

# Update

## Family Law Service

### Service 206 — March 2022

#### Updated commentary

##### **Care and protection — reform of child protection — Oversight of Oranga Tamariki System and Children and Young Person's Commission Bill**

On 11 November 2021 Member of Parliament Hon Kelvin Davis introduced the Oversight of Oranga Tamariki System and Children and Young Person's Commission Bill. Under the Bill the Children's Commissioner sole model would be replaced by a Children and Young People's Commission. See [6.551A].

##### **Care and protection — reform of child protection — Oranga Tamariki Amendment Bill**

On 25 November 2021 Member of Parliament Hon Kelvin Davis introduced the Oranga Tamariki Amendment Bill. The Bill amends the Oranga Tamariki Act 1989 by partially repealing the subsequent-child provisions, repealing a redundant information-sharing provision, and amending technical errors and ambiguities. The Bill is at the Select Committee stage. See [6.551A].

##### **Day-to-day care and contact — parenting orders — conditions — gaming**

In *Brooks v Knowles* [2021] NZFC 12352, Judge Grimes imposed conditions relating to electronic games and movies. See [6.103G.05].

##### **Day-to-day care and contact — parenting orders — conditions — COVID-19**

In *Sadat v Fox* [2021] NZFC 11418, Judge Grimes made it a condition that the father would have to produce a negative COVID-19 test taken within 72 hours of any contact visit with his 20-month-old daughter, because the father was not vaccinated against COVID-19. See [6.104F].

##### **Day-to-day care and contact — parents and whāngai caregivers**

In *Karauna v Karauna* [2021] NZFC 3189, Judge Coyle permitted one of five children to continue to live with a whāngai caregiver. This had been agreed to by the adults following a family group conference. See [6.107C].

##### **Family law practice and procedure — counsel to assist the Court — s 9C, Family Court Act 1980 — cross-examination of witness — s 95(5), Evidence Act 2006**

In *Irving v Irving* [2021] NZHC 2269 the High Court stated its opinion that jurisdiction exists for the Family Court to appoint Lawyer to Assist for the purpose of carrying out the role of putting questions for unrepresented party under s 95(5) of the Evidence Act 2006. See further discussion at [FPP6.6].

**Family law practice and procedure — witnesses — questioning by Judge — bias**

In *S v M* [2021] NZHC 2522 the Court considered an appeal on the basis that the Family Court Judge's questioning of the appellant indicated bias and that they had predetermined the matter. The High Court rejected this. See [FPP8.2].

**Family law practice and procedure — rehearings — extension of time — r 132, Family Court Rules 2002**

In *K v K* [2021] NZHC 1743, [2021] NZFLR 489, Walker J allowed the application for rehearing to be filed late and relied on r 132 of the Family Court Rules 2002 to extend the time for filing. See [FPP9.1].

**Family Protection Act 1955 — Law Commission recommendations**

In December 2021, the Aotearoa New Zealand Law Commission/Te Aka Matua o te Ture recommended the repeal of the Family Protection Act 1955 and new family provision awards. See [7.901.07].

**Family Protection Act 1955 — relevant factors in assessment of moral duty**

A comparison of benefits that were received during the lifetime of the deceased is generally not relevant: *Smith v Perry* [2021] NZHC 2767. See [7.903.03].

**Family Protection Act 1955 — children of deceased**

It would be justifiable for a sibling who provided considerable care to the deceased during the last years of the deceased's life to receive a disproportionate share of the estate; the requisite conservative approach does not change when a claimant is in financial need: *Howarth v Howarth* [2021] NZHC 2521. See [7.904.02(a)].

**Family Protection Act 1955 — percentages**

An estate was too small to meet both the deceased's primary obligation to his widow and a recognition award for the son: *O'Neill v O'Neill* [2021] NZCA 585. See [7.904.03].

**Family Protection Act 1955 — right of appeal**

The threshold for a second appeal is high: *Johns v Lord* [2021] NZCA 541. See [7.912].

**Family Protection Act 1955 — costs**

The Family Court needs to take into account as a relevant factor the longstanding practice and rationale for costs to be awarded from the estate: *AP v Lucas* [2021] NZHC 2949. See [7.915].

**Family Protection Act 1955 — costs**

Separate awards for costs for the executors and defendant were made because of their divergent roles *Johns v Lord* [2022] NZHC 3. See [7.915].

**Family violence — psychological abuse — financial abuse**

Text messages seeking money have been held to be financial abuse: *Guram v Guram* [2021] NZHC 3153. See [7.608].

**Family violence — psychological abuse — conduct of party in course of litigation**

In *S v R* [2021] NZCA 667, the Court of Appeal dismissed an appeal where the lower courts had accepted that the conduct of a party in the course of litigation can amount to psychological abuse. The Court of Appeal held that the grounds for a second appeal had

not been made out, but, in so doing, did not reject the finding of psychological abuse, which was “self-evidently fact-specific”. See [7.608.01] and [7.615.06].

### **Family violence — psychological abuse — cyber-bullying**

An example of psychological abuse analogous to cyber-bullying is taking a video of the victim in distressing and demeaning circumstances: *Guram v Guram* [2021] NZHC 3153. A condition of the protection order was that the video was not posted on the internet. See [7.608.02] and [7.621].

### **Family violence — application for protection order — “representative” — s 8 Family Violence Act 2018**

In *JKJ v SMR* [2021] NZHC 2082 a mother and maternal grandfather applied on behalf of a child but were held to have no standing as “representatives” within the s 8 definition. See [7.611].

### **Family violence — protection order — effect of other proceedings**

The effect of other proceedings can be seen in *S v R* [2021] NZCA 667, where the Court of Appeal dismissed an appeal against the refusal to grant a protection order. The husband’s conduct of proceedings under the Care of Children Act 2004 amounted to psychological abuse. See [7.615.06].

### **Family violence — order for parties to use alternative dispute resolution process**

In *S v N* [2021] NZHC 2860 where the wife had a protection order in her favour. Under the Trusts Act 2019, s 145, the Court can order the parties to use an alternative dispute resolution process. However, Wylie J declined to order mediation as this “would perpetuate the abuse to which [the wife] has been subject”. See [7.622].

### **Family violence — direction to attend non-violence programme**

A direction to attend a programme was declined in *Giles v Winkler* [2021] NZFC 705 because the respondent was in South Africa and Judge Montague was unable to see how it could be complied with. See [7.624].

### **Guardianship — removal of natural parent as guardian**

In *Snider v Frazier* [2019] NZFC 9186, the father was removed as guardian due to a lack of emotional and financial support. The father left the country a week before the child’s birth. See [6.204.01].

### **Guardianship — dispute over taking child overseas temporarily**

In *Padhya v Padhya* [2021] NZFC 12153, Judge Muir found that the risks of the child travelling to India outweighed the benefits and so refused the mother’s application. See [6.206.02(a)].

### **Hague Convention — grave risk that the child’s return would expose the child to physical or psychological harm — s 106(1)(c), Care of Children Act 2004**

In *Summer v Green* [2021] NZHC 3111, Wylie J returned three children to Australia in part because the high threshold for the grave risk exception was not met. See [6.165.04] and [6.165.05].

### **Hague Convention — grave risk that the child’s return would expose the child to physical or psychological harm — s 106(1)(c), Care of Children Act 2004**

In *G v G (No 2)* [2021] NZHC 3318, Churchman J upheld the Family Court’s decision to return the children to Australia. The alleged abuse was only verbal in nature, which even if proved would not constitute a grave risk. See [6.165.04] and [6.165.05].

**International — dissolution of marriage — domicile**

In *Chetti v Bhatta* [2021] NZFC 3626, the husband, now domiciled in New Zealand, sought the dissolution of his brief marriage, which took place in India. The dissolution was granted. See [11.14.06] and [11.30].

**International — family violence — abusive texts**

In *GS v LM* [2021] NZHC 2522 where abusive messages were sent while the parties were both overseas, Katz J had no difficulty in taking this into account in determining whether there had been a pattern of abusive behaviour. The overseas element did not affect the outcome. See [11.38].

**International — family violence — non-violence programme**

In *Giles v Winkler* [2021] NZFC 705, a direction to attend a programme was declined because the respondent was in South Africa. Judge Montague was unable to see how it could be complied with. See [11.38].

**International — relationship property — overseas immovable property — setting aside registration under Trans-Tasman Proceedings Act 2010**

*Lange v Lange* [2021] NZCA 447 involved a relationship property dispute. The husband had sold a property in Kaitaia, New Zealand, to his daughter with a deed of forgiveness of debt. A Western Australian Court set aside the latter deed, making the debt an asset available for distribution between husband and wife. The Western Australian order was registered in New Zealand under the Trans-Tasman Proceedings Act 2010. The husband argued that registration should be set aside because the order involved a New Zealand immovable. The New Zealand Court of Appeal rejected the argument. See [11.68.03(d)] and [11.93].

**Maintenance — interim maintenance — s 82, Family Proceedings Act 1980**

*Dalrymple v Dalrymple* [2019] NZHC 637 was followed in *Hogan v Hogan* [2020] NZFC 6084, where Judge Mahon declined to make an interim order for various reasons including the lack of independent evidence of income and expenditure. See [5.30].

**Maintenance — interim maintenance — s 82, Family Proceedings Act 1980**

In *ARS v SJS* [2022] NZHC 22, van Bohemen J held that an applicant may have a current inability to meet needs despite, in that case, a payment of \$25,000 paid to the applicant on separation and of the share of relationship property that she took with her. See [5.30].

**Maintenance — interim maintenance — s 82, Family Proceedings Act 1980**

In *K v K* [2022] NZHC 62, where interim maintenance was described as a stop gap to fill need between an application and the substantive hearing, the Court took account of the husband's legal control of a trust, the value of his capital and equity, and the history of dealings. See [5.30].

**Paternity — declaration of non-paternity**

In *Moss v Paul* [2020] NZFC 3072, Judge Russell was satisfied on the evidence that the couple did not have sexual intercourse around the time of conception and declared that the applicant was not the biological father of a now adult woman. See [6.502C.03].

**Paternity — declaration of non-paternity**

In *Black v Turner* [2021] NZHC 2963, the application for a declaration of non-paternity under pt 19 of the High Court Rules 2016 was dismissed. See [6.502C.03].

**Paternity — paternity order**

In *McKay v Holden* [2020] NZFC 4345, Judge Courtney made a paternity order declaring the respondent to be the father of a baby daughter. See [6.503E.01].

**Protection of Personal and Property Rights Act 1988 — inherent jurisdiction**

In *Re Z (A Child: Deprivation of Liberty)* [2020] EWHC 3038, Knowles J in the Family Division used the inherent jurisdiction to allow a 14 year old autistic boy to be transported to a special school, given doubts about the parents' ability to approve this. See [7.800].

**Protection of Personal and Property Rights Act 1988 — fiduciary duties**

Kós J in the High Court in *Public Trust v Vernon* [2015] NZHC 1928 was cited in respect of fiduciary duties by Associate Judge Gardiner in *Murray v Murray* [2021] NZHC 2257, a decision on discovery of evidence. See [7.800] and [7.890].

**Protection of Personal and Property Rights Act 1988 — capacity — undue influence**

In *JW v CW* [2020] NZFC 6683, [2020] NZFLR 940 where a woman had intellectual disabilities, it was held that her capacity was detrimentally affected by her relationship with a dominant man, his control of her, her consumption of alcohol, and her poor personal hygiene. See [7.813] and [7.843.02].

**Protection of Personal and Property Rights Act 1988 — health**

An abortion under general anaesthetic prior to 20 weeks was ordered in *NA v LO* [2021] NZFC 7685 (discussed at [7.801] on wishes and whānau involvement). See [7.801] and [7.818].

**Protection of Personal and Property Rights Act 1988 — health**

In *LH v CC* [2020] NZFC 8891, [2020] NZFLR 835 where treatment was in issue, Judge Grimes ordered oral medication as the least restrictive intervention, with a gastric tube if the woman refused the medication and with the further possibility of surgery being ordered in the future. See [7.818].

**Protection of Personal and Property Rights Act 1988 — appointment of litigation guardian**

In *Rere v Campbell* [2021] NZFC 3657 the Court found the applicant to be an “incapacitated person” as defined by r 8 of the Family Court Rules 2002. See [7.821].

**Protection of Personal and Property Rights Act 1988 — interim personal order**

An example of an interim personal order is *AF v RC* [2020] NZFC 6759, [2020] NZFLR 1029 where Judge Coyle made an interim order that a woman with significant intellectual and physical handicaps was to live with her mother even though latterly she had been with her father. The parents had been separated for 8 years. See [7.877].

**Protection of Personal and Property Rights Act 1988 — enduring powers of attorney — testamentary capacity of donor**

Under s 102(2)(j) and (2A) of the Protection of Personal and Property Rights Act 1988 a property attorney under an enduring power can be authorised to make a will. In *Re TN*

[2020] NZFC 7851, [2021] NZFLR 431, the power could not be used because the donor, though lacking competence to an extent that allowed the power to operate, did not lack testamentary capacity. See [7.894].

**Relationship property — “property” — economic disparity — personal goodwill — “key person discount”**

*Blake v Blake* [2021] NZHC 2590, an economic disparity case that refers to a “key person discount”. This is also referred to as “personal earning capacity or personal goodwill”. This decision illustrates how the formula can be affected by ill-health. See [7.320.01] and [7.383.03(b)].

**Relationship property — separate property — intermingling — s 10, Property (Relationships) Act 1976**

Intermingling of cash in *Stuart v Stoneham* [2021] NZHC 3316 meant that identification as separate property was no longer reasonable or practicable. See [7.335.05].

**Relationship property — de facto relationships of short duration — s 14A, Property (Relationships) Act 1976**

In *Bradford v Te Hei* [2021] NZHC 3485, a de facto case under s 14A, Nation J divided the property 60/40 in favour of the man. He used a non-formulaic approach. See [7.364.03] and [7.368].

**Relationship property — polyamorous relationships — jurisdiction under Property (Relationships) Act 1976**

On the question of multi-partner or polyamorous relationships, see *Paul v Mead* [2021] NZCA 649 per Goddard J, which reversed the High Court decision holding that no jurisdiction existed over such relationships: *Paul v Mead* [2020] NZHC 666, [2020] NZFLR 1042 per Hinton J. See [7.309.02] and [7.369.02].

**Relationship property — sale order — contempt order**

In *H v Z* [2021] NZHC 3007, a sale order had not been carried out. The applicant unsuccessfully sought a contempt order under s 16 of the Contempt of Court Act 2019. See [7.403].

**Relationship property — setting aside dispositions — s 44, Property (Relationships) Act 1976**

An advance by a trust in the form of a loan rather than a distribution is not a disposition: *Poros v Bax* [2021] NZCA 149. See [7.414].

**Relationship property — setting aside dispositions — s 44, Property (Relationships) Act 1976**

In *Sutton v Bell* [2021] NZCA 645, the Court of Appeal held that a disposition made before a qualifying relationship had started could fall within s 44, so long as the couple had reached the stage where there was mutual contemplation of beginning such a relationship. See [7.414].

**Relocation — relationship with contact parent**

In *RM v TC* [2021] NZHC 595, Muir J allowed the father’s unilateral relocation and overturned the Family Court’s direction that the two children be relocated back to Rotorua near their mother. See [6A.14].

**Surrogacy — international surrogacy — COVID-19 protocol — Adoption Act 1955**

*Chauvin v Chauvin-Baker* [2021] NZFC 11710 was another case brought under the protocol established for international surrogacy adoptions under COVID-19. The Adoption Act 1955 was used to ensure a child born as the result of surrogacy was legally recognised as the child of the intending parents. See [10A.1] and [10A.9.01].

**Surrogacy — reform of surrogacy law — Improving Arrangements for Surrogacy Bill**

The Improving Arrangements for Surrogacy Bill was introduced by Member of Parliament Tāmami Coffey on 23 September 2021. The Bill provides for the court to make a surrogacy order determining the custody of a child resulting from a pregnancy under a surrogacy arrangement. The Bill is on its first reading. See [6.701AA], [10A.1] and [10A.10].

**Testamentary promises — Law Commission recommendations**

In December 2021, the Aotearoa New Zealand Law Commission/Te Aka Matua o te Ture recommended the repeal of the Family Protection Act 1955 and new contributions awards. See [7.931.05].

**Testamentary promises — meaning of “services”**

The plaintiff in giving up her job to provide care and support exceeded what might normally be expected of a friend: *Nelson v Codilla* [2021] NZHC 1958. See [7.933.01].

**Testamentary promises — rateable payment**

There is no statutory presumption in favour of a rateable payment but a rateable payment can provide a prima facie mechanism to meet monetary claims: *Russell v Ensing* [2021] NZHC 1875. See [7.936.03].

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

In *Police v SD* [2021] NZYC 360, Judge Fitzgerald was offended by the Police’s decision to charge the young person with the attempted abduction of her brother. Judge Fitzgerald refused the Police’s request to leave a record of her Youth Court involvement. See [6.660I].

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

In *Police v FG* [2020] NZYC 13; [2020] DCR 320, Judge Lovell-Smith refused to dismiss charges of aggravated robbery and unlawfully getting into a motor vehicle against a 15-year-old. The delay between the offending and the anticipated hearing date may be between two and three years. However, the delay was not undue or unnecessary. See [6.660J].

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

In *Police v LB* [2020] NZYC 318, Judge Clark dismissed a rape charge against an 18-year-old defendant. It took just under a year for the matter to reach the courts. It would take significantly longer to allocate a Judge alone trial, let alone a trial by jury which the young person has elected. This constituted an undue or unnecessary delay. See [6.660J].

