

# Update Family Law Service

## Service 213 — November 2023

### New Act

#### **Children and Young People's Commission Act 2022 No 44**

This Act replaced the Children's Commissioner Act 2003 on 1 July 2023.

This Act also amended on 1 July 2023:

- ss 5 and 6D of the Children's Act 2014
- s 34 of the Human Assisted Reproductive Technology Act 2004
- ss 2, 66M and 447 of the Oranga Tamariki Act 1989
- s 63 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017
- regs 10, 29, 31 and 37 of the Oranga Tamariki (Residential Care) Regulations 1996

### Legislative amendments

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

These Regulations amended on 13 July 2023:

- items 18A, 18B of the schedule of the Births, Deaths, Marriages, and Relationships Registration (Fees) Regulations 1995

#### **Family Court (Supporting Children in Court) Legislation Act 2021 No 33**

This Act amended on 16 August 2023:

- ss 5, 5A, 6, 7AA and 7B of the Care of Children Act 2004
- s 11 of the Family Dispute Resolution Act 2013

#### **Natural and Built Environment Act 2023 No 46**

This Act amended on 24 August 2023:

- s 3 of the Joint Family Homes Act 1964

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

This Act amended on 6 October 2023:

- ss 7, 8, 23, 23A of the Adoption Act 1955
- ss 46E, 46F, 46G, 46O, 46P, 46Q, 47, 49A, 59, 77, 77A, 77B, 117, 118, 132, 134, 137, 139A, 141 of the Care of Children Act 2004
- ss 99, 103A, 103B, 103C, 104, 105, 106, 107, 117, 184, 185 of the Child Support Act 1991
- ss 7C, 7D, 7H, 7K, 15A, 17 and sch 2 of the Family Court Act 1980
- ss 51, 54, 55, 56, 57, 91, 145F of the Family Proceedings Act 1980

- ss 189, 190, 193, 194, 196, 198, 199, 200, 201, 203, 204, 206, 207, 208, 209, 210 of the Family Violence Act 2018
- ss 26, 27 of the Marriage Act 1955
- ss 39, 40 of the Oranga Tamariki Act 1989
- ss 25, 37, 40, 42, 43 of the Property (Relationships) Act 1976
- ss 15, 48, 66, 68, 69, 70, 72 of the Protection of Personal and Property Rights Act 1988
- s 10 of the Status of Children Act 1969

### **Mental Health (Compulsory Assessment and Treatment) Amendment Act 2021 No 41**

This Act amended on 29 October 2023:

- ss 33, 34, 34A, 34B, 34C, 34D, 92 and sch 1AA of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

## **Commentary on new legislation and legislative amendments**

### **Children and Young People’s Commission Act 2022**

On 1 July 2023 the Children and Young People’s Commission Act 2022 came into force. This Act is discussed at [6.551A] and [6.552] of the “Care and protection” chapter.

The purpose of this Act is “to establish the Children and Young People’s Commission to promote and advance the rights, interests, and participation of children and young people and to improve their well-being within (without limitation) the context of their families, whānau, hapū, iwi, and communities”.

### **Family Court (Supporting Children in Court) Legislation Act 2021**

Commentary on the legislative amendments in Family Court (Supporting Children in Court) Legislation Act 2021 which came into force on 16 August 2023 has been included in the “Family Dispute Resolution” chapter at [FDR2.2.3(a)] and in the “Day-to-day care and contact chapter at [6.104H.03], [6.104I], [6.105], [6.123], [6.123A], [6.131C.01].

Crucially, under principle (g) of s 5 of the Care of Children Act 2004 “a child must be given reasonable opportunities to participate in any decision affecting them”.

### **Family Court (Family Court Associates) Legislation Act 2023**

Commentary on the legislative amendments in Family Court (Family Court Associates) Legislation Act 2023 which came into force on 6 October 2023 has been included in the “Adoption” chapter at [6.707N], [6.708], [6.718A], [6.718B] and the “Care and protection” chapter at [6.566B], [6.566C].

These changes enable the newly created role of a Family Court Associate.

### **Oversight of Oranga Tamariki System Act 2022**

The Oversight of Oranga Tamariki System Act 2022 came into force on 1 May 2023. This Act is discussed at [6.551A], [6.552], [6.556], [6.566I] of the “Care and protection” chapter.

The objective of the Act is to improve outcomes for children and young people in New Zealand by strengthening the independent monitoring and complaints oversight of the Oranga Tamariki system; and advocacy for children and young person’s issues generally.

## **Updated commentary**

### **Care and protection — referral to care and protection co-ordinator by court or organisation — s 19, Oranga Tamariki Act 1989**

In *MD v LP* [2023] NZCA 215 the Court of Appeal discussed the scope of s 19 as a

question of law. Whilst the Court was not persuaded that it was relevant to that appeal, it noted that the scope of s 19 is potentially a question of law of general or public importance. See [6.564].

### **Family law practice and procedure — costs — paternity**

In *Thorpe v Greene* [2021] NZFC 12262 Judge Matheson considered the issue of costs following paternity proceedings in the Family Court. See [FPP8.7].

### **Family law practice and procedure — appeals from decisions of District Court and Family Court — s 174, Family Proceedings Act 1980**

The High Court recently summarised the approach on appeal under s 174 of the Family Proceedings Act 1980 in *Whyte v Whyte* [2022] NZHC 2607. See [FPP9.2].

### **Family violence — discharge of temporary protection order — s 153, Family Violence Act 2018**

In *H v R* [2021] NZHC 1144, [2022] NZFLR 955, the Family Court discharged a temporary protection order against the mother, upheld by Churchman J on appeal. While there had been family violence, the order was held not to be necessary. See [7.626].

### **Family violence — evidence — hearsay statements — ss 18, 19, Evidence Act 2006**

In *Farrady v Gower* [2020] NZFC 3601 Judge Muir used ss 18 and 19 of the Evidence Act 2006 and the “any evidence” rule in s 12A of the Family Court Act 1980 to admit various school and health exhibits. See [7.648].

### **Family violence — appointment of standby counsel to cross-examine witness — restrictions on cross-examination by parties in persons — s 95, Evidence Act 2006**

The limited role of lawyer to assist is nevertheless reinforced by Katz J in *Irving v Irving* [2021] NZHC 2269 and Judge Coyle in *Croy v Stafford* [2023] NZFC 6884, [2023] NZFLR 245: lawyer to assist cannot “freely” cross-examine on behalf of a self-litigant. Judge Coyle however got around this by using his inherent powers to regulate court processes to appoint an amicus or “standby” counsel. See [7.649].

### **Protection of Personal and Property Rights Act 1988 — wills — s 55, Protection of Personal and Property Rights Act 1988 — recusal of judge**

In *DP v JR* [2023] NZFC 10396, an attorney sought a new will under s 55 but argued that the Judge should recuse himself because he had made adverse findings against the attorney in an earlier judgment (see *NP v JR* [2023] NZFC 1477, [2023] NZFLR 282, at [7.894]). Judge Muir refused to recuse himself: he was able to put the earlier findings aside and consider the evidence in a routine way. See [7.850].

### **Protection of Personal and Property Rights Act 1988 — review of attorney’s decisions — s 103, Protection of Personal and Property Rights Act 1988 — recusal of judge**

In *NP v JR* [2023] NZFC 1477, [2023] NZFLR 282, a niece of the person concerned challenged decisions made by the attorney, a nephew, which meant that property ended up in the attorney’s name. Although the nephew claimed that he was not acting under the enduring power but with the “beloved” aunt’s consent, Judge Muir held that the nephew breached his duty as attorney and ordered him to pay back over \$1.3 million. See [7.894].

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

In *Price v Price* [2022] NZFC 1389, problems of enforcement arose in relation to a sale order. The only way of realising the wife's half share was to order the sale of company property, the shares in which were relationship property. As the Family Court did not have jurisdiction to do this, Judge de Jong transferred to case to the High Court. See [7.304.01].

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

In *Masters v Masters* [2022] NZFC 4043 where orders were said to be necessary under both the Trusts Act 2019 and the Companies Act 1993, Judge Ryan stated that “it would be foolhardy of me to continue the proceedings in [the Family Court]”. See [7.304.01].

### **Relationship property — jurisdiction of Family Court — s 141, Trusts Act 2019**

In *Kruize v Kruize* [2022] NZFC 4893, Judge Maude replaced two ex-partner trustees with an independent trustee despite the extra cost of doing so. This was because of the conflict that existed and the dysfunctional relationship between the trustees. They could not be neutral and evenhanded as between beneficiaries. See [7.304.02].

### **Relationship property — de facto relationship after dissolution of their marriage — s 2D, Property (Relationships) Act 1976**

In *Gerring-Gunn v Gunn* [2023] NZHC 2603, the parties' marriage had been dissolved, but they resided together after dissolution for the sake of the children. Jagose J upheld the Family Court's ruling that they were not in a de facto relationship. See [7.309.03].

### **Relationship property — application to enlarge time for making an application — application after death — s 24, Property (Relationships) Act 1976**

In *Cursons v Chamberlain* [2021] NZFC 6419, [2022] NZFLR 725 the parties had been in a de facto relationship but not within three years of the man's death. The man had been a drug user, overbearing and paranoid, and the relationship had been unhappy. On separation the woman accepted an offer that was less than her entitlement under the Act as “the path of least resistance” and against advice. When the man died, she sought to apply out of time under the Act. An extension of time was granted. See [7.315] and [7.432].

### **Relationship property — extension of time — right of appeal to High Court — s 39, Property (Relationships) Act 1976**

An appeal against an extension of time failed because it was held that there was no jurisdiction to appeal under s 39. A decision to allow extended time to apply is not an “order” as required in s 39(1)(a): *V v V* [2023] NZHC 2758. On the other hand, a refusal to grant an extension could be appealed as it “finally determine[d] the proceedings” under s 39(1)(c): the refusal meant that the case could not go ahead. See [7.315].

### **Relationship property — relationship debt — s 20(1), Property (Relationships) Act 1976**

In *Fleury v Fleury* [2021] NZFC 9116, [2022] NZFLR 887, the wife, a United States citizen, had to pay capital gains tax in the United States on the sale of the New Zealand family home. It was held that this was a relationship debt relating to a common enterprise. See [7.345.02].

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

In *Campbell v Stretch* [2022] NZFC 4608, Judge Dravitzki accepted that the gross disparity in favour of the husband was not enough to amount to extraordinary circumstances but several other factors led to a two thirds/one third division in his favour, including the following: the short length of the relationship, the husband's advanced age, the wife's ability to enhance her financial position for a number of years ahead, the wife's retention of surplus earnings, and the husband's use of an inheritance from his father's estate. See [7.366.03].

**Relationship property — exception to equal sharing — extraordinary circumstances — conduct — s 13, Property (Relationships) Act 1976**

Family violence is not as such an extraordinary circumstance. Thus, in *Ross v Hughes* [2022] NZFC 69, [2022] NZFLR 688, a man had a protection order under the Family Violence Act 2018 against his ex-partner who was also into things like methamphetamine. Section 13 was not satisfied, even though the man required hospital treatment on one occasion and police intervention on another. The evidence of the woman's conduct did not result in a disparity of contributions. See [7.366.04].

**Relationship property — exception to equal sharing — extraordinary circumstances — acquisitions from external sources — s 13, Property (Relationships) Act 1976**

In *Phillips v Bolitho* [2022] NZFC 9704, [2022] NZFLR 822, the male partner lost mental capacity. In awarding an 80/20 split in his favour, Judge Russell relied on three reasons that taken together meant that the situation was extraordinary. In summary, the finance did not come from the parties' efforts during the three and a half year period of the relationship. See [7.366.07].

**Relationship property — economic disparity — causation — s 15, Property (Relationships) Act 1976**

*Fleury v Fleury* [2021] NZFC 9116, [2022] NZFLR 887 was a case where the "working assumption" was not displaced. Prior to the marriage, the husband had a reputation and a skillset for yachting, but "[h]is career as an international yachtsman was established and continued to flourish throughout the relationship". The wife was awarded \$490,000 compensation. See [7.382.03] and [7.387].

**Relationship property — order for interim distribution — s 25(3), Property (Relationships) Act 1976**

In *J v L* [2023] NZHC 2434, [2023] NZFLR 249, Paul Davison J granted the wife an interim distribution to meet her needs and those of the daughter. The parties were Chinese residents but had property in New Zealand. The daughter was studying at university in Auckland. The wife had borrowed in order to pay for the daughter's university and living expenses. The amount was well less than the wife's expected share of relationship property. See [7.401].

**Relationship property — orders with respect to tenancy — s 28, Property (Relationships) Act 1976 — licence to occupy granted by the trust**

Judge Coyle in *Lindsay v Lamb* [2023] NZFC 8072, [2023] NZFLR 419 held that, where the home was in trust and the parties had a licence to occupy granted by the trust, the licence was not a tenancy capable of being the subject of a tenancy order under s 28. In this case, the male partner died and the trustees gave the surviving partner notice that she would have to vacate. See [7.403].

**Relationship property — order for sale — s 25, Property (Relationships) Act 1976**

In *Liu v Qian* [2023] NZHC 2653 a sale was ordered even though it meant that the mother and daughter would have to leave the home. For some time the mother had not accepted invitations to resolve property matters and, in the absence of a sale, she was under no pressure to advance matters. See [7.403].

**Relationship property — orders for benefit of children — s 26, Property (Relationships) Act 1976**

In *Ross v Hughes* [2022] NZFC 69, [2022] NZFLR 688, the ex-partner mother was a user of methamphetamine and the father had protection and parenting orders against her. She did not appear in the proceedings. Judge Grimes declined to settle the mother's share of the property on the children. The Judge held that the mother would be given a year to uplift her share of the sale proceeds and, if she did not do so, that share would be held on trust by the father until the children turned 18. See [7.404].

**Relationship property — agreements to defeat creditors void — s 47, Property (Relationships) Act 1976**

*Purucker v Huebler (No 3)* [2023] NZHC 2246, [2023] NZFLR 334 concerned not an agreement under Part 6 but one made in Germany and updated in 2018 and 2019 when the parties purportedly separated (it was suspected that the separation was a sham). The wife was convicted of theft and was being pursued by a victim for compensation. The agreement contained a gross disparity in favour of the husband, which did not take account of the wife's contributions over 25 years. Isac J had no hesitation in concluding that the dispositions made under the agreement were undertaken for the dominant purpose of defeating creditors. See [7.416.02].

**Relationship property — spouses or partners may settle differences by agreement — s 21A, Property (Relationships) Act 1976**

In *Swenson v Lawson* [2022] NZHC 3544, [2022] NZFLR 847, the wife suffered a serious stroke and her husband cared for her for a long time until separation. They entered a Part 6 agreement, which included a provision that, if she died within 10 years, the husband would pay half of her insurance policy to her estate. She died less than two years later but the husband refused demands from the executors to pay the amount to the estate. The husband sought to have the agreement set aside and also sought a share under the Family Protection Act 1955, with the executors seeking enforcement. He failed on both counts, Isac J found that the husband had made an informed decision to proceed with the agreement, under which the division was "already very favourable to him". Giving effect to the agreement would not cause serious injustice. The husband was therefore liable to comply with the agreement. See [7.420.02].

**Relationship property — Court may set agreement aside if would cause serious injustice — s 21J, Property (Relationships) Act 1976**

A case that could be seen as falling under the residual matters in s 21J(4)(f) is *Vernooij v Official Assignee in Bankruptcy of Vernooij* [2020] NZFC 11149, [2021] DCR 492. The former wife was bankrupt. The husband unsuccessfully challenged an agreement he and his wife made after separation. There was no serious injustice to him in upholding the agreement whereas there was significant prejudice to the former wife and her creditors. See [7.422.06].

**Relationship property — Court's discretion under s 182, Family Proceedings Act 1980**

In *Fleury v Fleury* [2021] NZFC 9116, [2022] NZFLR 887, Judge Muir ordered that a

trust be created for the daughter, the wife be reimbursed for money spent on the children's university expenses, and the balance be split into two mirror trusts. See [7.423.04].

