Update
Family Law Service

Service 209 — October 2022

Legislative amendments

Three Strikes Legislation Repeal Act 2022 (2022 No 40)

This Act amended regs 3 and 8A of the Criminal Procedure (Transfer of Information) Regulations 2013 on 16 August 2022.

Data and Statistics Act 2022 (2022 No 39)

This Act amended on 1 September 2022:

- s 87A of the Births, Deaths, Marriages, and Relationships Registration Act 1995
- ss 2, 112 and 236 and sch 3 of the Child Support Act 1991
- s 236 of the District Court Act 2016
- s 363 of the Oranga Tamariki Act 1989
- ss 452A and 453 of the Social Security Act 2018

Updated commentary

Change of name — damage to child's reputation — hyphenated surname

In *Rowe v Easton* [2022] NZFC 767, Judge Wills allowed a four-year-old boy's surname to be changed. The boy and his father shared the same names. His father had an extensive criminal history which meant that when the boy's name was searched on Google, it would bring up news articles of the father's offending. The Judge removed the boy's middle names and implemented the hyphenated surname of father's and mother's last names. See [6.404A].

Day-to-day care and contact — child's safety — risk of psychological abuse — polyamorous relationships

In *Verwolde v Blake* [2021] NZFC 7015, the Family Court had found that two children had been psychologically abused because they were put at risk of exposure to sexual activity in the home and by introducing them to successive short-term partners. On appeal, in *RM v JB* [2022] NZHC 1126, Katz J agreed that there was no evidence that polyamorous family environments themselves are inherently harmful to children. The parents lacked child focus and instead prioritised their own sexual lifestyle. This did not meet the threshold for a finding of psychological abuse, though, in disagreement with the Family Court Judge. See [6.104C.01(c)].

Day-to-day care and contact — judicial review of lawyer for child report

The Court of Appeal in *Newton v Family Court at Auckland* [2022] NZCA 207 clarified that lawyer for child reports are not amenable to judicial review. The parties are seeking leave to appeal to the Supreme Court. While it considers the leave application, the

Supreme Court has granted an interim stay of the Court of Appeal judgment in *Newton v Family Court at Auckland* [2022] NZSC 92. See [6.105H] and [6.123D.01].

Day-to-day care and contact — judicial review of lawyer for child report

As part of dismissing a judicial review of a Family Court decision in *H v Family Court at Whangarei* [2022] NZHC 1779, Harvey J dealt with an argument that the Family Court Judge erred by not obtaining a s 133 specialist report. Harvey J summarised: "In *Newton v Family Court at Auckland*, the Court of Appeal highlighted that it would only be in "very rare circumstances" where an interlocutory decision regarding a s 133 report would be reviewable." See [6.123D.02].

Day-to-day care and contact — vaccinations — judicial review of decision to approve and roll out paediatric vaccine — interim relief — s 15, Judicial Review Procedure Act 2016

In *MKD v Minister of Health* [2022] NZHC 67, [2022] NZFLR 47, Ellis J dismissed interim relief for a judicial review application made by parents of young children (aged 5–11) regarding the Government's decision to grant provisional consent for the supply and use of the Pfizer COVID-19 paediatric vaccine, as well as the Government's decision to roll-out the vaccine. See [6.141.01].

Day-to-day care and contact — judicial review — discretionary nature of relief

GS v Family Court at Manukau [2022] NZHC 555 found that a directions conference breached natural justice by taking place in the father's absence but declined to order relief because of delay and subsequent events that overtook that conference. See [6.141.02].

Family law practice and procedure — admissibility of evidence — expert evidence — s 12(4), Family Court Act 1980

In judicial review proceedings in *Newton v Family Court at Auckland* [2022] NZCA 207 the Newtons had filed an affidavit from Professor Mark Henaghan offering expert evidence on the interpretation of certain aspects of the Care of Children Act. The Court of Appeal said "it is elementary that the purpose of evidence is to establish *facts* relevant to the proceeding before the Court." Counsel could refer to the material provided by the Professor in submissions, however, it could not be accepted as evidence. See [FPP4.8].

Family law practice and procedure — counsel to assist Court — s 95(5), Evidence Act 2006

Section 95(5) of the Evidence Act 2006 allows the Court to appoint a person to put the defendant's or party's questions to the witness where the defendant is unrepresented and fails or refuses to engage a lawyer. The limited role of a person appointed pursuant to s 95(5) has been restated in *Ross v Family Court at Auckland* [2021] NZHC 3204. See [FPP6.6].

Family law practice and procedure — discovery — relevance — privacy

Documents are "relevant" where they either advance the case of the party seeking discovery or damage the case of the adversary. Privacy interests will be weighed (where applicable) when considering discovery applications: *Mercer v McDaniel* [2021] NZFC 3403, [2021] NZFLR 860. See [FPP7.2].

Family law practice and procedure — witness — failure to cross-examine witness — s 92, Evidence Act 2006

Section 92(1) of the Evidence Act 2006 states that "a party [their counsel] must cross-examine a witness on significant matters that are relevant and in issue". Failure to

cross-examine a witness on such matters is generally taken as acceptance of the assertions made in the witness's affidavit evidence: *Guram v Guram* [2021] NZHC 3153, [2021] NZFLR 528. See [FPP8.2].

Family law practice and procedure — publication of proceedings — leave to intervene in appeal — r 48(1), Court of Appeal (Civil) Rules 2005

In *Newsroom NZ Ltd v Solicitor-General* [2022] NZCA 58, [2022] NZFLR 42 the Media Freedom Committee, which is an unincorporated body representing mainstream news media organisations (including Newshub, Newsroom, NZME, Radio NZ, Stuff, the Spin Off, and TVNZ), applied for and was granted leave to intervene in the appeal under r 48(1) of the Court of Appeal (Civil) Rules 2005. The appeal is yet to be heard. See [FPP8.4].

Family law practice and procedure — costs on appeal — mixed success

In *Blake v Blake* [2022] NZHC 594 the High Court considered the issue of costs on appeal where there is mixed success of the parties involved. Whata J concluded that Mrs Blake was the successful party, however, in light of the mix of outcomes, Mrs Blake was awarded scale costs as sought, but reduced by 35%. See [FPP9.2].

Family violence — tort of family violence — Canada

In Canada, a new tort of family violence has been recognised in *Ahluwalia v Ahluwalia* [2022] ONSC 1303. While this tort may overlap with other torts, there will be situations where the latter do not fully capture the cumulative harm associated with family violence. This is especially so where the harm is a pattern of abuse, in particular where there has been coercion and control of the victim. See [7.602.03].

Family violence — cultural issues

In *Haroun v Reda* [2022] NZHC 2199 the parties were Egyptian Muslims. Gordon J said "I acknowledge that aspects of the parties' relationship were governed by culturally specific norms and values which differ from the common experience in New Zealand. However, I do not consider that this is a case where this dimension requires active consideration as outlined by the Supreme Court in *Deng v Zheng* [2022] NZSC 76." See [7.607.01].

Family violence — psychological abuse — dog

In *Brady v Burns* [2020] NZFC 10827 Judge Strettell granted an interim order with a condition that the applicant have the pet dog until the full hearing when the questions of ownership of the dog and using the dog for abuse purposes could be determined. He considered that the Act should not be used to secure ownership but a condition could be attached "if a pet is being used as [a] tool for psychological abuse". See [7.608] and [7.621].

Family violence — urgent applications

Simeon v Simeon-Campbell [2022] NZHC 2029 involved two sisters. An application without notice was declined and the case ordered to proceed on notice. There had been a delay of many months and the threats were not immediate. Thus, an urgent order was not needed. See [7.614].

Family violence — breaching a protection order — sentence

In *Mitchell v R* [2022] NZCA 159, a woman was sentenced to 2 years 3 months, when she sent letters to her ex-husband that were collected by his new partner. The Court of

Appeal upheld the sentence and the Supreme Court refused leave to appeal. Although the offence might appear minor, the appellant had 80 previous convictions, which elevated the gravity of the offending. See [7.627].

Family violence — breaching a protection order — sentence— pattern of behaviour

In *Lucas v R* [2022] NZCA 367, a charge was based on multiple instances of abuse forming a pattern. Because the jury was instructed on the basis of one instance — the antithesis of a pattern — the charge was quashed. Needless to say, there were other successful charges, but the overall sentence was reduced. See [7.627].

Guardianship — unsuccessful removal of parent as guardian

In *Norton v Ru* [2022] NZFC 1748, Judge Manuel refused to remove the father as guardian but granted the mother sole guardianship for decisions about the children's names, travel, medical treatment and their education. The father was not established, on the balance of probabilities, to be *unwilling* to perform his guardianship duties. Although he had not seen or spoken to the children for multiple years, he was not completely disinterested in the children. See [6.204.02].

Guardianship — vaccinations — child with significant medical needs — child under guardianship of Court

In *Oranga Tamariki Ministry for Children v Narang* [2022] NZFC 1807, Judge Matheson found that it was in the child's welfare and best interests for the child to be vaccinated against COVID-19 as soon as possible, given the spike in cases. The 14-year-old child, with significant medical needs including susceptibility to respiratory infection, was under the guardianship of the Court. See [6.206.03(a)].

Guardianship — vaccinations — child's views

In *Townsend v Poole* [2022] NZFC 2773, [2022] NZFLR 87, Judge Collin went against the children's views and ordered immediate vaccination against COVID-19. Their views were assigned weight but not determinative like in *Long v Steine* [2022] NZFC 251, [2022] NZFLR 73. See [6.206.03(c)].

Hague Convention — return order — grave risk exception — s 106(1)(c), Care of Children Act 2004

In *Cresswell v Roberts* [2022] NZHC 1265, Doogue J quashed a Family Court order to return two children to France. Doogue J recognised the importance of the Court of Appeal's change of approach in *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610. There was a grave risk of placing the children in an intolerable situation if they were not in their mother's care as the primary parent. See [6.165.04].

Paternity — deceased father — declaration of paternity — s 10, Status of Children Act 1969

In *McGrath v Dalgety* [2022] NZHC 2180, Van Bohemen J made a declaration of paternity in the context of an estate dispute. The application was brought by the child, and supported by his mother, but the alleged father died after the proceeding commenced. Van Bohemen J was satisfied on the balance of probabilities that the deceased was the applicant's natural father. See [6.502C.02].

Separation order — domicile — s 21, Family Proceedings Act 1980

In *Hanson v Frank* [2021] NZFC 279, [2021] NZFLR 375 the applicant successfully sought a separation order under s 21 of the Family Proceedings Act 1980, despite both

parties living in Oman. The case focused on whether the applicant could be seen as being domiciled in Aotearoa. See [3.1].

