Update
Family Law Service

Service 210 — February 2023

Legislative amendments

Oranga Tamariki Amendment Act 2022 No 81

This Act amended ss 11, 17, 18B, 22, 28, 66D, 83, 87, 95, 104, 110, 113A, 116, 121, 126, 137, 144, 158, 165, 186, 187, 196, 198, 207B, 207O, 207U, 207ZC, 214, 214A, 239A, 242, 248A, 258, 261, 272, 273, 311, 325, 328A, 350, 365, 386A, 447 and sch 1AA of the Oranga Tamariki Act 1989 on 17 December 2022.

Rights for Victims of Insane Offenders Act 2021 No 55

This Act amended on 13 December 2022:

- ss 5, 9A, 65A to 65E, 66, 67B to 67H and sch 1 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
- ss 2C, 46, 48, 50 to 50G, 51, 52, 52A, 52B to 52H, 80, sch 1AA and cl 3AAA of sch 1 of the Mental Health (Compulsory Assessment and Treatment) Act 1992

Statutes Amendment Act 2022 No 75

This Act amended on 30 November 2022:

- s 47B of the Care of Children Act 2004
- ss 49, 105 and 106 of the Family Violence Act 2018

Family Court Amendment Rules 2022 SL 2022/344

These Rules amended rr 8, 12, 76, 102, 105, 107A, 113A, 127A, 198 and 206B of the Family Court Rules 2002 on 23 December 2022.

Updated commentary

Adoption — discharge of adoption order

In *Hess v Adoption Unit* [2022] NZFC 3051 Judge Paul discharged a 1957 adoption order; ordered a change of name, and made a declaration as to paternity, determining that the applicant's biological father could be recorded on the applicant's birth certificate. See [6.717A].

Care and protection — custody order — s 101, Oranga Tamariki Act 1989 — tamariki Māori

In *Moana's Mother v Smith* [2022] NZHC 2934 Cull J declined to grant an appeal in a case where the mother of a seven-year-old Māori child, "Moana", appealed the placement of Moana in the care of a non-Māori couple (under a s 101 custody order rather than a

s 113A special guardianship order). Cull J held that the Family Court Judge was correct in stating that no one principle under the Act trumps another. See [6.582], [6.583E] and [6.610].

Care and protection — special guardianship order — s 113A, Oranga Tamariki Act 1989 — tamariki Māori

In *McHugh v McHugh* [2022] NZHC 1174, [2022] NZFLR 168 the appellants appealed a Family Court decision declining their application for special guardianship orders. Doogue J granted the appeal and remitted the matter back to the Family Court for a cultural report to be obtained in respect of the child's best interests. See [6.583E] and [6.610].

Care and protection — special guardianship order — s 113A, Oranga Tamariki Act 1989 — tamariki Māori

Chief Executive of Oranga Tamariki — Ministry for Children v Mahima [2021] NZFC 8742, [2022] NZFLR 204 Judge Tan granted an application for a special guardianship order, adding that "[t]o begin an analysis of the wellbeing and welfare of a Māori child, it is necessary to understand that whānau and collective relationships underpinned by whanaungatanga or kinship are at the core of being Māori." See [6.583E].

Care and protection — application for habeas corpus

In *Adamson v Oranga Tamariki* [2022] NZHC 2153 where the applicants filed an application for a writ of habeas corpus on behalf a child where Oranga Tamariki had been granted custody and additional guardianship of the child pursuant to ss 101 and 110(2)(b) of the Oranga Tamariki Act 1989. Gwyn J dismissed the application for writ of habeas corpus. See [6.616].

Child support — step-parent declaration — s 99, Child Support Act 1991

In *Taylor v Sydney* [2021] NZFC 7409, a step-parent declaration was made even though the mother's husband was not a guardian. The step-parent's support was equivocal at the start but he provided for the girl for six years, including private school fees. See [5.205.01] and [5.205.06].

Child support — proportion of ongoing daily care — boarding school fees — departure order — s 105, Child Support Act 1991

The rule that the party paying school fees has 100 per cent of care was acknowledged in *Byers v Jennings* [2022] NZFC 862, where the father paid boarding school fees under a relationship property agreement. However, under the agreement the mother received less on the basis that the father paid the fees. Judge Southwick QC held that special circumstances existed that meant that each party was in effect paying half. This justified a departure under s 105. This represents an exception to the 100 per cent rule. See [5.208] and [5.215].

Day-to-day care and contact — parental alienation — re-establishing contact with alienated parent

Marlowe v Gardiner [2021] NZFC 5151 shows what can go wrong when contact is awarded to the alienated parent despite a mature child's views otherwise. The child did not comply. In *G v M* [2021] NZHC 2066 the High Court heard that three attempts at contact were made. The child ran away. The updated s 133 psychologist report suggested a therapeutic approach was best for gradually re-establishing contact. See [6.108D].

Day-to-day care and contact — admonishing a party — s 68, Care of Children Act 2004

In *Puckett v Mason* [2020] NZFC 3899 Judge E Smith admonished the mother. See [6.111B.01(a)(i)].

Family dispute resolution — arbitration — contrary to public policy — s 10, Arbitration Act 1996

In *Wade v Wade* [2022] NZFC 5482, the mother sought to invoke the arbitration clause in a parenting order. However, s 10(1) of the Arbitration Act 1996 allowed the Judge to dismiss the arbitration agreement as it would be contrary to public policy. See [FDR2.6].

Family Protection Act 1955 — precedents

Discussion on relevance of previous case-law: *Scott v Garnham* [2021] NZHC 592; *Brown v Brown* [2022] NZCA 476. See [7.901.01].

Family Protection Act 1955 — moral duty

Moral duty arises because of irrational way in which deceased had managed her affairs (*Scott v Garnham* [2021] NZHC 592) and through material contributions without which the estate would have been poorer: *Brand v Douglas* [2022] NZHC 1769. See [7.903.03].

Family Protection Act 1955 — percentages

Ten percent is not a starting point for a claim by an adult child (*Scott v Garnham* [2021] NZHC 592); a percentage approach can create a misleading impression, particularly with respect to a large estate: *Chin (Payne) v Payne* [2022] NZHC 3095. See [7.904.03].

Family Protection Act 1955 — grandchildren

There is a continuum to be found in claims by grandchildren: *Brown v Brown* [2022] NZCA 476. See [7.904.04].

Family Protection Act 1955 — estate

Where dispositions had been earlier made by the deceased to avoid the Family Protection Act 1955, equitable claims of unjust enrichment (*Pollock v Pollock* [2022] NZCA 331) and of breach of fiduciary duty (*D & E Ltd v A* [2022] NZCA 430) were unsuccessful in the Court of Appeal. See [7.905.03].

Family Protection Act 1955 — distribution of the estate

Discussion on whether an estate had been distributed: *Hunt v Moriarty* [2022] NZHC 2121. See [7.908.01].

Family Protection Act 1955 — right to appeal

The onus on an appellant is frequently difficult to discharge: *Brown v Brown* [2022] NZCA 476. See [7.912].

Family Protection Act 1955 — evidence — cross-examination

Cross-examination can and should take place if it is necessary to decide a case: *Scott v Garnham* [2021] NZHC 592. See [7.913].

Guardianship — education — s 16(2)(d), Care of Children Act 2004

In *Mortimore v Sherman* [2021] NZFC 8191, Judge L de Jong declined an application by the father for his 14-year-old child to trial a different high school for the last two terms, closer to where the father was moving to. See [6.204.02].

Guardianship of Court — blood transfusion — child under guardianship of Court

In *Te Whatu Ora, Health New Zealand, Te Toka Tumai v C* [2022] NZHC 3283, Gault J placed a six-month-old baby under the guardianship of the Court to allow him to undergo an urgent heart surgery that included the administration of blood and blood products. Gault J was satisfied that the use of blood from vaccinated donors was in the child's best interests. Following the decision, the parents obstructed the medical staff from preparing the child for the surgery, threatening criminal charges. Gault J then issued a minute ruling: *Te Whatu Ora, Health New Zealand, Te Toka Tumai v C* [2022] NZHC 20221208. Now that the parents revoked consent to the surgery and pre-operative checks, Gault J issued an ancillary order clarifying that these were both to take place. The parents were not obstructive and the surgery went ahead. See [6.314.01].

Hague Convention — preventing removal of children from New Zealand — application for suspension of order

In *Kanda v Kanda* [2021] NZFC 7903, Judge SJ Maude refused to suspend an order preventing the removal of the child to allow the mother and the child to attend the child's great-grandmother's funeral in Germany. See [6.153].

Hague Convention — consent/acquiescence defence — s 106(1)(b)(ii), Care of Children Act 2004

In *Scott v Jenkins* [2021] NZFC 3340, Judge BR Pidwell returned two young children to Australia that their mother had removed. The mother claimed that the father had verbally consented to the children's removal. The defence failed as there was not evidence of the father's clear, cogent, real, positive and unequivocal consent. See [6.165.03] and [6.165.04].

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

In *Parish v McDonald* [2022] NZHC 3022, Edwards J concluded that the separating either of the two other children from their siblings constituted a grave risk of an intolerable situation. Therefore, Edwards J was compelled to ensure both children remained in New Zealand until the final day-to-day care issues were decided. See [6.165.04].

Paternity — presumption as to paternity — child born during marriage — s 5, Status of Children Act 1969

In *Al-Zaidi v Shaheed* [2021] NZFC 7363 the mother became pregnant during the parties' marriage. However, the father alleged during the pregnancy that the child was not his. The Judge considered a paternity declaration inappropriate. Finally, the Registrar-General agreed that the statutory presumption applied and the father was registered on the child's birth certificate. See [6.502A].

Protection of Personal and Property Rights Act 1988 — trust — appointing property managers — s 31, Protection of Personal and Property Rights Act 1988

In *NA v JB* [2022] NZFC 1666, the subject person had a sum of about $120,000, well above the $5000 limit. Judge Dravitzki accepted a proposal to appoint temporary managers so that the money could be transferred to a trust. Subsequently, his non-trust finances could be handled by an administrator under s 11. See [7.822], [7.845] and [7.852.06].

Protection of Personal and Property Rights Act 1988 — procedure — "unless order" — review of attorney's decisions — s 103, Protection of Personal and Property Rights Act 1988

In *NP v DP* [2022] NZFC 3662 the Court also made an "unless order", ie unless the party (a former attorney) complied with the discovery order, he would be barred from participation in a s 103 application. This "unless order" was activated in a later judgment because of a failure to fully comply. He was debarred from taking further part in the proceedings except for a summons to appear for cross-examination. See [7.875].

Protection of Personal and Property Rights Act 1988 — procedure — interlocutory injunction — r 182, Family Court Rules 2002

JH v LN [2022] NZFC 771 involved a dispute between two sisters over the treatment of their father who had dementia, and in particular the role of one of them who was the attorney under an enduring power. The other sister sought an interim injunction for the reinstatement of an earlier medical regime for the father and reversing various decisions on life-saving treatment. The Judge was reluctant to make an order that second-guessed the views of health professionals. However, it was different when it came to a non-resuscitation order and orders for life sustaining treatment. An injunction was granted but limited to these documents, which were of no legal effect and not to be taken into account. See [7.894].

Relationship property — transfer of proceedings to High Court — s 38A, Property (Relationships) Act 1976

Judge Tan refused to transfer a case that she described as "not uncharacteristically complex" despite issues about constructive trusts: *Boswell v Korving* [2022] NZFC 4154. See [7.304.01], [7.304.02] and [7.304.03].

Relationship property — transfer of proceedings to High Court — s 38A, Property (Relationships) Act 1976

In *Baker v Baker* [2022] NZFC 7461, Judge Manuel held against transfer to High Court. The case involved *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 11 NZLR 551, s 57 of the Evidence Act 2006 (privilege), and differences between forensic accountants but Judge Manuel described these issues as "the bread and butter of the Family Court." See [7.304.01] and [7.304.03].

Relationship property — Act as a code — s 4, Property (Relationships) Act 1976

In *Lung v Liu* [2022] NZHC 3074 the husband wanted to sell a property under s 339 of the Property Law Act 2007. The wife protested. It was held that the High Court had jurisdiction but was required to apply the Property (Relationships) Act 1976. See [7.305].

Relationship property — Act as a code — s 4, Property (Relationships) Act 1976

In *Kake v Napier* [2022] NZHC 2395, the appellant sued Napier in the District Court for breach of contract in relation to building work he did on her property. It was assumed that they were de facto partners. Campbell J pointed out that not every type of civil proceedings involving spouses or partners comes under the rule that the Family Court has exclusive jurisdiction under the Property (Relationships) Act 1976, nor every proceeding where the Act may have some application. It depends on an application having been made under the Act, which had not happened in the case. See [7.305].

Relationship property — Act as a code — s 4, Property (Relationships) Act 1976

In *Whinery v Niu* [2022] NZFC 5711 the nature of the Act as a code came up in an unusual way. The parties had entered a contracting out agreement. The question arose of

whether s 16 (an adjustment power where both parties had homes only one of which became the family home) applied despite the agreement. The agreement did not mention s 16. As the Act is a code, it was held that s 16 must apply in the absence of its express exclusion in the agreement. See [7.305], [7.385] and [7.420.01].

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

In *Wilkinson v Wilkinson* [2021] NZFC 8995, [2022] NZFLR 215 the parties dated for six years before they got married. They did not cohabit during this period because of their Christian beliefs. According to Judge Lindsay, this fell well short of being in a de facto relationship. Living together began only on marriage. See [7.309.04].

Relationship property — exception to equal sharing — disparity of contributions — s 13, Property (Relationships) Act 1976

In *Wilkinson v Wilkinson* [2021] NZFC 8995, [2022] NZFLR 215 the husband came into an inheritance 18 months prior to separation. It was held that this had been intermingled under s 10, with the result that the relationship property pool rose from $250,000 to $1.4 million. It was further held to be "overwhelmingly compelling" that the husband's contribution was disproportionately beyond the wife's and a 70/30 split was ordered in the husband's favour. See [7.366.03].

Relationship property — economic disparity — division of functions — s 15, Property (Relationships) Act 1976

In *Beach-Ward v Ward* [2022] NZHC 2693 per Ellis J, where "the striking point" was that the disparity was almost identical at the end of the marriage as at the start. Despite this, 20 per cent was allocated to the division of functions. See [7.382.03] and [7.383.03(a)(iii)].

Relationship property — contracting out agreement — adjustment for second home — s 16, Property (Relationships) Act 1976

In *Whinery v Niu* [2022] NZFC 5711, it was held that s 16 applied despite the parties having entered a contracting out agreement. The agreement did not mention s 16, which meant that, because the Act is a code, the section survived and was applied. See [7.305], [7.385] and [7.420.01].

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

In *Hudson v Gough* [2021] NZFC 9618, Judge Grimes said "It is well understood that s 18B compensation should not result in double counting where child support is being paid." See [7.387].

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

No occupational rental was payable in *Beach-Ward v Ward* [2022] NZHC 2693, where the father had full responsibility for housing and care of the children, and, further, both parties shared a considerable capital gain on the delayed sale of the home, which was relevant to off-setting the father's occupation. See [7.387].

Relationship property —— new valuation — ancillary powers of court — s 33, Property (Relationships) Act 1976

In *Munro v Senior* [2022] NZHC 2103 where the appellant wanted a valuation updated using the powers in s 33. The High Court upheld the Family Court's Judge's ruling that

he was functus officio. An order for a new valuation involved more than giving effect to the earlier substantive ruling: it would involve re-opening or re-litigating the interconnected findings in the substantive decision. Section 33 does not extend to this. See [7.402].

Relationship property — order vesting relationship property — ancillary powers of court — s 33, Property (Relationships) Act 1976

In *Hudson v Gough* [2021] NZFC 9618, the home was to vest in the male partner subject to his confirming finance within 28 days and paying an amount owed to the ex-partner. See [7.403].

Relationship property — sale order — ancillary powers of court — s 33, Property (Relationships) Act 1976

In *Moon v Moon* [2020] NZFC 2960 a sale order had been made previously but the husband had adopted a tactical approach to the litigation — he procrastinated and prevaricated. Judge Burns held that the only way of resolving the impasse was to give the wife sole occupation so that she could implement the sale order. See [7.403.04].

Relationship property — agreement — extension of time to appeal

In *W v W* [2022] NZCA 512, an agreement had been set aside. The wife appealed out of time but the Court of Appeal allowed her to proceed partly because of the trauma caused by an earlier perjury conviction that had been set aside. See [7.422].

Relationship property — marriage of short duration — resettlement of trust — s 182, Property (Relationships) Act 1976

The source of the assets and the shortness of the marriage were relevant in *Zhou v Lassnig* [2022] NZHC 2475, where Venning J replaced an equal division order with one that went 60/40 in favour of the ex-wife. See [7.423.05].

Relationship property — interests of children — resettlement of trust — s 182, Property (Relationships) Act 1976

The interests of the children arose in *K v K* [2022] NZHC 3123, where Gwyn J made detailed orders but beginning with equal division of the trust assets subject to further adjustments. She stated that the orders adequately considered the children's interests, the youngest of whom was 12. See [7.423.05].

Relationship property — applications after death — s 88, Property (Relationships) Act 1976

The executrix (the deceased's daughter) was granted leave in *Glass v Glass* [2022] NZHC 3233 because there were reasonable prospects of claims under ss 44, 44C, 9A and 17 of the Property (Relationships) Act 1976 and under the Family Protection Act 1955. See [7.432].

Relocation — need for a settled environment

In *Randall v Cobb* [2022] NZFC 882, Judge CL Cook declined a relocation application by the mother. See [6A.17].

