand Family Court, the sexual abuse allegations have been fabricated by PB. Further, it finds that PB has alienated the child from PA and that it would be in the child's best interests for the child to have contact with PA. The courts of CS do, however, find that PA has been psychologically abusive towards the child and PA's contact is therefore to occur on a supervised basis. PA subsequently seeks to enforce this order in New Zealand pursuant to art 23 of the CPC.

Discussion of case example 3

Case example 3 illustrates the possibility that fundamental conflicts of orders may continue to occur between jurisdictions, even when both relevant nations are contracting states to the CPC and the CAC. In case example 3, both courts are squarely seized with the issue of the sexual abuse allegations, albeit in different legal contexts: CS retains general jurisdiction to determine custody matters but New Zealand has jurisdiction to

determine the CAC proceedings and to make urgent protective orders. Despite the overlap in subject matter and evidence, the courts in CS and New Zealand make fundamentally different factual findings in relation to those allegations. The issue is then whether the New Zealand courts will recognise the conflicting orders made in CS. The risk is that, if the New Zealand Court's findings of fact are correct, any form of contact the child has with PA may expose the child to significant psychological harm. In this respect, the orders made in each contracting state appear to be fundamentally incompatible.

In the context of the recognition of the custody order in New Zealand, the question then becomes whether the New Zealand Court will defer to the findings of fact of the courts of CS. For example, the New Zealand Court may elect to recognise the order made in CS despite the inconsistency with the New Zealand orders that are in place on the basis that the Court in CS had the benefit of additional evidence that the New Zealand Court did not have or that the Court in CS had the benefit of having the evidence properly tested before it.

It may be, however, that the New Zealand Court refuses recognition under art 23(2)(d) on the basis that recognition is manifestly contrary to public policy in New Zealand. However, this would appear to directly undermine the orders made in CS and would be in direct contravention of the principle of international comity. It cannot be that the protection of children from a grave risk of harm ought to yield to international comity alone. On the basis of the facts in case example 3, however, it is possible that the New Zealand courts will be faced either with the risk of endorsing an approach likely to cause significant harm to the child or, by refusing recognition, risking considerable offence being caused to CS.

Unfortunately, it does not appear that this potential for conflict is either anticipated or adequately addressed in the CPC. It is difficult to anticipate how courts will grapple with these issues as the international case law develops. However, it may be that courts will defer to the jurisdiction of the courts of habitual residence, which retain primary jurisdiction. This would be particularly likely if that court has had the benefit of a full hearing conducted in the usual way. This approach would, however, be concerning from a child-protective perspective. For example, it may be that the hearing processes in each jurisdiction are in fact substantially similar and that different credibility assessments were the sole cause of the different factual findings. If this were the case, should a child-protective approach through non-recognition of a custody order not trump any potential concerns in relation to comity?

Conclusion

The decision in *LRR v COL* has highlighted the way in which the functions of the CAC could be significantly supported if New Zealand were to accede to the CPC. In particular, as I have explored in this article, the CPC could in many cases provide a complete solution to the problems that have been faced by judges considering the grave risk exception in the context of CAC proceedings. Under the CPC, such proceedings could be resolved simply by making orders under the urgency jurisdiction in art 11.

There remains the possibility that conflicts of orders will continue to occur even if New Zealand accedes to the CPC. Time will tell how courts grapple with such conflicts. However, courts already frequently deal with the problem of conflicting orders and the possibility that such conflicts may occasionally continue to occur should not be a barrier to New Zealand's accession to the CPC. Courts will resolve such conflicts as they arise just as they have done in the past. However, it is hoped that a child-protective approach will guide judicial discretion in this context. Whilst the child's interest in continuing to have contact with their parents is no doubt important in the majority of cases, the child's safety should always be the courts' central concern.

Although the CPC is not a panacea for the gaps in the CAC, it would certainly serve to protect more children who are abducted across international borders, and would do so more effectively. By providing a mechanism to make internationally enforceable protective court orders, the CPC would provide a solution to the problematic approach taken in cases such as *A v Central Authority*. In particular, it would remove many of the risks involved in thrusting a child back into a potentially violent environment under the CAC, without any effective measures to protect it from harm. Where a child's safety is at risk, it cannot be a sufficient response to order return and simply "hope for the best".

Footnotes

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1. Convention on the Civil Aspects of International Child Abduction 1343 UNTS 98 (opened for signature 25 October 1980, entered into force 1 December 1983) [CAC].
2. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 2204 UNTS 97 (opened for signature 19 October 1996, entered into force 1 January 2002) [CPC].
3. See Adair Dyer "Report on international child abduction by one parent ('legal kidnapping')" in Permanent Bureau of the Hague Conference on Private International Law *Actes et Documents de la Quatorzième Session: Tome III: Enlèvement d'enfants/Child abduction* (Impremerie Nationale, The Hague, 1982) 12 [Dyer Report] at 21–22.
4. Dyer Report, above, at 20.
5. Elisa Pérez-Vera "Explanatory Report on the 1980 Hague Child Abduction Convention" in Permanent Bureau of the Hague Conference on Private International Law *Actes et Documents de la Quatorzième Session: Tome III: Enlèvement d'enfants/Child abduction* (Impremerie Nationale, The Hague, 1982) 426 at [11].
6. Nigel Lowe and Victoria Stephens "Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics" (2018) 52 Fam LQ 349 at 349.
7. See *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (Hague Conference on Private International Law, Prel Doc No 9, May 2011) [Reflection Paper] at [3].
8. See, for example, Merle Weiner "International Child Abduction and the Escape from Domestic Violence" (2000) 69 Fordham L Rev 593; Miranda Kaye "The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four" (1999) 13 IJLPF 191; John Caldwell "Child Abduction Cases: Evaluating Risks to the Child and the Convention" (2008) 23 NZULR 161.
9. See Reflection Paper, above n 7, at [56]–[66].
10. See, for example, *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 (HC); Rhona Schuz "The Hague Child Abduction Convention and Children's Rights" (2002) 12 TLCP 393; Weiner, above n 8.

11. *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619 at [51].
12. See Allie Maxwell "The Hague Convention on the Civil Aspects of International Child Abduction 1980: The New Zealand Courts' Approach to the 'Grave Risk' Exception for Victims of Domestic Violence" (2017) 48 VUWLR 81.
13. *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA).
14. *LRR v COL* [2020] NZCA 209 [*LRR v COL* (Reasons Decision)].
15. *A v Central Authority*, above n 13, at 520.
16. At 520.
17. At 520.
18. At 523–524.
19. At 523.
20. Above.
21. Above.
22. Above.
23. Caldwell, above n 8, at 176.
24. *HJ v Secretary for Justice (habitual residence)* [2006] NZFLR 1005 (CA) at [31(a)].
25. At [31(b)].
26. At [32].
27. At [33].
28. See, for example, the decision of the High Court in *Mikova v Tova* [2016] NZHC 1983 and the more recent decision of the Family Court in *Sparrow v Waldergrave* [2019] NZFC 6196.
29. Care of Children Act 2004; *LRR v COL* [2019] NZCA 248.
30. *LRR v COL* (Reasons Decision), above n 14, at [113].
31. *Mikova v Tova*, above n 28.
32. *LRR v COL* (Reasons Decision), above n 14, at [113].
33. At [113] (emphasis added).
34. At [113].
35. See Weiner, above n 8, at 660–662.
36. *LRR v COL* (Reasons Decision), above n 14, at [135].
37. At [135].
38. *A v Central Authority*, above n 13, at 524.
39. At 518.
40. *Mikova v Tova*, above n 28, at [9].
41. At [54]–[57].
42. At [59].
43. *A v Central Authority*, above n 13, at 524.
44. See, for example, Paul Beaumont and Peter McEleavy *The Hague Convention on International Child Abduction* (Oxford University Press, Oxford, 1999) at 156–172; Rhona Schuz *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, Oxford, 2013) at 289–316; Caldwell, above n 8, at 183–186; Weiner, above n 8, at 676–681.
45. See Schuz, above n 44, at 291–294.
46. See Schuz, above n 44, at 294–298.
47. Schuz, above n 44, at 294–295.
48. Schuz, above n 44, at 297–298.
49. *LRR v COL* (Reasons Decision), above n 14, at [117]–[118].
50. At [117].
51. Above.
52. At [120].
53. See CPC, above n 2, art 50.
54. See Care of Children Act, s 126.
55. See, for example, *Gilmore v Gilmore* [1993] NZFLR 561 (HC).
56. Care of Children Act, ss 8, 81 and 82.
57. CPC, above n 2, arts (1)(a), 3(a)–(c) and 5.
58. Article 7(1)–(2).
59. Article 7(1)(a)–(b).
60. Article 15.
61. Article 23(1).
62. Article 24.
63. Article 28.
64. Article 11(2).
65. See, for example, *Re J (A Child) (1996 Hague Convention: Morocco)* [2015] UKSC 70, [2016] AC 1291; *B v B* [2014] EWHC 1804 (Fam).
66. The CAC currently boasts 101 contracting parties: HCCH "Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Status Table" (19 July 2019) <www.hcch.net>.
67. HCCH "Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status Table" (9 December 2019) <www.hcch.net>.
68. See, for example, Bill Atkin "Submission to the Foreign Affairs, Defence and Trade Committee on the International treaty examination of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children".
69. Foreign Affairs, Defence and Trade Committee *International treaty examination of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (29 July 2010) at 4.
70. See *LRR v COL* (Reasons Decision), above n 14, at [120].
71. CAC, above n 1, art 21. Article 21 is incorporated into New Zealand law pursuant to Care of Children Act, s 113.
72. See Colin Pidgeon "Access applications: role of Central Authority in New Zealand" (2002) 4 BFLJ 46.
73. See Nigel Lowe and Michael Nicholls *The 1996 Hague Convention on the Protection of Children* (Jordan Publishing, Bristol, 2012) at [7.16]. See generally Permanent Bureau of the Hague Conference on Private International Law *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice, Hague Conference on Private International Law* (Jordan Publishing, Bristol, 2008).
74. *Gumbrell v Jones* [2001] NZFLR 593 (FC). Compare *Secretary for Justice v Sigg* [1993] NZFLR 340 (DC).
75. For a valuable and comprehensive discussion of the possibilities for the use of mediation in the context of international child abduction, see Sarah Vigers *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing, Oxford, 2011).
76. *LRR v COL* (Reasons Decision), above n 14, at [150].
77. At [150].
78. These measures are contained in the Care of Children Act, ss 63–79.
79. Care of Children Act, s 107.
80. See *Re L (A Child) (Recognition of Foreign Order)* [2012] EWCA Civ 1157, [2013] 2 WLR 152 at [45]–[52].
81. See Nigel Lowe, Mark Everall and Michael Nicholls *International Movement of Children: Law Practice and Procedure* (Jordan Publishing, Bristol, 2004) at [24.63].

82. See Henry Setright and others *International Issues in Family Law: The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Jordan Publishing, Bristol, 2015) at [9.103].

83. For a helpful discussion of the potential benefits of the compulsory appointment of a lawyer for child in CAC proceedings, see Maxwell, above n 12, at 101.

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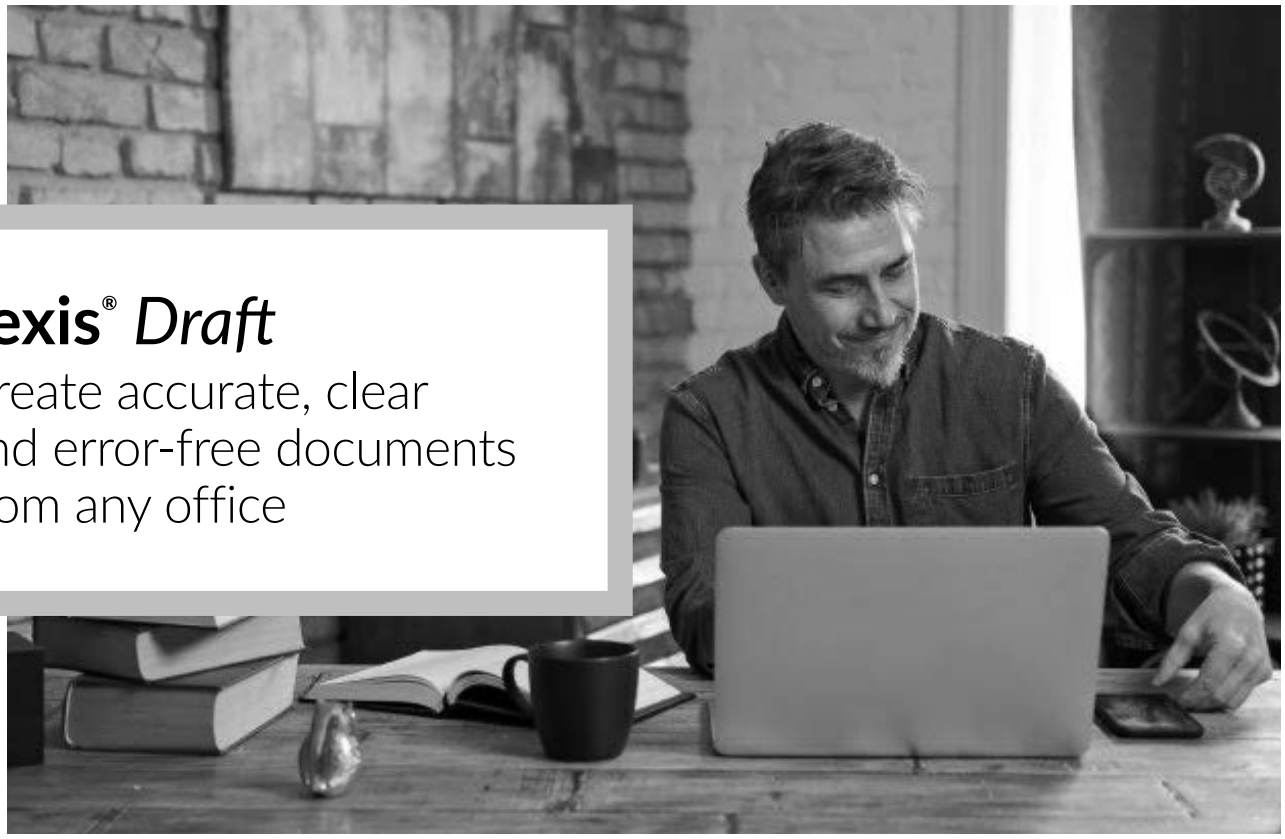

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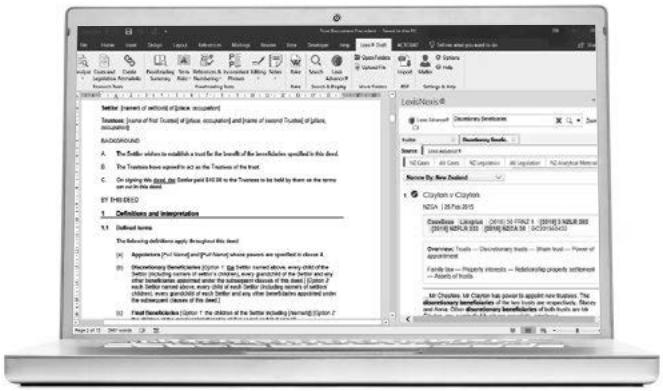

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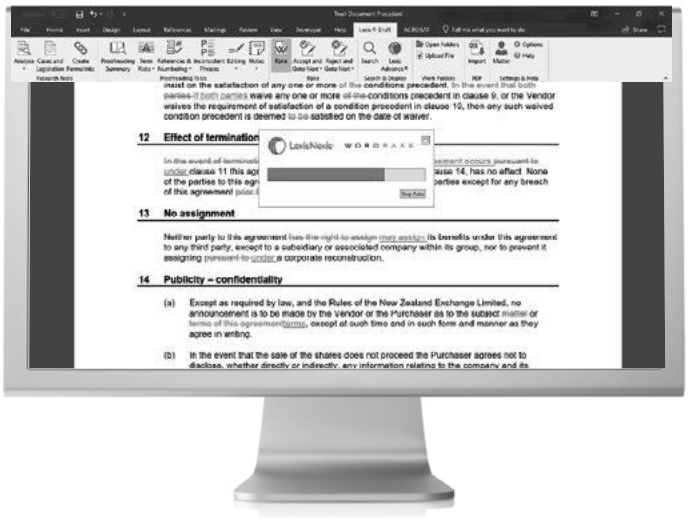

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Whāngai v adoption: succession in the Māori Land Court

Maureen Ann Malcolm*

Abstract

This article argues that an adopted child should not automatically succeed to Māori land purely on the basis that they have been legally adopted. Automatic succession to an adopted child works directly against Tikanga Māori. Taking Tikanga Māori into consideration, an adopted child should be treated in the same way that a whāngai child is treated in the Māori Land Court when an application for succession is made.

I Introduction

I want to briefly introduce myself so that there is a greater understanding of the arguments I raise within this article and my perspective when writing this article. My name is Maureen Malcolm and I was born and raised in Rotorua surrounded by what I would call a large Māori family. My father is of Māori descent and the youngest of 15 children, hence the large family. We have always had a connection to our Māori side, therefore my perspective in life is always from a Te Ao Māori lens. This article will be no different. I note that I am not an expert on Tikanga Māori but my upbringing has provided me with a good understanding of our traditional cultural practices.

I am also a practising solicitor who at times has struggled to reconcile my thoughts when dealing with Tikanga Māori issues in my role as a solicitor. Balancing a Tikanga Māori issue while also remaining within the parameters of our current legal system can be a challenge — a challenge that many Māori lawyers will be familiar with — the collision between Tikanga Māori and New Zealand legislation.

Early in my legal career I experienced such a collision when dealing with an adoption case in the Māori Land Court. This is where I first realised that an adopted child can succeed to their adopted parents Māori land interests without any whakapapa connection to the land or blood tie to the adopted parent.

I was always taught that Māori land should only be passed on to those who can whakapapa to the land. On initial discussions with colleagues around whāngai and adoption in the Māori Land Court I found myself somewhat disheartened to see that current legislation allows an adopted child to succeed to Māori land despite having no whakapapa connection to the land, while a whāngai child must meet several different requirements before such a succession can take place. One of those requirements being that the whāngai child has a whakapapa connection to the land. While I agree with the current process for succession of Māori land by a whāngai child, I think it is unfair that an adopted child does not need to meet the same requirements because of a legal fiction called adoption. This article will make two arguments — firstly, that an adopted child should not automatically succeed to Māori land purely on the basis that they have been legally adopted. I will argue that this works directly against Tikanga Māori and that when dealing with Māori land it is Tikanga Māori that should be at the forefront of any decision. Secondly, this article will argue that an adopted child should be treated in the same way that a whāngai child is treated in the Māori Land Court.

Following on from this introduction Part II will discuss whāngai and adoption and explore the differences between a whāngai child and an adopted child. This section will include a discussion on Tikanga Māori and Māori land from a Māori perspective. This part will also highlight the collision between Tikanga Māori and New Zealand legislation.

Part III of this article will review how a whāngai child and an adopted child are currently treated in the Māori Land Court taking into consideration current legislation and case law. Part IV will set out some recommendations for the future.

II Whāngai and adoption

Whāngai

I am going to spend a bit of time exploring whāngai and what it means to be a whāngai child. Before we proceed it is important to note that the practice of taking a child as a whāngai is a Māori practice that falls within Tikanga Māori. An understanding of Tikanga Māori is therefore required in order to understand the concept of whāngai and all that it encompasses. The Te Ture Whenua Māori Act 1993 (the Act) also defines the word whāngai as a person adopted in accordance with Tikanga Māori.[1] Therefore it seems only right that I start this section off by providing a brief insight into Tikanga Māori.

Tikanga Māori

The Act defines Tikanga Māori as "Māori customary values and practices".[2] The word Tikanga is derived from the root word "Tika" meaning straight, correct or fair and the addition of the suffix "Nga" renders it a noun, which can then be translated as a system, value or principle which is correct, just or proper.[3] To further expand on this, Tikanga Māori is the right way to do something, or the correct way of doing something in Te Ao Māori. Tikanga Māori encompasses a number of fundamental concepts, principles and values that govern and dictate how people of Māori descent go about their day to day life.

For many Māori it is imperative to their wellbeing that they operate in accordance with Tikanga Māori. Therefore, operating in accordance with current legislation can be difficult and problematic given the fact that Tikanga Māori and the New Zealand legal system collide. It is important that you take this into consideration when discussing whāngai which is practiced in accordance with Tikanga Māori and adoption which is governed by the Adoption Act 1955.

Whāngai

As previously discussed, a whāngai is a person adopted in accordance with Māori customary values and practices. The word whāngai also translates to nourish or to care for.[4] This is

a fitting translation as it describes the actions of a whāngai parent towards a whāngai child. It is the role of the whāngai parent to nourish and care for the child with all the necessities of life and with a strong knowledge of who they are as a person of Māori descent.

It is highly unusual for a whāngai to be taken with no kinship connection to either of the whāngai parents. When a child is raised by a family member, they are raised within their own hapū and iwi. The kinship cord or lifeline of that child is left intact. Giving a whāngai child to family members ensures that no cultural violence is done to the child and that the child will grow up to be an active member of their birth whānau, hapū and iwi.[5]

Early accounts of whāngai

Whāngai is not a new practice and early accounts indicate that Maui-Tikitiki-a-Taranga may have been the first person to be adopted in accordance with Māori customary values and practices.[6] Maui-Tikitiki-a-Taranga also known throughout Aotearoa and the greater Polynesia as Maui was born a demi-god, half-human and half-god.[7] Maui is known for many things, but it is his birth that I wish to explore. You see when Maui was born he was so premature as to be classified as an abortion so his mother wrapped him up in her hair and seaweed and threw him into the sea.[8] Eventually Maui was found in the sea by Tamanui-ki-te-Rangi, his tupuna who took him in and raised him as a whāngai.[9]

Another example of whāngai is displayed in the story about the Mamaku and Ponga. The Mamaku and Ponga are ferns that are found in Te Wao Nui a Tāne or the great forest of Tāne. According to oral traditions, that was not always the case. While Tāne Mahuta is the god of the forest, it is said that the Ponga and Mamaku once resided in the sea. They were chased out of the sea into the domain of Tāne Mahuta who took them in as his own. It is important to note these early examples of whāngai so that there is an understanding of how embedded the practice of whāngai is in Māori culture.

My own experience

In my own family I can think of several family members who were whāngai children adopted in accordance with Tikanga Māori including my paternal grandmother. My grandmother was raised by close relations after her siblings passed away and the wider whānau believed it to be in her best interest to be raised by other whānau members who were unable to bear children. The whānau who raised her had two other whāngai children all of whom were related to the whāngai parents in some way.

My grandmother went on to have 15 children. Two out of the 15 children were taken as whāngai children. One uncle was given to my grandfather's relations and raised as their son, with their last name. He was also formally adopted by his whāngai family. Whilst he was predominantly raised with his adopted family, he returned in the holidays to his birth family. This was a way to keep the connection to his birth family alive. According to my father he was given to my grandfather's relation after this particular relation had asked my grandmother multiple times for them to give her one of my grandfather's children. What I find interesting about this example is that my uncle was legally adopted. I cannot comment on whether my grandmother knew the implications of a formal adoption but from all accounts my uncle was treated like he was a whāngai child rather than an adopted child.

My other uncle was simply taken when he was a child. The story as told to me by my father is that my great-grandmother was looking after my uncle, but her taxi home was waiting outside. My grandmother had not returned so my great-grandmother took my uncle and kept him with her until she died. This was a slightly different situation in that while he was raised by my great-grandmother, he was still a part of his birth family and returned in his teenage years to live with his biological parents.

I have only provided three examples within my own family but there are many more within my family, within my hapū and within my iwi. Taking a child as a whāngai was and is a normal part of Māori society and this practice would have occurred in many Māori families. The need for the kinship line to be left intact is centred around whakapapa. Just because a child is taken as a whāngai by another does not mean that they are removed from your whakapapa. For example, while my grandmother was taken as a whāngai by relations, it is her biological parents that I recite when giving my whakapapa. The same goes for my two uncles — both remain in my whakapapa as if they were not adopted out or taken as whāngai children. It is important that the whakapapa is correct so that it is always clear where a person comes from.

Te take — the reason

Before we move on to adoption, I want to discuss the reasons why a whāngai child may have been taken. Mead provided the following reasons:[10]

- He whare ngaro (lost house) — Here the aim is to help a child survive because the parents' house had a "ritual lien" on it and the family is classed as a whare ngaro. In such cases it is believed that the children will not survive and so must be given to other relatives to bring up.
- He whakamahana I ngā here whānaungatanga (warming the kinship links) — In this case two sets of parents negotiate over a long period of time for a child to become a link between them in order to keep the bonds of kinship between them warm.
- He wahine pukupa (barren women) — In this case the wife is classified as barren and so the childless couple negotiates with relatives for a child for them to bring up.
- He waka pakaru (a broken canoe) — In this case the waka is broken and a parent, usually the mother, has died.

While these are not the only reasons a child could have been taken as a whāngai, they are certainly some of the more common reasons. As provided in my own family examples, you can see that the whāngai of my grandmother could be viewed as both "he wahine ngaro" and "he wahine pukupa". The whāngai of the first uncle I discussed could be viewed as what Mead describes as "he whakamahana I nga here whānaungatanga" or the warming of kinship links. I am also of the opinion that the following reasons can be added to the list provided above:

- Hei whakamahana i te whare (to warm one's house) — In this case a child is taken to warm the house of a grandparent or relative whose children have grown and left the nest leaving the parents or parent alone. It is my opinion that this is quite often the case with grandparents.
- He tohutohu (a directive) — Currently if a parent is incapable of looking after a child, Oranga Tamariki would get involved and if required, remove the child and place that child in another family. Before, traditionally, it was the whānau who took on this role and in most cases the grandparents. If a mother was too young when a child

was born, if a child was born out of wedlock or if the parents were incapable of looking after a child, the family or grandparents would decide where the child would go. The directive was adhered to because the views of elders were respected.

Adoption

Adoption can take on many forms from an open adoption to a closed adoption. Currently in New Zealand an adopted child is a child that is adopted in accordance with the Adoption Act. Before I explore the Adoption Act, I want to briefly discuss historical adoptions both within and outside of New Zealand.

Historical adoption

Adoption is not a modern concept and examples of adoption can be found throughout the history of time — from the adoption of Sargon the king of Agade over 4800 years ago to the adoption of Moses.[11] Historic cases of adoption can easily be found. Interestingly, Sargon, Moses and Maui (whom I discussed earlier on in this article) were all placed in a body of water by their mothers and later adopted. This supports the idea that reasons for adoption could be linked to the era in which that child was born.

History of adoption in New Zealand prior to 1955

Between 1840 and 1880, adoptions were informal and there was no secure basis for an adoption within the law.[12] The adoptive parents would assume guardianship of the child and the child would be raised within the adoptive family. The problem with this process was that either one of the biological parents could return at any point in time and successfully demand that the child be returned.[13]

Taking this problem into consideration, the Adoption of Children Act 1881 was enacted. This Act sought to provide a legal solution to the problem detailed above. This Act arose in the Victorian period and therefore the Act had a strong Victorian influence. Children were seen as possessions that were to be owned and unless permanent ownership was assured, many adults were not willing to take on a child.[14]

Adoption Act 1955

As the needs of society changed, so too did the legislation. In 1955, the Adoption Act was enacted. The Adoption Act does not define adoption or set out the objects, principles or goals of the Act; it merely describes the process and legal effect of adoption.[15]

In order for an adoption to take place, an adoption order needs to be sought and approved by the Court. Once an adoption order has been approved by the Court, the adopted child is deemed to be the child of the adoptive parent as if the child had been born to the adoptive parent.[16] Once adopted, the adopted child would cease to be the child of the existing parents.[17] The Adoption Act severs the kinship link between the biological parents and the child. Judge Inglis concluded that Parliament's intention when creating the Adoption Act was to create a situation where the relationship between the adopted child and the adoptive parents was to be accepted by everyone without question or further enquiry.[18]

Whāngai v adoption

Reasons for adoption can be similar to reasons why a whāngai child is taken. The death of a parent, illegitimate children and fertility issues can all feature as reasons why a child would be placed for adoption or taken as whāngai. The key difference between the two concepts is that whāngai is derived from a cultural practice. The whāngai child is still connected to their biological family and the kinship link between the child and their birth family should never be severed. The child is raised with the knowledge of who they are and where they come from and the whakapapa line remains intact.

In order to understand why the concept of adoption is so different to whāngai, a good grasp of what whakapapa means is required. Whakapapa is a key concept in Tikanga Māori. The word whakapapa translates to genealogy, family tree or cultural identity.[19] It is a child's birth right and provides them with the knowledge of who they are and where they come from. It is their identity. Whakapapa is passed on from generation to generation and it is quite common when you see another person of Māori descent to ask them where they come from or their whakapapa in order to assess whether there is kinship connection.

Knowing your whakapapa provides you with a connection to your ancestors, your hapū, your iwi, to the physical world, to the spiritual world and everything in between. This is why it is so important that the kinship cord or lifeline of a child is never severed. It is through whakapapa that we trace our connection to the land.

Adoption on the other hand is a formal process under the Adoption Act. Once adopted, a legal fiction is created, and the child is deemed to be the child of the adoptive parents. This works directly against Tikanga Māori. Fuller summarised legal fiction as a statement propounded with a complete or partial consciousness of its falsity or a false statement recognised as having utility.[20] I believe that adoption falls within both definitions provided by Fuller. First, when a child is adopted, a statement of fiction is made — that being that once the child has been adopted, they are to be recognised as a child of the adoptive parent as if that child had been born to them. Given the fact that an adopted child is not physically born to adoptive parents, this is a statement of fiction — a statement created by legislation that works to conceal the truth. The second definition requires the false statement to have utility. In relation to adoption, I agree that this false statement has utility. When a child is adopted, they should be accepted into that adoptive family as if they were a child born to the adoptive parents. I sympathise with the adoptive parents in wanting an adopted child to be treated the same as a biological child. I agree that an adopted child should succeed in the exact manner that a biological child would succeed with the exception of succession to Māori land. It is my argument that an adopted child should not automatically succeed to Māori land if they do not whakapapa to the land. This argument is centred around the importance of land to Māori and the need for there to be an evaluation of the tikanga associated with the land.

The land — whenua

The importance of land to people of Māori descent derives from their connection to the land. This connection comes about in many ways. The creation story for Māori starts with Ranginui and Papatūānuku, mother earth. Māori are born from the land as it was Papatūānuku who conceived their ancestors.[21] This is the first connection, and it is through this connection that Māori are taught to protect the land. Māori see themselves as users of the land rather than its owners.[22] They are the kaitiaki or guardians of the land and they must ensure that they protect the land for future generations. Māori also believe that land is

passed on from generation to generation and in most circumstances the land should remain in the ownership of the direct descendants of those ancestors that occupied the land all those years ago. This is the whakapapa connection to the land.

Attachment to the land was reinforced by the stories that accompany that land, and by a preoccupation with the accounts of ancestors and by the numerous connections between different tribes and particular physical landmarks.[23] From a young age I walked on our land with my father and other family members and heard the history of our land — from the caves where our ancestors' bones were buried in, to the battles that took place. It is this history of occupation of certain lands that ties a person of Māori descent to a particular parcel of land. This history is passed on from generation to generation just like the land is passed on. The importance of land can also be found in the translation of the word whenua, which means both land and placenta. This is significant in that when a Māori child is born, their placenta is taken back to their land and buried, and when a person of Māori descent dies, they are taken back to their land and buried.

Given the deep connection between the land and those who whakapapa to the land I strongly disagree that an adopted child should automatically succeed to Māori land as if they were a biological child of the deceased. An adopted child and a biological child are completely different from a Tikanga Māori perspective. A biological child is connected by blood to the land. Every ancestor that has come before that biological child is connected to them by blood and it is this whakapapa connection that makes a biological child different to an adopted child. Just because legislation states that an adopted child is a child of the deceased does not result in the adopted child being a biological child of the deceased. The legal fiction that is adoption is in direct conflict with Tikanga Māori.

Whāngai and adoption in the Māori Land Court

Introduction

The Act currently allows for the succession of Māori land to adopted children as if they were a biological child of the deceased. For a whāngai child the process for succession is very different. This part of my article will review how a whāngai child and an adopted child are currently treated under the Act. I will also review specific case law that currently guides the Māori Land Court when deciding cases for succession.

The Preamble

The Preamble of the Act is important because it requires the Court to take into consideration a number of factors when deciding cases in the Māori Land Court. The Preamble also recognises that land is a taonga tuku iho of special significance to Māori people and that land should be retained in the hands of its owners, their whānau and their hapū.[24] I want to highlight the use of the words "taonga tuku iho" in the Preamble. Taonga tuku iho is a process whereby something of great importance is passed down from generation to generation. If land is passed on to someone who does not have a whakapapa connection, then the land is not passed on to the next generation in accordance with the process of "taonga tuku iho". The Preamble also recognises that land should be retained by owners, their whānau and hapū. A strong argument can be raised that succession by an adopted child with no whakapapa connection to the land is a severe breach in that the land will be passed on to a non-whānau member in terms of a blood connection. Unfortunately, there is no obligation to satisfy the notions raised in the Preamble. The Preamble is merely something to be considered by the Court when deciding a case in the Māori Land Court.

Succession to Māori land under s 108 of the Act

Section 108 of the Act provides that an owner of a beneficial interest in Māori freehold land can leave their interest by will to any person who belongs to any one or more of the special classes of alienee outlined in s 108(2). It is imperative to understand the class of alienee and how it works in terms of a whāngai and adopted child. Essentially if you are named in the will and can fit within at least one of the special classes of alienee, the Court will allow succession to take place. Section 108(2)(a) is outlined below:

> **108 Disposition of will**
>
> …
>
> (2) An owner of a beneficial interest in Māori freehold land may leave that interest by will to any person who belongs to any 1 or more of the following classes:
>
> (a) children and remoter issue of the testator:
> (b) any other persons who would be entitled under section 109(1) to succeed to the interest if the testator died intestate:
> (c) any other persons who are related by blood to the testator and are members of the hapū associated with the land:
> (d) other owners of the land who are members of the hapū associated with the land:
> (e) whāngai of the testator:
> (f) trustees of persons referred to in any of paragraphs (a) to (e).

Adopted-in child under s 108

A child who has been adopted into a family is able to succeed to the adoptive parents' beneficial interests in Māori land on the basis that they are a child of the deceased and fall within s 108(2)(a). The effect of the Adoption Act is that once a child is adopted, they cease to be the child of their biological parent. For all purposes, including the succession to Māori land, that child will be deemed to be the child of the adoptive parents. As long as the adopted child is named in a will executed before 1 July 1993, they will take the Māori land interest of an adoptive parent without limitation, with the exception of any interests in the Tītī Islands (Muttonbird Island).[25] Succession to beneficial interests in Tītī Islands is currently the only exception to the rule. *Quinn v Coote*[26] (*Coote–Tītī Islands* case) provides us with the circumstances around why the Tītī Islands are the exception to this rule. Before we get into the details of the case I want to give a brief overview of the Tītī Islands and the Tītī.

The Tītī Islands consist of about 36 islands to the east, south and west of Rakiura/Stewart Island.[27] In 1864 the Crown negotiated an agreement to purchase Stewart Island from Ngāi Tahu and in return reserved 21 of the surrounding islands (Tītī Islands) exclusively for Ngāi Tahu individuals and their descendants.[28] The remaining Tītī Islands were also returned to Te Rūnanga o Ngāi Tahu as part of their settlement.[29] The Tītī Islands are an important part of the Ngāi Tahu economy in that they are known for muttonbirding which is where the tītī or mutton bird is harvested, processed, preserved and transported throughout the country.[30] Only those who are beneficial owners in the Tītī Islands are able to harvest tītī. The Tītī Islands are not only important to the people who whakapapa to the islands but their

importance is also felt by Te Ao Māori as a whole. The tītī is a delicacy that many Māori, including myself, wait all year round for. Growing up I can always remember when we received our white paint bucket full of tītī; it was the highlight of our year. The battle was to see how many you could eat before you got to the bottom of the bucket. The bird itself is a fat, salty bird that in our house is only ever boiled in a big pot with not too much water to keep the water salty. Since the tītī is only available for a short period of the year, it is highly sought after.

The Tikanga associated with the Tītī Islands is that only those who have a whakapapa connection to the land and the original owners are able to succeed to the interests in the Tītī Islands. When Māori land interests in the Tītī Islands were succeeded to by persons who had no whakapapa connection to the land, an application to cancel the succession was sought. This case is known as the *Coote–Tītī Islands* case. The deceased, Mrs Quinn, legally adopted three children. In 2008 after her death, her adopted children applied to succeed to her beneficial interest in Māori land in accordance with her will.[31] The original application was successful as the children fell within the first class of alienee which was that they were children of the deceased in respect of the Tītī Islands blocks. Mr Coote claimed that the Court failed to take into consideration the following when making the original order:[32]

- the customs (tikanga) of the beneficial Tītī Islands;
- the Tītī (Muttonbird) Notice 2005;
- the Tītī (Muttonbird) Islands Regulations 1978;
- s 48(d) of the Conservation Act 1987;
- the implicit intent of the reservation of 21 islands within the Deed of Cession of Stewart Island; and
- the intent of s 6(4) of the Māori Purposes Act 1983.

Mr Coote further submitted that:[33]

> Such omission by the Court has led to the circumstance where it is becoming increasingly possible [that the] descendants of the original Ngatimamoe and Ngaitahi owners of the Tītī Islands will be displaced by persons who are not such descendants. Such circumstance will undermine the ability of the ethnic minority defined as Beneficiaries to enjoy in community with other members of that minority its cultural heritage and therefore undermine those rights guaranteed by the New Zealand Bill of Rights Act 1990.

The Court held that the Adoption Act did not apply to Tītī Islands successions and that entitlement to the Tītī Islands was to be made in accordance with the Native Land Act 1931. The Native Land Act specified that only those who were blood descendants of Rakiura Māori, the original owners of the Tītī Islands, are persons entitled to succeed.[34] The succession order was cancelled, and the adopted children were not entitled to receive Māori land interests in the Tītī Islands.[35] This case is a perfect example of the law versus Tikanga Māori. The only difference in this case is that the Tikanga in regard to the Tītī Islands was implemented in legislation, regulations and other legal documents. Had it not been for these legal documents, the succession of land in the Tītī Islands to the adopted children of Shirley Quinn could not have been challenged. This is the exception. The reality of the current legal system is that persons who have no whakapapa connection to the land are entitled to succeed if they are legally adopted. There is essentially a loophole in the law. On one hand, we have the Preamble that recognises land as a taonga tuku iho but on the other hand allows for the succession of that "taonga tuku iho" to persons who do not whakapapa to the land. I argue that automatic succession to an adopted child under s 108 is done in breach of the Preamble and Tikanga Māori.

Adopted-out child under s 108

A child adopted out of a family can still succeed to beneficial interest in Māori land as they still fall within the special class of alienee. Section 108(2)(c) sets out that an owner of Māori land can leave that interest to any other person who is related by blood to the testator and is a member of the hapū associated with the land.

In *Estate of Ross Glencairn Hovell* the deceased left a will which left certain Māori land interests to his grandson who had been adopted out of the family.[36] The Court determined that the grandson was entitled to succeed to the Māori land interests of the deceased in accordance with s 108(2)(c).

The effect of s 108(2)(c) is that it provides the Court with a pathway for those who whakapapa to the land to still be able to succeed to Māori land interests despite being adopted out of the family. This is important because in Te Ao Māori your link to your biological parents can never be severed and your whakapapa can never be changed.

Earlier in this article I spoke about my uncle who had been legally adopted out of my family. My uncle succeeded to his adoptive mother's land. After my uncle passed away interests in his biological mother's land were also transferred to him. The succession to his biological mother's land was made on the back of a family agreement between my father and his siblings. The Court tends to frown upon such a situation as it would appear from the Court's perspective that my uncle would have been taking two bites at the pie. Prior to my family entering into a family agreement about my grandmother's land they were shown the Māori Land Court records which showed that my uncle had already received land from his adoptive mother. Despite the fact that he had already received land from his adoptive mother my family agreed that my uncle would still succeed to his biological mother's land. In their eyes, it did not matter that my uncle was adopted out as he was biologically theirs, their blood, their brother. Therefore, it was important that he succeed to my grandmother's land so that his children would always have a tūrangawaewae or a place to stand in the hapū and iwi that they biologically whakapapa to. The lawyer in me sought further explanation from my whānau about whether it mattered that my uncle would receive from both his biological mother and adoptive mother. The general consensus was that my family did not worry about what his adoptive family did; they only worried about what they could do to ensure that my uncle's line was continued in our family. For his line to continue he needed to be included in the succession to my grandmother's land. I also note that when my uncle died, he was buried in our family urupā, next to his biological mother. His adoptive parents were buried in a different family urupā.

An adopted-out child can only succeed to Māori land interests of their biological parent in the following ways: a biological parent leaves Māori land interest to an adopted-out child in their will as seen in *Estate of Ross Glencairn Hovell* or via a family agreement as seen in my own family example about my uncle.

Whāngai child under s 108

Section 108(2)(e) provides that a beneficial owner can leave Māori land interests to a whāngai child. However, the right to succeed to Māori land by a whāngai is not automatic. The

Court must then decide under s 115 of the Act whether the child was a whāngai child and if so to what extent that whāngai child should inherit. A discussion around s 115 will be discussed further in this article.

Succession to Māori land under s 109 of the Act

Section 109 of the Act provides that if an owner of any beneficial interest in Māori freehold land dies intestate, the persons entitled to succeed to the deceased Māori land interests will be determined in an order as outlined by s 109(1)(a)–(c). Section 109(1)(a) states that:

> … where the deceased leaves issue, the persons entitled shall be the child or children of the deceased living at his or her death, in equal portions if more than 1, together with the issue living at the death of the deceased of any child of the deceased who died before the deceased, that issue to take through all degrees, according to their stocks, in equal portions if more than 1, the portion to which their parent would have been entitled if living at the death of the deceased …

Adopted-in child under s 109

A child adopted into a family is treated in the same way that an adopted-in child is treated under s 108. The adopted child is a child of the deceased and therefore falls within the ambit of s 109(1)(a) which states that a child of the deceased is entitled to succeed. This an automatic right and as previously discussed the only exception to the automatic succession of an adopted child to Māori land interest is in cases of succession to the Tītī Islands.

Adopted-out child under s 109

An adopted-out child is not permitted to succeed to any Māori land interest of a biological parent who has died intestate. In *Sainsbury v Graham* an adopted-out child sought provisions out of the estate of his biological mother Parehura Durie under the Family Protection Act 1955.[37] While this case was heard under the Family Protection Act, it would still need to go to the Māori Land Court for succession under s 109. In this case the deceased died intestate, and she had no children except the child she adopted out. There was a discrepancy about whether the child was adopted in accordance with the Adoption Act or whether the child was a whāngai. The adoption took place around the time when the Adoption Act came into force, which was the reason for the confusion around whether the child was legally adopted. The Court ruled that the child was adopted in accordance with the Adoption Act. The Court further held that the Adoption Act severed the link between the child and his biological mother resulting in the child not being able to claim provisions out of her estate. On deciding the biological child had no claim to the estate, the Court stated:[38]

> This outcome may appear tough to the plaintiff. After all, he was the only child born of the late Ms Durie. But, at law, he has no entitlement to succeed to any of her interests in Māori land, which are substantial. That is the law. This is a Court of law. I do not know what, if any, redress might be available to the plaintiff upon application to the Māori Land Court. That is a matter for the plaintiff and his advisers.
>
> One further comment, given the size and value of the late Ms Durie's interests in Māori land, I wonder whether there is not scope for some compromise that would give both parties something. That is likely to involve goodwill on the defendant's part, and I have no idea as to her attitude, or as to whether there has been any communication between the parties along these lines. The season of goodwill approaches.

The Court made a number of important points in the paragraphs quoted above that I want to discuss further. The first point I want to highlight is the Court's recognition that they are bound by the current legislation. There is also a feeling of sympathy from the Court for the current position of the adopted-out child. From a Te Ao Māori perspective the fact that the child is the only child of the deceased makes this situation all the more challenging. The effect of the Adoption Act and the Te Ture Whenua Māori Act is that the sole heir of Parehura Durie will not succeed to the land that he has a whakapapa connection with.

Essentially Mrs Durie's line to the land is severed and any descendants she would have via her only living heir would have lost their connection to their tribal land. I argue that this is incorrect and that despite a person being adopted-out of a family, they should be able to provide evidence to the Court as to why they should succeed to particular Māori land interests. The automatic effect of the Adoption Act needs to be amended so cases such as this one can be heard on the evidence, that evidence being arguments regarding the Tikanga of that area. I also note that Tikanga is fluid, it is adaptable and can differ from iwi to iwi and from hapū to hapū. I note this because my argument is not that an adopted-out child should automatically succeed to the Māori land interests of a biological parent; my argument is that there should be an assessment made by the Court based on the facts of the situation and the Tikanga of that area.

The second point I want to raise is that the Court in this case also tried to reason with the defendant's moral compass by questioning whether there is any scope for some sort of compromise that would be beneficial to both parties.[39] This is a good point raised by the Court, but I wonder if a mutual agreement could have been reached prior to the Court hearing. Currently in the Māori Land Court, there is no obligation for parties to mediate. I am unsure whether mediation occurred in this case but if parties were required to mediate with a mediator who had the relevant knowledge of Tikanga before claims for succession are made, a mutual agreement may be reached. From my own experience in the Māori Land Court, a mutually accepted agreement is less likely to occur once the hearing has been completed. The tension created between the parties through a hearing and in the lead up to a hearing means that many parties do not want to compromise after the hearing.

Whāngai child under s 109

A whāngai child can succeed to Māori land interests of a whāngai parent but only in accordance with s 115 of the Act, not s 109.

Succession to Māori land under s 115 of the Act

In every case that concerns the succession of Māori land interest to a whāngai child, requirements under s 115 will need to be satisfied. Section 115 has a two-step approach. The first step is that the Court needs to determine that the person purporting to be a whāngai child is indeed a whāngai child of the deceased. If the Court determines that a child was a whāngai child of the deceased, then the Court must determine to what extent that whāngai child should succeed — this is the second step. The Court has the power to determine that a whāngai child should succeed to all of the deceased's interests, to a lesser extent, or that a whāngai child should not succeed to any interest of the

deceased. This provides the Court with the ability to authorise life interests over particular land. These life interests are given back to those who whakapapa to the land upon the death of a whāngai child. I find this a helpful alternative in situations where the whānau wants the whāngai to have some sort of right to the land but also wants to fulfil Tikanga requirements of only giving land to persons who whakapapa to the land.

When considering an application under s 115, the Court often takes into consideration evidential material, including the nature and length of the relationship between the whāngai and their whāngai parent, recognition of the relationship between the whāngai and their adoptive parent, recognition of the relationship by the whānau or other members of the community, the whakapapa connections of the whāngai, whether there is a blood relationship and the Tikanga of the relevant iwi.[40] It is important to understand the evidential material and how that is interpreted by the Court.

There are two key factors I want to explore that the Court examines when applications for succession to a whāngai are made. The first is the relationship between the whāngai child, the whāngai parents and the whāngai family. The second is the need for there to be a whakapapa connection to the land in question.

The first two cases I want to explore are cases where grandchildren were taken as whāngai children. In *Moses-Heeney — Estate of Eric Moses*, two grandchildren who were raised as whāngai of the deceased Eric Moses had applied to the Court for succession of the deceased estate. In considering the evidence, the Court determined that the grandchildren were whāngai in accordance with s 115(1) and that they were entitled to succeed to the Māori land interest of the deceased because of the following evidence:

- majority support from the siblings of the grandchildren;
- majority support from the natural children of the deceased;
- the grandchildren also confirmed that they would not succeed to their biological mothers' shares. This is important as the Court does not approve of children succeeding to multiple persons' shares, in essence having two bites at the pie;
- there was no issue regarding their whakapapa link as they are natural grandchildren of the deceased;
- all whānau appear to recognise the grandchildren as whāngai of the deceased; and
- when Mere Moses passed away, the wife of Eric Moses, both grandchildren were considered natural children of the deceased.

In *Pulham — Succession to Tiro Taupaki*,[41] which was a similar case to *Moses-Heeney — Estate of Eric Moses*, the Court was asked to consider whether the applicants who were natural grandchildren to the deceased were entitled to succeed to the deceased estate. The Court in this case held that the applicants were whāngai grandchildren but not whāngai children in accordance with the Act and were not entitled to succeed. The Court reached this conclusion because of the following evidence:

- uncontested evidence that the applicants were never referred to by the deceased's other natural grandchildren as aunty or uncle but as cousins;
- three letters from the deceased to one of the applicants where she signed the letter "nana";
- lack of express wishes whether by will, letter or ohaaki that the applicants should succeed as equal to her children; and
- the fluidity of the whānau arrangement in that when the deceased grew sick, her biological daughter Laura returned home to look after her mother and the applicants.

Taking both *Moses-Heeney — Estate of Eric Moses* and *Pulham — Succession to Tiro Taupaki* into consideration, you can see how the relationship of the whāngai child to the whāngai parent is important when establishing whether that child should succeed. Where a child cannot satisfy the Court that they were a whāngai child of the deceased, they will not be permitted to succeed. The fluid nature of whāngai means that a child could be in a person's care for a very short period or very long period. In order for the child to be a whāngai that can succeed to the Māori land interests of a whāngai person, there has to be a clear and firm relationship between the whāngai child and the whāngai parents. The whāngai child has to have relied on the whāngai parent and vice versa since the whāngai relationship was established. This relationship needs to be accepted by the wider family. Throughout my own childhood, there were multiple instances where children would come to live with us as whāngai. All of these children only ever stayed for short periods. In most circumstances they moved in after emergencies that occurred with their biological parents. Some stayed for a few months, others stayed for a few years but in all circumstances my parents were referred to in accordance with whakapapa. They were either uncle and aunty or koro and nan. None of these whāngai children will succeed to my father's Māori land interest because the relationship between my father and these children were of short duration and all children were returned to their biological parents in due course.

The next case I want to explore concerns the whakapapa connection that a whāngai child must have to the land they seek to inherit. The case of *Hohua — Estate of Tangi Biddle or Hohua*[42] is a special case in that the expert evidence given by Professor Wharehuia Milroy in relation to the Tikanga associated with whāngai in his iwi of Ngāi Tuhoe has been of great assistance to the Court and the legal profession. Professor Wharehuia Milroy is not the only kaumātua who has provided expert evidence to the Māori Land Court on this issue, but for this article I will be using his evidence in *Hohua — Estate of Tangi Biddle or Hohua*. In this case, the deceased died intestate. The deceased had no biological children but had three whāngai children. The whāngai children applied for succession to the deceased estate on the basis that they were whāngai of the deceased. The lower Court in this case found that the children were whāngai of the deceased in terms of s 115 of the Act. However, the whāngai children could not establish how they were connected through whakapapa to the deceased. The inability to make the whakapapa connection resulted in the lower Court finding that they were not entitled to succeed to the Māori land interests of the deceased. The Court made the following comment when hearing the case in the lower Court:[43]

> … I've got real doubts that you can take shares in the Waimana through Tangi, because you've got no blood relationship with Tangi. She was your mum but there's no blood relationship … there. And here are all the people who are her blood relations and they are saying in terms of their Tikanga, only someone who is a blood relationship and a whāngai can take as a whāngai. These people don't get any pleasure out of being rude to you but they're saying it's not tika for you to take through Tangi.

I wanted to discuss this comment from the lower Court to highlight the views of those who whakapapa to the land. The Court in this case is attempting to explain to the whāngai child that succession to this land would be in breach of the Tikanga, that the Tikanga associated with the land in question requires that only those who are blood-related can inherit this land. Now imagine if the children in this case were adopted. No such discussion could take place and the children would automatically succeed to the land in breach of the Tikanga associated with the land. I want to quickly note that a breach of Tikanga is severe and will be carried by the people of that land for generations to come.

I want to return to the facts in the *Hohua — Estate of Tangi Biddle or Hohua case*. One of the whāngai children in this case appealed the decision of the lower Court on the basis that she was a blood relation to the deceased. The Court allowed the appeal on the basis that the lower Court did not give the whāngai enough time to establish the whakapapa connection to the deceased and a rehearing was allowed. What I now want to focus on from this case is an extract from Mr Milroy's report on Tikanga pertaining to Tuhoe which is provided below:[44]

> Tuhoe iwi determines "whāngai" as any customary and optional procedure for taking as [one's] own, a child of other parents. The main principle in "whāngai" is kinship. Tuhoe regarded as important in the "whāngai" of a child that there has to be a whakapapa link which is readily established and that … taking the point of relationship in the "whāngai" situation outside the fourth cousin status is too far removed to allow a "whāngai" to have the rights in the use of family land. Thus, a close blood relationship is a pre-requisite to the "whāngai" eventually assuming rights in family land.

This extract reinforces the need for a whāngai child to whakapapa to the land. It is also important that a whāngai child is able to readily provide how they are connected to the whāngai parent. This case, and the evidence provided in this case, provide a valuable insight into succession by a whāngai child. This insight exacerbates the fact that none of the requirements for a whāngai child are required to be met by an adopted child.

Whāngai v adoption — succession to land

In my opinion, the current law with regard to succession to Māori land interests by a whāngai child is correct in accordance with Tikanga. This opinion is formed on the basis that s 115 provides an avenue for all parties concerned to be heard. When it comes to a whāngai child, evidence on the relationship between the whāngai parents and the whāngai child is heard. The whakapapa connection from the whāngai child to the land is provided. Evidence on the Tikanga of that particular land is heard. The views of the wider family, hapū and iwi are also heard. Considerations are also given to the Preamble of the Act. This is the correct way to hear a case that concerns the succession of Māori land.

On the opposite side of the spectrum, it is my argument that the current law with regard to succession to Māori land interests by an adopted child is incorrect and in breach of Tikanga Māori. My argument is based around the automatic succession of an adopted child with no consideration to any external evidence, including Tikanga Māori. Māori have always had their own legal system and as such should have the ability to enforce Tikanga Māori when dealing with Māori land. The automatic effect of the Adoption Act results in no evaluation of Tikanga being conducted when an adopted child applies to succeed to Māori land interest of an adoptive parent. This is a severe problem from a Tikanga perspective that needs to be rectified.

As seen in *Hohua — Estate of Tangi Biddle or Hohua*, the Māori Land Court is more than capable of hearing evidence and deciding cases in accordance with Tikanga Māori. Every whānau, hapū or iwi should be able to provide evidence to the Court when succession to tribal land is sought by an adopted child. This land has been held in Māori ownership under Tikanga Māori for centuries so the fact that the Adoption Act overrides this historic and ever-existing Māori legal system adds to the conflict already felt between Māori and the Crown.

I strongly believe that the only way forward is for an adopted child to be treated in the same manner that a whāngai child is treated. When an application for succession is made by an adopted child, the Māori Land Court should decide whether succession can be made under an amended version of s 115. Currently, s 115 has a two-step approach. The Court must first determine that a child is a whāngai child. If this first step is applied to an adopted child, I would argue that the adoption order should be prima facie evidence that the child is adopted. Therefore, the first step would be satisfied.

The second step, however, would be where the real evaluation is done. This is where a review of the relevant Tikanga of the land and Tikanga of the people who whakapapa to that land is undertaken.

I note that a whānau, hapū or iwi can decide that a person can succeed to land despite no whakapapa connection. Historically, I have heard of instances where a personal contribution to a particular whānau, hapū or iwi is rewarded with land. My argument is that the relevant Tikanga of that area should be heard and adhered to over the Adoption Act.

IV Recommendations for the future

When dealing with succession to Māori land, current legislation needs to reflect Tikanga Māori. The key recommendation of this article is that the current legislation needs to change.

The Adoption Act which was enacted in 1955 is out of date and needs to be amended. I agree that the effect of the adoption order should be that an adopted child is deemed to be a child of the adoptive parent. However, there needs to be an exception to this rule. An adopted child should not be deemed to be a child of an adoptive parent in circumstances where an adopted child has applied for succession to Māori land interests of an adoptive parent. When it comes to Māori land, an adopted child should not be treated as if they are a child born to the deceased and certain requirements must be adhered to before any succession to an adopted child can be made.

Te Ture Whenua Māori Act also needs to be amended. There are a number of ways that the Act can be amended but I propose the following. The word "child" should be defined in s 2 of the Act as a biological child. This will result in only biological children being viewed as children under applications for succession.

Section 115 of the Act should be amended to allow that the Court may make provisions for a whāngai or adopted child. These amendments would allow the Court to consider whether an adopted child should succeed to the land. This consideration would be based on the criterion that is currently set for a whāngai child that has applied to the Court for a succession order. These amendments would ensure that there is no automatic succession to Māori land by a person who has no whakapapa connection.

Mediation should also be compulsory when disputes around succession to Māori land by a whāngai or adopted child arise.

V Conclusion

The importance of land to Māori is one of the key reasons why an adopted person should not automatically succeed to Māori land interests of an adoptive parent. Current legislation provides an avenue for Tikanga Māori to be breached. This legislation does not recognise the fact that land is a taonga tuku iho that needs to be passed on from generation to generation in accordance with Tikanga Māori. Instead, legal fiction is created and Tikanga Māori is cast aside. Succession by an adopted child should be similar to the requirements set out for succession by a whāngai child. There must be recognition that when dealing with Māori land, Tikanga Māori needs to be adhered to.
Whatu ngarongaro he tangata, toitū he whenua.
Man disappears but land remains.

Glossary

hapū	sub-tribe
iwi	tribe
Tāne Mahuta	god of the forest
Te Ao Māori	the Māori world
Te Reo Māori	the Māori language
Te Wao Nui a Tāne	the great forest of Tāne Mahuta
tītī	muttonbird
tohunga	priest
tupuna	ancestor
turangawaewae	home, place to stand
urupa	cemetery
whānau	family

Footnotes

*. He uri tēnei o Ngāti Pikiao, o Ngāti Tarāwhai, o Tapuika o Te Arawa whanui. He hononga ano hoki kia Ngāti Ruanui.
1. Te Ture Whenua Māori Act 1993, s 4.
2. Section 4.
3. Ani Mikaere "The Treaty of Waitangi and recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 333.
4. PM Ryan *The Raupō Dictionary of Modern Māori* (2nd rev ed, Raupo Publishing (NZ) Ltd, 1997) at 367.
5. Sidney Moko Mead *Landmarks, Bridges and Visions: Aspects of Māori Culture* (Victoria University Press, Wellington, 1997) at 208.
6. Sir George Grey *Nga mahi a nga tupuna* (Māori Purposes Fund Board, Wellington, 1953) at 6–2; and Mead, above n 5, at 208.
7. Mead, above n 5, at 204.
8. At 204.
9. At 204.
10. At 206.
11. Keith C Griffith *New Zealand Adoption: History and Practice, Social and Legal, 1840–1996* (KC Griffith, Wellington, 1997) at 4.
12. At 4.
13. At 4.
14. At 5.
15. At 17.
16. Adoption Act 1955, s 16(2)(a).
17. Section 16(2)(b).
18. Griffith, above n 11, at 9.
19. Ryan, above n 4, at 355.
20. Lon L Fuller *Legal Fictions* (Stanford University Press, 1967).
21. Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23.
22. At 23.
23. At 23.
24. Te Ture Whenua Māori Act 1993, Preamble.
25. Norman F Smith "Successions to interests in Māori Land" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 155 at 157.
26. *Quinn v Coote* [2013] Chief Judge's MB 1018 (2013 CJ 1018).
27. Jacinta Ruru "Whānau Verses Whakapapa in the Māori Land Court: A Tribute to Nin Tomas" (2017) 5 Te Tai Haruru 121 at 127.
28. At 127.
29. At 127.
30. Michael J Stevens "An Intimate Knowledge of 'Māori and Mutton-Bird': Big Nana's Story" (2013) 14 JNZS 106.
31. *Quinn v Coote*, above n 26, at [2].
32. At [4].
33. At [4].
34. At [23].
35. At [24].
36. *Estate of Ross Glencairn Hovell* (2012) 25 Tairāwhiti MB 258 (25 TRW 258).
37. *Sainsbury v Graham* [2009] NZFLR 173 (HC).
38. At [45]–[46].
39. At [46].
40. *Moses-Heeney — Estate of Eric Moses* (2018) 201 Waiariki MB 122 (201 WAR 122) at [8].
41. *Pulham — Succession to Tiro Taupaki* (2010) 9 Taitokerau MB 209 (9 TTK 209).
42. *Hohua — Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 APRO 43).
43. At 4.
44. At 7.

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Powers and jurisdiction of the Family Court clarified: the decision in Wihongi v Broad reverses a concerning trend

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Introduction

In the usual course, it does not do to dwell on desires and forget to live. There is, however, no question that the public's desire for finality in litigation enables parties to move on and live their lives free of any continuing demands. This desire is amplified in the family law context, especially in relationship property matters where the parties often end up in protracted and acrimonious disputes.[1]

Notwithstanding the above, there have been a growing number of decisions in the Family Court that have been willing to prolong or re-liven a dispute by setting aside orders that are otherwise final and dispositive.[2] A recent decision of the Family Court, *Wihongi v Broad*, has challenged this concerning trend by determining the parameters of the Family Court's jurisdiction in such circumstances.[3]

The purpose of this article is to dissect the *Wihongi* decision in order to discuss the legal bases in which an application to set aside court orders should fail. The discussion starts with a summary of the decision itself, before moving on to provide a more in-depth look at the doctrines of merger and res judicata. The discussion then moves on to review the limited powers and jurisdiction the Family Court (or any statutory court for that matter) possesses to set aside its own orders.

The decision shines a clarifying light into the otherwise murky waters of inherent and implied jurisdiction and powers. That light should ensure future applicants proceed cautiously when considering the merits of re-litigating finally determined matters, particularly when there has been no miscarriage of justice or abuse of process.

Summary of *Wihongi v Broad*

The initial stages of the dispute between Ms Wihongi and Mr Broad are representative of how most relationship property disputes traverse through the Family Court.

Following a 20-year relationship that ended in 2014, Ms Wihongi commenced proceedings against Mr Broad and the trustees of the John Broad Trust in the Family Court, seeking the division of the couple's relationship property and trust interests under the Property (Relationships) Act 1976 (PRA).

The parties progressed to a judicial settlement conference in 2017. At that settlement conference an agreement was reached to settle the dispute and a minute was issued that recorded the terms of that agreement. It included payment of two tranches of money from Mr Broad to Ms Wihongi. The first was a payment of $5,000, which was to be made that same day. The second was a payment of $255,000, which was to be made at a later date. A consent order recording that agreement was subsequently filed and sealed by the Family Court.

The first payment was made. The second payment was not made as Ms Wihongi purported to cancel the agreement. What occurred next is somewhat more atypical of relationship property disputes.

In 2019, Ms Wihongi filed an application in the Family Court seeking (amongst other things) to "set aside a mediated agreement and an order of the Family Court and for determination of entitlement to relationship property".[4] In response, Mr Broad applied to strike out the application based on the doctrine of merger, the doctrine of res judicata, and a number of jurisdictional issues. In the alternative, Mr Broad argued that the failure to pay the second tranche of funds engaged the principle that a party cannot benefit from its own wrong and the prevention principle, due to Ms Wihongi's refusal to provide a bank account to deposit the funds.

Putting to one side the alternate arguments, the Family Court was tasked with determining, on strike out principles, whether it had the power and/or jurisdiction to set aside the consent order. In order to do so, Judge Pidwell had to grapple with whether:

(a) there was a contractual agreement remaining between Ms Wihongi and Mr Broad that was capable of being cancelled in light of the doctrine of merger;

(b) the application to set aside the consent order offended the principle of finality and the doctrine of res judicata; and

(c) the Family Court has the ability to set aside a final order it has made and, if so, in what circumstances it may do so.

It was held that the agreement had merged into the consent order, leaving Ms Wihongi with no agreement to unilaterally cancel or somehow set aside. It was also held that the consent order was subject to the doctrine of res judicata with the Family Court possessing only a narrow and exceptional jurisdiction to set aside orders based on an implied or inherent power that all courts possess to protect against abuse of their own processes. The strike out application was granted, and the Family Court considered itself *functus officio*.

Doctrine of merger

Ms Wihongi argued that her agreement with Mr Broad at the judicial settlement conference was validly cancelled. This, it was said, gave the Family Court the ability to redetermine the parties' relationship property entitlements.

It was held that this position failed to appreciate that the entire agreement between Ms Wihongi and Mr Broad reached at the judicial settlement conference was the subject of the consent order. Judge Pidwell remarked:[5]

> [22] The purpose of a settlement conference is to settle the issues between the parties. The term "settle" means to "terminate (a lawsuit) by mutual agreement". By virtue of the doctrine of merger, the agreement reached between Ms Wihongi and Mr Broad at the settlement conference was merged into a court order on that day. The Judge noted that "all issues settled". He then wrote the particular order.

The doctrine of merger essentially posits that the greater instrument subsumes and extinguishes the lesser instrument.[6] In the circumstances this is best expressed by the High Court decision in *MacPherson v McCaffery*, which considered an attempt by a wife to enforce a maintenance agreement that had subsequently been embodied in an order. Henry J held:[7]

> The result is that the parties were thereafter bound by the consent order and could no longer dispute its terms and attempt to reply upon their former agreement. They could no longer rely upon defences or any other rights or remedies they may have had under the prior agreement. The obligations previously contained in the Deed were thereafter liable to be the subject-matter of further applications under the Act and in the event of a variation of the obligations the parties could no longer rely upon the former agreement upon which the consent order was founded. An order by consent, not discharged by mutual consent, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal: *Kinch v Walcott* [1929] AC 482; [1929] All ER Rep 720. In that case the Judicial Committee of the Privy Council said:
>
> > A party bound by a consent order, as was tersely observed by Byrne J in *Wilding v Sanderson* [1897] 2 Ch 534, 544, "must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose". In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal".

Ms Wihongi's position presupposed that her agreement with Mr Broad remained the legal basis for the settlement reached. It did not. A consent order was made and sealed.[8] This had the effect of perfecting the order[9] and removing any ability to mount an attack on the agreement based on contractual principles.[10]

Doctrine of res judicata

"Res judicata" is an expression used to describe a doctrine that means "the matter has been adjudicated".[11] It supports the public need for judicial decisions to be final and conclusive, and an individuals' need to be protected from repeated lawsuits for the same cause.[12] It is often expressed as the need for finality in litigation.

A res judicata has been described by the learned authors of *Spencer Bower and Handley: Res Judicata as*:[13]

> … a decision pronounced by a judicial tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.

The words "which disposes once and for all" must necessarily exclude decisions that are temporary, provisional or preliminary.[14] However, if a dispute has been finally concluded, it is an abuse of process for a disgruntled party to seek to resurrect it.[15]

In order for there to be a finding of res judicata:[16]

(a) there needs to be an element of finality in the order; and
(b) the subject of the order must be the same question that is now before the court.

The consent order is a res judicata. It resolved the dispute between Ms Wihongi and Mr Broad to the extent it finally determined their respective relationship property entitlements and all matters concerning the Trust. Ms Wihongi's application essentially attempted to have these matters redetermined, notwithstanding the status of the consent order.

Although the Family Court did not pronounce a judicial opinion, it gave judicial sanction to an agreement that could not otherwise operate as a bar into a judicial decision on which a plea of res judicata may be founded.[17]

The following statement of Lord Herschell LC in *Re South American and Mexican Co, ex parte Bank of England* has withstood the test of time:[18]

> … a judgment by consent is intended to put a stop to litigation between the parties, just as much as a judgment is which results from the decision of the court after the matter has been fought out to the end … and I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and to allow questions that were really involved in the action … to be fought over again [in subsequent litigation].

The Family Court, like all other courts, should be concerned to preserve the finality of litigation through res judicata, especially in the relationship property context.[19] It does not matter whether that finality is achieved by adjudication or by compromise.[20]

But it was argued that, notwithstanding the doctrine of res judicata, the Family Court possesses the ability to set aside its own orders. It is on this basis that a discussion on powers and jurisdiction is warranted.

Powers and jurisdiction of the Family Court

The legislation

The Family Court is a creature of statute. It has an implied jurisdiction ancillary to the performance of its functions, powers and duties conferred by statute, but it does not possess an inherent jurisdiction.[21]

The Family Court Act 1980 (FCA) provides the Family Court with the statutory jurisdiction to hear and determine proceedings under various legislation, including the PRA.[22] As such, an applicant seeking to set aside court orders must be able to point to a statutory provision in the PRA (or other relevant legislation) that enables the Family Court to set aside its own orders. If there are no available statutory provisions, the Family Court cannot rely on an implied jurisdiction. It must look elsewhere.

This was accepted in the High Court decision *Carrell v Carrell* where Cooke J held that an order in the District Court (then the Magistrate's Court) could be varied or discharged before being perfected by sealing, but could otherwise only be done on an application under some specific statutory provision.[23]

The Family Court Rules 2002 provide limited carriage for an aggrieved litigant to apply for a rehearing if there has been a miscarriage of justice. Rule 209 states:

> **209 Application for rehearing**
>
> (1) A party may apply for a rehearing of all or any part of an application on the grounds that there has been a miscarriage of justice in the proceedings.
>
> …
>
> (3) An application under subclause (1) must be filed in the proper court (see rule 28(1)) within 28 days after the date on which judgment was delivered on the application or (as the case requires) part of the application.
>
> …

Rule 210 goes on to provide some non-exhaustive examples of a miscarriage of justice:

> **210 Court may order rehearing**
>
> (1) On an application for a rehearing of an application, the court may order a rehearing of all or any part of the application if (and only if) it considers that there has been a miscarriage of justice in the proceedings.
>
> (2) Examples of a miscarriage of justice include—
>
> (a) unfair or improper practices by a successful party to the prejudice of another party:
>
> (b) the discovery since the hearing of material evidence that could not reasonably have been known or foreseen before or during the hearing:
>
> (c) misconduct by a witness that affects the outcome of the hearing.

The timeframe is couched in mandatory terms, which must represent the desirability of finality of litigation and certainty for the parties in planning for their future lives.[24] If Parliament intended to equip the Family Court with further powers to overcome the res judicata principle and retrospectively vary or revoke substantive orders already made, it would have done so in explicit terms.

The decisions

It is useful to start with the High Court decision in *Aplin v Lagan*.[25] That decision concerned a consent order by the Family Court to sanction the sale of a farm, which was an item of relationship property. The parties subsequently entered into a s 21 agreement based on an agreed sale price for the farm. It transpired that there was an ancillary agreement for the sale of the farm that was fraudulently not disclosed to the wife. As a result, the wife applied to set aside the s 21 agreement and the Family Court ordered a redistribution of the assets to reflect the true value of the farm.

An issue on appeal was whether the consent order removed jurisdiction from the Family Court to set aside the initial agreement and order a redistribution. In determining that issue, Fisher J held:[26]

> In my view, both the Family Court and this Court would have had the jurisdiction to set aside the consent order of 5 December 1986, had that been required. The Family Court has implied jurisdiction to prevent an abuse of its own processes where appropriate grounds are shown. The High Court has inherent jurisdiction with respect to its own orders and a supervisory jurisdiction with respect to those of inferior tribunals. …
>
> As to the grounds upon which the jurisdiction to set aside consent orders should be exercised; a Court draws assistance from contractual principles but by way of analogy only. In the end the Court is exercising an inherent jurisdiction to control the use of its own processes and/or those of inferior Courts; it is not ruling upon a matter of contract per se. It is misleading to approach a consent order as if it were a species of contract to which contractual principles and contract statutes directly apply, especially where the order has been made possible only by the exercise of statutory powers and discretions such as those conferred by the Matrimonial Property Act. Although an antecedent agreement will obviously influence the exercise of the Court's statutory discretions, in such a case the Court derives its jurisdiction from the Matrimonial Property Act, not from any agreement which preceded it (*Hensby-Bennett v Hensby-Bennett* (1981) 4 MPC 101, 102). In making such orders, the Court has a supervisory role from which it will not abdicate in favour of the parties (*Re E* [1978] 2 NZLR 40, 43). If it later sets aside a consent Court order, the Court is exercising an inherent jurisdiction to prevent the intentional or innocent misuse of the Court's own processes, and in particular to correct errors which might otherwise have perpetuated a miscarriage of justice: see further *Waitemata City Council v MacKenzie* [1988] 2 NZLR 242, 249 (CA).

His Honour's use of the terms "inherent", "implied", and "supervisory" along with the use of the terms "jurisdiction" and "powers" has led to some degree of confusion.[27] This criticism, however, should not be for Fisher J to bear alone. As Rosara Joseph recognises in her work "Inherent jurisdiction and inherent powers in New Zealand", the inconsistent and confusing use of this nomenclature has pervaded judgments at all levels.[28]

The statement that "[t]he Family Court has implied jurisdiction to prevent an abuse of its own processes where appropriate grounds are shown" conflates two distinct concepts. The first is the implied jurisdiction of a statutory court to allow it to perform its statutory functions, powers and duties. In the context of the Family Court, this implied jurisdiction is incidental to the substantive statutory jurisdiction that derives from the FCA. The second is the inherent power possessed by all courts (including the Family Court) to prevent abuse of its processes. This inherent power protects the integrity of a court's process.[29] As such, the threat must be to the process of a court that is wrongly being made use of and from which the court must protect itself.[30]

The District Court decision in *Rush v Rush*[31] has subsequently conflated the discussion in *Aplin* on inherent powers to prevent an abuse of its processes with the inherent jurisdiction of the High Court to set aside its own orders or those of inferior courts. This conflation is best explained by Judge Pidwell in *Wihongi v Broad* when she held:[32]

> … her Honour interprets Justice Fisher's reasoning in *Aplin* as authority to support the Family Court's inherent jurisdiction to set aside a consent order without further qualification.[33] With respect, that is not the ratio of *Aplin*. Her Honour truncated the direct quotation from *Aplin*, omitting the qualifying words explaining the parameters of the grounds upon which the jurisdiction should be exercised. Those parameters are the inherent jurisdiction of the High Court. The Family Court has no such inherent jurisdiction, just implied powers, which are limited to procedural regulation in order to prevent an abuse of its own processes.

On the back of a misapplication of the *Aplin* decision, the *Rush* Court attempted to dilute the abuse of process principle so that it applied in circumstances where it would be "unjust to give effect to the agreement".[34]

The inherent power that gives rise to the abuse of process principle is much more limited than the implied or inherent jurisdiction of a court to set aside its own orders. An order cannot simply be "unjust". This view is recognised by the Court of Appeal in *R v Smith* when it held that an inherent power to revisit its decision only exists in *exceptional circumstances* "where a substantial miscarriage of justice would result if a fundamental error in procedure were not corrected and where there was no alternative effective remedy reasonably available".[35]

The high threshold accords with the underlying rationale of the abuse of process principle, which has been aptly described by Joseph as "the prevention of abuses that would strike at the public confidence in a court's process and so diminish the court's ability to fulfil its function".[36]

It is unfortunate that the flawed rationale in *Rush* has been followed by a number of subsequent Family Court decisions.[37] These Family Court decisions must suffer the same demise as *Rush* in the sense that they have also conflated decisions of the High Court as being authority for the Family Court somehow possessing an expanded power or jurisdiction to set aside its own orders.

This conflation is perhaps best illustrated by the Family Court decision in *DRM v AWH* when Judge O'Dwyer held:[38]

> [16] There was no dispute between counsel that the Court has jurisdiction to set aside a consent order. Counsel referred me to several High Court and Court of Appeal decisions dealing with the issue, including *Jones v Borrin* [1989] 3 NZLR 227, *Phillips v Phillips* [1993] 3 NZLR 159 (CA), *Aplin v Lagan* (1993) 10 FRNZ 562. Both counsel relied on the summary of the principles contained in the Fisher J decision in *New v New and the Family Court at Te Kuiti* (High Court Hamilton, M 107/01/) [2002] NZFLR 901, pages 8 and 9:
>
> **Jurisdiction and principles**
>
> [17] Counsel helpfully traversed a series of decisions including *Phillips v Phillips* [1993] 3 NZLR 159 (CA), *Aplin v Lagan* (1993) 10 FRNZ 562; *Jones v Borrin* (1993) 3 NZLR 227 and *Arthur v Arthur* [1994] NZFLR 120. I do not understand the principles to be in dispute. For the purposes of this case it is sufficient to summarise them as follows:
>
> (a) All courts have a supervisory jurisdiction to set aside their own consent orders where there would otherwise be a miscarriage of justice. In addition the High Court can exercise a supervisory power in that respect for orders made in the Family Court.
>
> (b) Although a consent court order is not a contract, where mistake or misrepresentation is relied upon the courts will, in the exercise of this jurisdiction, draw broad assistance from contractual principles by way of analogy.
>
> (c) For cases based on unilateral mistake that will usually mean that the plaintiff will have to show that he was mistaken as to a significant fact, that the other party knew at the time that he was so mistaken, and the result was a substantially unequal exchange of values. If the case is based on common mistake both of the parties must have made the same mistake and this must similarly have resulted in a substantially unequal exchange of values.
>
> (d) Misrepresentation will normally need to be substantial before the consent order will be set aside.
>
> (e) Even where the plaintiff establishes contractual grounds of that nature the Court will not normally intervene until it is shown that there would otherwise be a serious miscarriage of justice. Whether there is a serious miscarriage of justice is a broad question but the principal consideration is likely to be whether there is a major disparity between rights under the Act and the effect of the order sufficient to override the desirability of finality in litigation and certainty for the parties in planning their future lives.
>
> (f) There is ultimately an overriding discretion whether to grant relief bearing in mind all the surrounding circumstances including the extent to which one party may have acted in reliance on the order, delay, effect on third parties, and the conduct of the parties.

The High Court decision in *New v New* uses the term "supervisory jurisdiction" to describe what must only be the inherent power all courts possess to protect against abuse of processes.[39] It must then follow that — following an acknowledgment of the High Court's inherent jurisdiction (or "supervisory power") to set aside orders of the Family Court — the proceeding discussion is limited to the wider grounds on which the High Court may exercise that inherent jurisdiction. It does not attempt to describe the exceptional circumstances when a court may exercise its inherent power to protect against a fundamental error in process.

This view accords with the need for finality in litigation, particularly when administering a statute that has an overriding principle for the speedy, simple and inexpensive resolution of proceedings.[40]

Concluding remarks

The circumstances in which the Family Court can reopen its own orders are narrow. Where the narrow jurisdiction is engaged, it is nonetheless exceptional to reopen an order, particularly when that order is perfected by sealing. In summary, this is because of the following:

(a) Once an underlying agreement (eg, a settlement reached at a judicial settlement conference) has been embodied in a consent order, the agreement merges into a court order and ceases to exist in the eyes of the law. It is incorrect to view such a case through the lens of contract as it is irrelevant whether that order is entered by consent or otherwise.

(b) It offends the principle of finality in litigation and the doctrine of res judicata.

(c) The limited abuse of process jurisdiction is only available to cure a miscarriage of justice (eg, judgment obtained by fraud or through bias). It will not be an abuse of process where parties reach an agreement and one of the parties changes their mind.

This is not to say applicants such as Ms Wihongi are without remedy. There are obvious enforcement options in relation to the consent order. Putting those to one side, it is open to an applicant to seek leave to appeal out of time or to bring proceedings for judicial review of the Family Court processes that were adopted in reaching the consent order.[41]

Footnotes

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represented the respondents in the decision subject to this article: *Wihongi v Broad* [2020] NZFC 7746. The factual statements made in this article are based on publicly available material. The opinions expressed in this article are the authors' own and do not, in any way, reflect the views of their employer. Any errors or omissions are also their own.

1. *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 269.
2. *DRM v AWH* [2012] NZFC 618; *MJT v DAW* [2006] NZFLR 464; and *CCL v FLLS* [2012] NZFC 4159.
3. *Wihongi v Broad* [2020] NZFC 7746.
4. *Wihongi v Broad*, above, at [12].
5. *Wihongi v Broad*, above n 3.
6. *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (formerly Contour Aerospace Ltd) [2013] UKSC 46, [2014] AC 160 at [17] (per Lord Sumption) which held the doctrine of merger:

   > … treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right upon the judgment. … it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action.

7. *MacPherson v McCaffery* [1968] NZLR 489 (SC) at 491.
8. The doctrine of merger also acts as a form of res judicata in and of itself, see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, above n 6, at [17] (per Lord Sumption).
9. See discussion on perfecting in *Carrell v Carrell* [1975] 2 NZLR 441 (SC) at 446 (Cooke J).
10. *Wihongi v Broad*, above n 3, at [24]–[31].
11. *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at [40]. See generally K R Handley *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, London, 2009).
12. *Craig v Stringer* [2019] NZHC 1363, [2019] 3 NZLR 743 at [11].
13. K R Handley *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, London, 2009) at 1.
14. *Harris v Anais Holdings Ltd* HC Invercargill CP 29/01, 4 December 2002 at 23.
15. Wihongi v Broad, above n 3, at [32].
16. *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 95.
17. The exception is when the agreement is pursuant to statute. For example, s 21 of the Property (Relationships) Act 1967.
18. *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37 (CA) at 50, cited in *Dinch v Dinch* [1987] 1 WLR 252 (HL) at 263 where a consent order for financial provision barred a further application by the former wife; *Rick v Brandsema* (2007) 281 DLR (4th) 517 BCCA. This has been applied in the New Zealand context in *Damesh Holdings Ltd v Apples Fields Ltd* HC Christchurch, CP55/02, 30 August 2002 at [109].
19. *Foley v Foley* (1981) 4 MPC 60 (HC) (per Speight J):

    > Finality is one of the principles striven for by this legislation, except where changing circumstances are allowed to be recognised as undoubtedly appropriate in the subsidiary matters relating to children, tenancy etc.

    as cited in *Von Dadelszen v Peacock* (1986) 4 NZFLR 187 (HC) at 190.
20. *Johnson v Gore Wood & Co* (unreported, 12 November 1998, CA transcript 211) as cited in *Drummond v Attorney-General* HC Invercargill CP33/00, 17 July 2000 at [41]. This view also accords with the "clean break" principle: see generally *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507. See also Bill Atkin *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Lexis Nexis) at [18.47]; Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2009) at [1.2].
21. *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 703. See also the Australian position: *DJL v Central Authority* (2000) 170 ALR 659 (HCA) at 667 (Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ). A useful summary is provided in Rosara Joseph "Inherent jurisdiction and inherent powers in New Zealand" (2005) 11 Canta LR 220.
22. Family Court Act 1980, s 11.
23. *Carrell v Carrell* [1975] 2 NZLR 441 (HC) at 446 (Cooke J). It was also held that in rare cases resort to an inherent jurisdiction is necessary with the application having to be made in the High Court.
24. *Foley v Foley*, above n 19.
25. *Aplin v Lagan* (1993) 10 FRNZ 562 (HC).
26. *Aplin v Lagan*, above, at 568.
27. See also *New v New* [2002] NZFLR 901 (HC).
28. Joseph, above n 21.
29. *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114] where it was held that: … the courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. … The inherent powers of a court do not, however, extend to furthering the general public interest beyond that concerned with the due administration of justice. See also *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [65].
30. *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098 at [84].
31. *Rush v Rush* [1998] NZFLR 365, (1998) 16 FRNZ 536.
32. *Wihongi v Broad*, above n 3, at [44].
33. *Aplin v Lagan*, above n 25.
34. *Rush v Rush*, above n 31, at 544.
35. *R v Smith* [2003] 3 NZLR 617 (CA). Although it is not expressly discussed, this must also be relevant to other statutory courts such as the Family Court.
36. Joseph, above n 21, at 237.
37. *DRM v AWH*, above n 2; *MJT v DAW* above n 2; and *Lau v Lau So*, above n 2.
38. *DRM v AWH* FC Queenstown FAM-2007-059-000091, 21 December 2009.
39. *New v New*, above n 27, at [17].
40. Property (Relationships) Act 1976, s 1N(d).
41. This would, of course, allow the High Court to utilise its more expansive inherent (or supervisory) jurisdiction: see *Jones v Borrin* [1989] 3 NZLR 227; *Phillips v Phillips* [1993] 3 NZLR 159 (CA); *Aplin v Lagan*, above n 25; and *New v New*, above n 27.

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