Update
Family Law Service

Service 212 — July 2023

Legislative changes

Births, Deaths, Marriages, and Relationships Registration Act 2021 No 57

This Act (other than ss 12(3), 39, 98(2)(b)(ii) and 144) came into force on 15 June 2023. This Act replaced the Births, Deaths, Marriages, and Relationships Registration Act 1995. This Act also amended on 15 June 2023:

- s 23 of the Adoption Act 1955
- ss 2, 5, 6 and 11 of the Adult Adoption Information Act 1985
- ss 8 and 18 of the Care of Children Act 2004Day-to-day care and contact — obtaining child's views before ordering s 133 report on child
- s 7 of the Child Support Act 1991
- ss 3, 4, 11, 15, 16, 26 and sch 1 of the Civil Union Act 2004
- s 16A of the Family Court Act 1980
- s 145D of the Family Proceedings Act 1980
- s 5 of the Human Assisted Reproductive Technology Act 2004
- ss 2, 9, 11, 32B and 42 of the Marriage Act 1955
- s 90 of the Social Security Act 2018
- ss 8 and 9 of the Status of Children Act 1969
- regs 5 and 8 of the Adoption Regulations 1959
- sch of the Births, Deaths, Marriages, and Relationships Registration (Fees) Regulations 1995
- regs 3, 4, 5 and 6 of the Births, Deaths, Marriages, and Relationships Registration (Non-Disclosure Direction) Regulations 2008
- regs 2, 3, 3A, 4, 4A, 5, 5A, 5B, 6A, 7, 8, 8A and 8B of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995
- reg 6 of the Civil Union (Prescribed Information, Fees, and Forms) Regulations 2005
- rules 7, 28, 38, 130, 425 and sch 2 of the Family Court Rules 2002
- regs 11, 19, 22, 23 and sch 3 of the Family Violence Regulations 2019
- reg 3 of the Marriage (Forms) Regulations 1995

Births, Deaths, Marriages, and Relationships Registration (Fees) Amendment Regulations 2023 SL 2023/137

- These regulations the sch of the Births, Deaths, Marriages, and Relationships Registration (Fees) Regulations 1995 on 13 July 2023.

Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023 SL 2023/121

- These regulations came into force on 15 June 2023.

Child Support (Pass On) Acts Amendment Act 2023 No 27

This Act amended on 1 July 2023:

- ss 2, 9, 12, 27, 35A, 50, 89B, 96Y, 122, 131, 141–143, 152B, 179A, 180, 180A and sch 1 of the Child Support Act 1991
- rr 13, 19 and sch 1 of the Child Support Rules 1992
- rr 21, 258, 260 and sch 3 of the Family Court Rules 2002
- ss 113, 296, 304, 304A, 363A–363D, 418 and schs 1, 2, 3 and 4 of the Social Security Act 2018

District Court (Electronic Filing) Amendment Rules 2023 SL 2023/14

These rules amended rr 1.4, 2.4A, 2.5, 2.6, 5.1A, 5.1B, 7.2, 7.14, 9.53, 20.17 and sch 2 of the District Court Rules 2014 on 23 March 2023.

Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 SL 2023/111

These regulations came into force on 6 July 2023. However, reg 62 comes into force on 6 January 2024.

These regulations replaced the Evidence Regulations 2007.

Family Court (Family Court Associates) Legislation Act 2023 No 25

This Act inserted ss 7A, 7B, 7C, 7D, 7E, 7F, 7G, 7H, 7I, 7J, 7K in the Family Court Act 1980 on 7 June 2023.

Oversight of Oranga Tamariki System Act 2022 No 43

This Act amended on 1 May 2023:

- ss 2, 7, 47, 445E, 447, 447A and sch 1AA of the Oranga Tamariki Act 1989
- regs 5, 77 to 85, 86, 87 of the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018
- reg 31 of the Oranga Tamariki (Residential Care) Regulations 1996
- r 427 of the Family Court Rules 2002

Social Security (Rates of Benefits and Allowances) Order 2023 SL 2023/38

This order amended Schedules 1 and 2 of the Social Security Act 2018 on 1 April 2023.

Witnesses and Interpreters Fees, Allowances, and Expenses Regulations 2023 SL 2023/18

These regulations amended on 1 May 2023:

- r 59 of the Child Support Rules 1992
- r 9.44 and sch 2, form 27 of the District Court Rules 2014
- sch 1 of the District Courts Fees Regulations 2009
- rr 50, 51, and 402 of the Family Court Rules 2002
- r 77 of the Family Proceedings Rules 1981
- reg 8 of the Family Violence Regulations 2019

Proposed legislative developments

Improving Arrangements for Surrogacy Bill 72-1

On 30 May 2023 the Government announced it has now adopted Labour MP Tāmati Coffey's Member's Bill as a Government Bill and will support the Health Select Committee to consider how the Bill can be amended to incorporate recommendations

from the recent report into New Zealand's surrogacy laws by Te Aka Matua o te Ture | Law Commission. Now that the Bill has been adopted as a government bill, reform of surrogacy law may be escalated. See https://www.beehive.govt.nz/release/next-steps-reform-outdated-surrogacy-law. See [10A.1] and [10A.1].

Adoption law reform

Adoption law is currently being reviewed. Te Tāhū o te Ture — Ministry of Justice has published two summaries of feedback from the second round of engagement: Summary of submissions from engagement and Targeted Engagement: Adoption law reform report. See https://www.justice.govt.nz/assets/Uploads/Adoption-reform-Summary-of-engagement-2022.pdf. See [6.701A] and [6.701AA].

Commentary on new legislative amendments

Child Support (Pass On) Acts Amendment Bill 241-2

Commentary on the Child Support (Pass On) Acts Amendment Bill 241-2 which came into force on 1 July 2023 has been updated at [5.200.03], [5.201.01], [5.206.04], [5.207], [5.241], [5.242B], [5.264], [5.278.05], [5.279.03], [5.282] and [5.284].

Updated commentary

Adoption — restrictions on making adoption orders — surrogacy — s 4(2), Adoption Act 1955

In *Wilkins v Wilkins* [2020] NZFC 4786 a male applicant filed an application for adoption of a female child. The s 10 social worker report identified an issue with the s 4 restriction on this type of application. Judge Paul found that there were special circumstances due to: the application being made with the approval of the surrogacy process; the application was initially intended to be filed by both the male applicant and his wife who had subsequently passed away; and genetically the child was the child of the male applicant. He was her father. See [6.704B].

Adoption — applicant to be a "fit and proper" person — s 11(a), Adoption Act 1955

In *Graham v Graham* [2020] NZFC 11085 a s 10 social worker's report, whilst supporting the adoption application noted that the step-parent wishing to adopt had a previous conviction for failure to pay tax to the IRD. Judge von Keisenberg found the applicants met the s 11 fit and proper test and was satisfied that an adoption order should be made. See [6.710A].

Care and protection — well-being and best interests of child or young person — s 4A, Oranga Tamariki Act 1989 — tamariki Māori

In *Chief Executive of Oranga Tamariki—Ministry for Children v Frye* [2020] NZFC 6519 Judge Moss considered the concept of "well-being" in s 4A of the Oranga Tamariki Act 1989. Her Honour noted that "Section 4A requires that the Court consider mana tamaiti. A child's mana derives from its whakapapa." See [6.554].

Care and protection — principles — s 5, Oranga Tamariki Act 1989 — tikanga Māori

In *Waitomo Papakāinga Development Society Inc v Te Kōti Whānau Ki Kaitaia (Family Court at Kaitaia)* [2022] NZHC 2792 the High Court noted that the s 5 amendments; the stated purpose of the Act amendment; and the s 13 care and protection principle

amendments confirmed "these essential tikanga Māori principles must be considered by persons exercising powers and functions under the Act, including the Court." See [6.555].

Care and protection — duties of the chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi) — ss 7, 7AA, Oranga Tamariki Act 1989 — tamariki Māori

In *Waitomo Papakāinga Development Society Inc v Te Kōti Whānau Ki Kaitaia (Family Court at Kaitaia)* [2022] NZHC 2792 the High Court noted that the statutory duties of the chief executive under ss 7 and 7AA required the chief executive to develop strategic partnerships with iwi and Māori organisations in order to provide opportunities to delegate functions under the Act to qualified people within those organisations. See [6.556A].

Care and protection — access orders — s 121, Oranga Tamariki Act 1989

In *Chief Executive of Oranga Tamariki – Ministry for Children v CA* [2022] NZFC 18179 the child's paternal grandmother sought an order defining her access. His Honour Judge Maude made an access order after detailing the s 5 principles and taking into account the child's views. See [6.584].

Care and protection — application to discharge orders

In *Chief Executive of Oranga Tamariki—Ministry of Children v Frye* [2020] NZFC 6519 Judge Moss took a different approach when considering an application to discharge orders. See [6.589.02].

Care and protection — appeals — breach of right to natural justice — s 27(1), New Zealand Bill of Rights Act 1990

X and Y v Chief Executive of Oranga Tamariki [2022] NZCA 622, [2023] 2 NZLR 261 was a partially successful appeal by X and Y against a High Court decision declining to award damages for breach of s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) and dismissing their claims for negligence and judicial review. The Court of Appeal awarded Y $20,000 and X $10,000 in damages for breaches of their right to natural justice under s 27(1) of NZBORA. See [6.610.07].

Care and protection — appeals — habeas corpus

In *Adamson v Chief Executive of Oranga Tamariki* [2022] NZCA 505 the appellants appealed a High Court decision to refuse their application for writ of habeas corpus in respect of the care arrangements of a child in the care of Oranga Tamariki. The appeal was dismissed. See [6.610.07].

Care and protection —judicial review — "Maori children" — s 7AA, Oranga Tamariki Act 1989

In *C's Father v Chief Executive of Oranga Tamariki—Ministry for Children* [2023] NZHC 184 a child's father sought judicial review of Oranga Tamariki's identification of the child as a "Māori child". Edwards J dismissed the application for judicial review, finding that Oranga Tamariki was right to identify the child as a Māori child. See [6.615.01].

Care and protection — judicial review — Family Court

In *Waitomo Papakāinga Development Society Inc v Te Kōti Whānau Ki Kaitaia (Family Court at Kaitaia)* [2022] NZHC 2792 the Family Court was the subject of an application for review. See [6.584].

Change of name — surnames

In *Foster v Ruscoe* [2022] NZFC 4024 the applicant mother succeeded in changing her three-year-old son's surname from his father's surname to a double-barrelled surname. See [6.404A].

Day-to-day care and contact — continuity in care, development and upbringing — tikanga — s 5(d), Care of Children Act 2004

McQueen J in Hopkins v Jackson [2022] NZHC 2649 overturned a Family Court decision that altered a 2:2:3 care arrangement, which had been in place for over two years, to a two-week cycle arrangement. The *Court of Appeal in Hopkins v Jackson* [2022] NZCA 653 did not grant leave for a second appeal. Given that tikanga merely confirmed the Judge's conclusions, rather than being material to the outcome, the Court of Appeal determined that the case was not an appropriate one to clarify the law regarding evidence about tikanga in Family Court proceedings. See [6.104F].

Day-to-day care and contact — obtaining child's views before ordering s 133 report on child

The *Supreme Court declined leave to appeal in Newton v Family Court at Auckland* [2022] NZSC 112. See [6.105H] and [6.123D.01].

Day-to-day care and contact — supervised contact — psychological abuse between the parties

In *Carson v Holt* [2021] NZFC 8280 there had been a finding of psychological abuse between the parties. Judge Walsh found that it was appropriate for the father to have unsupervised contact with the child. See [6.110E.02].

Day-to-day care and contact — appeals to the Court of Appeal — s 145, Care of Children Act 2004

Section 145(1)(a) of the Care of Children Act 2004 provides that no appeal lies to the Court of Appeal if the order or decision is under s 46C or 46R, which both relate to guardianship decisions. However, a guardianship matter under these sections can be appealed to the Court of Appeal if it is so closely intertwined with a decision under another section, such as s 48 (parenting orders), that one cannot be dealt with without the other. One example may be schooling, where one school is closer to one guardian and another school is closer to the other guardian: *Hopkins v Jackson* [2022] NZCA 653. The application for leave to appeal was declined. See [6.139].

Dissolution of marriage — application to recall — s 27, Family Proceedings Act 1980

In *Goyal v Goyal* [2020] NZFC 10209, [2020] NZFLR 905 an application to recall a sealed dissolution order was struck out due to a lack of jurisdiction. See further, *G v G* [2023] NZHC 166, an important case involving the same parties (this time focusing on s 27 of the Family Proceedings Act 1980) in which Ms G unsuccessfully claimed that the parties' marriage dissolution had been obtained via fraud and should be voided by the court. See [4.7].

Dissolution of marriage — grounds for dissolution — s 39, Family Proceedings Act 1980

In *Lobb v Lobb* [2019] NZFC 5268, the Family Court had granted Ms Ryan's application for a dissolution order. Mr Lobb then appealed this decision to the High Court, who dismissed his appeal, declaring Mr Lobb's appeal against the dissolution to be "misconceived": *Lobb v Ryan* [2020] NZHC 348. Mr Lobb then unsuccessfully sought

leave to appeal to the Court of Appeal: *Lobb v Ryan* [2020] NZCA 244. See full discussion at [4.3].

Family Protection Act 1955 — unfair will

An unfair will does not necessarily result in a breach of moral duty: *Barnard v Robertson* [2022] NZHC 469. See [7.901].

Family Protection Act 1955 — fact specific

The Court of Appeal observes family protection cases are intensely fact-specific: *M v Lyon* [2022] NZCA 559. See [7.901.01].

Family Protection Act 1955 — moral duty — contributions to estate

Contributions to the deceased's estate do not provide a discrete special claim but are simply part of the overall factual matrix; a beneficiary does not have to justify the share which he or she has been given: *Barnard v Robertson* [2023] NZCA 230. See [7.903.03].

Family Protection Act 1955 — equality between children of deceased

The Court of Appeal reaffirms that there can never be a presumption of equality between siblings; proper provision cannot be measured by percentages: *Barnard v Robertson* [2023] NZCA 230. See [7.904.02(a)] and [7.904.03].

Family Protection Act 1955 — percentages

Proper provision is often in the realm of ten per cent: *Swenson v Lawton* [2022] NZHC 3544. See [7.904.03].

Family Protection Act 1955 — percentages

The entire estate, which was relatively modest, was awarded to two sons where the will-maker had bequeathed it to great-nephews to whom she owed no moral duty: *Hedgeman v Driver* [2022] NZHC 3356. See [7.904.03].

Family Protection Act 1955 — discovery

The steps to be taken in an application for discovery under the Family Protection Act 1955 *Page v Clapham* [2022] NZHC 2633. See [7.913].

Family Protection Act 1955 — discovery

The income and assets of a party, whether claimant or beneficiary, need to be disclosed, and affidavits setting out the applicant's and respondent's financial positions as at the date of the will-maker's death were ordered: *Midgley v Brumby* [2022] NZHC 3158. See [7.913].

Family Violence Act 2018 — offence to breach protection order — s 112, Family Violence Act 2018 — second appeal — s 237, Criminal Procedure Act 2011

The test for a second appeal is "a high one": *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764. This test was applied in the family violence context in *N v Police* [2023] NZCA 103. The appellant father had contacted the mother by text about getting divorced. Although the protection order covered contact over matters relating to the children, it was held on appeal that the divorce text did not fall within this exception. The Court of Appeal declined to give leave to bring a second appeal. See [7.627].

Guardianship — medical treatment — meaning of "routine" and "treatment" — s 16(2)(c), Care of Children Act 2004

In *Gibbs v Gibbs* [2022] NZFC 4325, COVID-19 testing was not considered to be "medical treatment" under s 16(2)(c) of the Care of Children Act 2004 because it is used simply for diagnostic purposes. See [6.206.03(d)].

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

In *Hopkins v Jackson* [2022] NZHC 2649, McQueen J overturned a Family Court decision directing that a child was to attend the mother's preferred school, rather than a school slightly further away that her half-sisters were attending. It was overall in the child's best interests to go to the same school as her sisters. The Court of Appeal in *Hopkins v Jackson* [2022] NZCA 653 did not grant leave for a second appeal. See [6.206.04].

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

The Supreme Court declined leave to appeal in *Cresswell v Roberts* [2023] NZSC 62. The Court found that the proposed appeal would only challenge the Court of Appeal's assessment of the facts, rather than how *LRR v COL* [2020] NZCA 209, [2020]2 NZLR 610; [2020] NZFLR 98 was applied to those facts. However, the Supreme Court indicated that it may be open to hearing a future appeal. See [6.165.04].

Hague Convention — return order — human rights and fundamental freedoms exception — s 106(1)(e), Care of Children Act 2004

In *Peterson v Piripi* [2023] NZFC 2584, the mother argued that if her tamariki Māori was returned to Australia, the child would no longer be surrounded by the whānau hapū, culture, whenua, language and her birthright. Judge Howard-Sager considered this argument within the context of the human rights exception to the Hague Convention. The Court found that that returning the child to Australia would not breach the child's human rights and fundamental freedoms. See [6.165.06].

International — relationship property — forum conveniens — immovable property — s 7, Property (Relationships) Act 1976

Gilmore v Gilmore [1993] NZFLR 561 was cited in *Lee v Lee* [2020] NZFC 2984 where New Zealand was held to be forum conveniens ahead of Korea: the main property including an immovable property was in New Zealand. See [11.44.09].

Marriage — proxy marriage — s 34, Marriage Act 1955

Section 34 of the Marriage Act 1955 establishes extremely limited circumstances under which a proxy marriage request will be granted, including "a state of war". In *Mazany v Registrar General, Births, Deaths and Marriages* [2021] NZFC 1704, [2021] NZFLR 479 a couple separated as a result of COVID-19 travel restrictions unsuccessfully argued that the COVID-19 international travel restrictions that stopped them from getting married in person were "tantamount to a state of war". See [1.6.01].

Relationship property — power to remove trustee

In *Green v Hing* [2021] NZFC 4687, it was accepted that the Family Court had power to remove a trustee. However, various undertakings were made that were considered sufficient to prevent a disposition of property and hence the removal of the trustee in question was not necessary. See [7.304.02] and [7.305.01].

Relationship property — de facto relationship

In *Alden v Levitt* [2022] NZFC 3580, Judge Moss held that a de facto relationship continued despite the woman's "enforced absence" when she was in prison for welfare fraud. See [7.304.01] and [7.304.03].

Relationship property — polyamorous relationships

On the question of multi-partner or polyamorous relationships, see *Mead v Paul* [2023] NZSC 70, which by a majority of 3 to 2 upheld the Court of Appeal decision, *Paul v Mead* [2021] NZCA 649, [2022] 2 NZLR 413, [2021] NZFLR 551. See full discussion at [7.309.01], [7.309.02], [7.309.03] and [7.369.02].

Relationship property — trusts — power of appointment

The Court of Appeal was split 2/1 in *Cooper v Pinney* [2023] NZCA 62, [2023] 2 NZLR 4550. The majority (Cooper and Gilbert JJ) distinguished *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230 primarily on the basis that ordinary trust principles should apply, for example fiduciary duties and good faith, and the need for the trustees to act with unanimity. In the minority, Miller J referred to "weakly fiduciary" powers and considered that there was a power of appointment that constituted property. See [7.320.02].

Relationship property — postponing vesting of property — s 26A, Property (Relationships) Act 1976

In *Sutton v Bell* [2023] NZSC 65, the Supreme Court was invited to postpone orders relating to the family home but declined to do so even in the face of arguments about the interests of the children under s 26. See [7.402.01] and [7.404].

Relationship property — notice of interest — s 42, Property (Relationships) Act 1976

Benini v Woodrow [2022] NZFC 1033 turned on whether there was a de facto relationship or not. It was noted that this can be "notoriously difficult" and, given the available evidence in the case, it was imprudent to do so on the basis of untested affidavits. There was thus an arguable case, with the result that the notice was not to lapse. See [7.412].

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

In the context of s 44(4), the *Supreme Court in Sutton v Bell* [2023] NZSC 65 held that Mr Sutton's knowledge meant that he had an intention to defeat Ms Bell's rights and thus acted without good faith. His knowledge also applied to the trustees, who had in any event not altered their position as required by s 44(4). The lack of good faith meant that it was not necessary to consider whether there had been valuable consideration under s 44(2). See full discussion of the Supreme Court decision at [7.414].

Relationship property — agreements — implying a term

In *Oertel v Laing* [2020] NZFC 6310, an agreement provided for the gain on the sale of a property to be shared between the parties. As it happened, the sale made a loss and the wife had to use her own resources to settle. The agreement did not cover this situation. The wife inter alia argued that a term should be implied so that the husband shared in the loss. The test in *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 16 ALR 363 (PC) was not satisfied. The term was not so obvious that it "[went] without saying". See [7.420.01].

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

In *WL v AJ* [2023] NZHC 703, Mallon J was dealing with an agreement that failed to meet the necessary formalities for a valid agreement. She held that it could not be saved under s 21H. As a further point, she considered under s 21J that, although evidence of family violence against the woman was to be put to one side because it was difficult to make a finding on how this affected the signing of the agreement, the woman was nevertheless "vulnerable" as she was young with a baby and was told to sign if she wanted to rent the property when they separated. See [7.422.03].

Youth justice — power of court to discharge charge — s 282, Oranga Tamariki Act 1989

While the courts' broad discretion to discharge must be exercised in a manner consistent with the s 208 of the Oranga Tamariki Act 1989 principles and the primary considerations in s 4A(2), there is not presumed to be any particular offence that cannot be discharged: *Police v Court* [2022] NZHC 2987. See [6.660I].

Youth justice — Unfit to stand trial — ss 4 and 7 of the Criminal Procedure (Mentally Impaired Persons) Act 2003

The *Court of Appeal in Tihema v R* [2022] NZCA 444 provided a useful discussion of fitness to stand trial. The Supreme Court granted leave to appeal but not on this issue: *Tihema v R* [2023] NZSC 37. See [6.662].

