

New Zealand Family Law

A guide for Australian family lawyers

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June 2019

This is my favourite
Queenslander!..

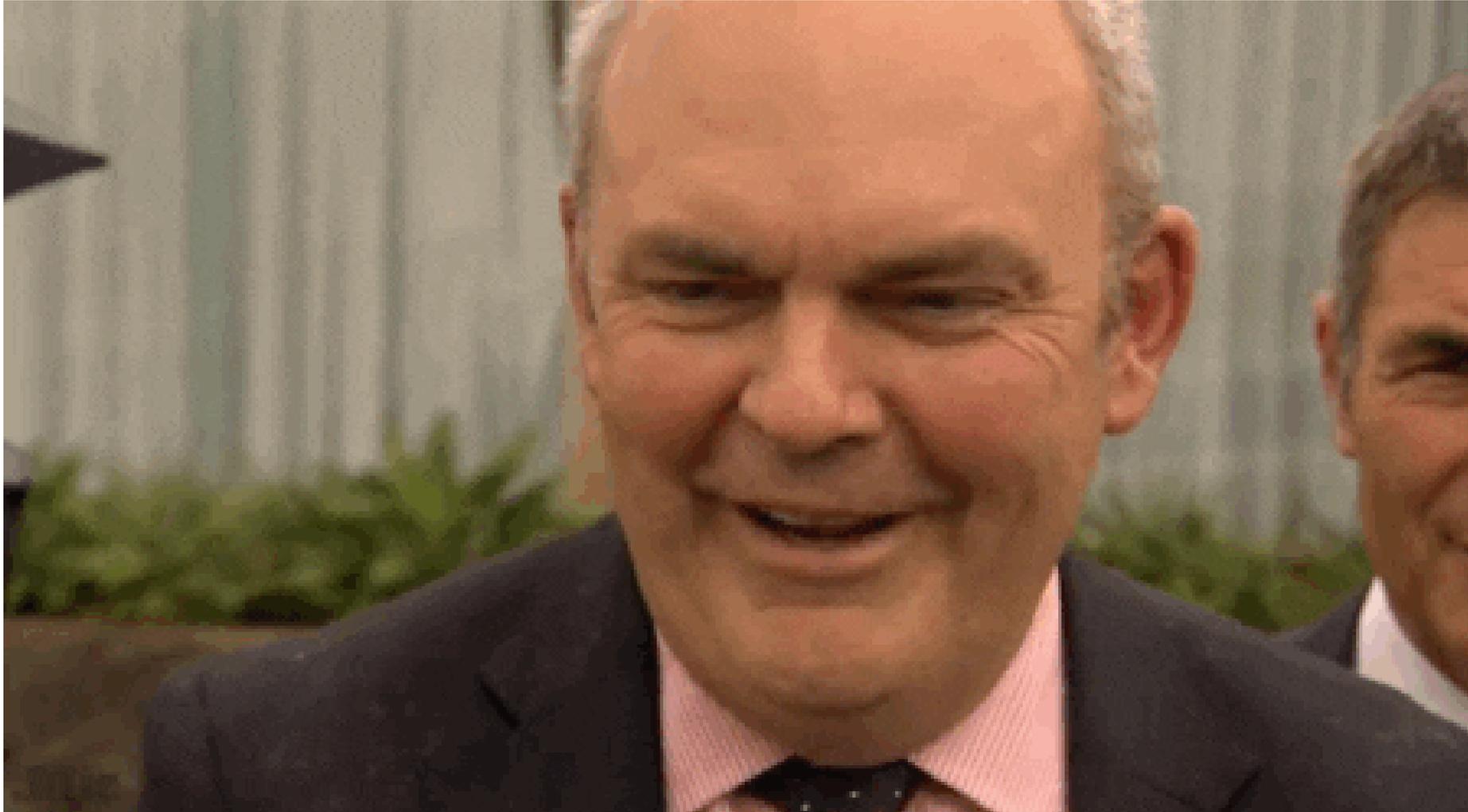


'Egg boy' Will Connolly donates \$100,000 to help mosque attack survivors

13:50, May 29 2019



This is how we do it in New Zealand...



NZ Family Law System

Source of law:

- Family law **statutes**
- **Case law** (interpretation of statutes)

The courts

- **Family Court** (first instance)
- **High Court** (appeals and limited first instance)
- **Court of Appeal** (leave to appeal required)
- **Supreme Court** (leave to appeal required)

Recognised relationships

- NZ family law recognises the following relationships:
 - **Marriage** (including same sex marriage)
 - **Civil Union** (including same sex civil union)
 - **De facto**
- Virtually **identical legal rights**

Dissolution

- **Marriage and civil unions** end by **dissolution**
- Mandatory **2 year separation** period
- Irreconcilable breakdown of relationship – **no fault**

- **De facto** relationships end upon separation

Dissolution not needed to bring applications for financial orders

Separation

- A couple separates when the parties begin **'living apart'**
- No need to apply for a separation order
- 'Living apart' involves a mental and physical element:
 - May be living apart even though living under the same roof
 - May be living together as a couple even though living in separate residences

Property division

Property regime

- **The Property (Relationships) Act 1976 (the PRA)**
 - **Deferred community of relationship property**
 - Rights under the Act are deferred until separation
 - General scheme - relationship property is divided equally, separate property remains the property of its owner
- Rules-based scheme, courts have very little discretion
- Under review by the NZ Law Commission

Jurisdictional gateway

- Power to make orders under the PRA is based on:
 - Whether property is **movable or immovable**
 - Whether property is **situated in NZ or overseas**
 - Whether a party is **domiciled in NZ**
- Test for jurisdiction is out of step with other jurisdictions
- Law Commission likely to recommend test of '**country with which the relationship has the closest connection**'

Jurisdictional gateway (ss 7 and 7A PRA)

- NZ courts can make orders in respect of the following categories of property:
 - **Immovable property situated in New Zealand.**
 - **Movable property situated in New Zealand if one of the parties is domiciled in New Zealand** at the date of application.
 - **Movable property situated outside New Zealand if one of the parties is domiciled in New Zealand** at the date of application (although if an order is sought against a person who is neither domiciled nor resident in New Zealand, the court can decline to make an order in respect of any movable property that is situated outside New Zealand).
 - Any property where the parties have agreed in writing or consented, that New Zealand law is to apply

Domicile

- Invokes the notion of a **permanent or indefinite home** (as opposed to simple residence) in a particular country
- Cases are very fact specific
- *Humphries v Humphries* [1912] NZFLR 18 – husband retained his NZ domicile even after he had lived overseas for 35 years

Agreements as to applicable law (but not forum)

- Applicable law - parties can agree *at the time of entering into* their relationship that the law of a country other than NZ will apply to their dispute – s 7A
- But no provision allowing parties to agree that the courts of a specified country shall determine their dispute
- Law Commission likely to recommend better facilitation of agreements about both applicable law and forum

To whom does the PRA apply?

The PRA applies to the following relationships:

- Marriages
- Civil unions
- De facto relationships

De facto relationships

- Parties are in a de facto relationship if they are **‘living together as a couple’**
- Definition of de facto relationships 2D (“all the circumstances of the relationship” including 9 specific factors)
 - Includes heterosexual and same sex relationships
 - Not necessary to live together in the same house
 - Not necessary to engage in sexual relations

Courts retrospectively assess whether parties were in a de facto relationship and if so, whether it was for the requisite length of time for property rights to accrue

Multi-party relationships

- PRA applies to **multi-party relationships**
- ***Chapman v HP*** – a deceased male left both a wife and a de facto partner for the purposes of PRA
- ***C v S*** – a mistress applied unsuccessfully for orders against a husband with whom she had enjoyed a covert relationship
- ***Grieg v Hutchison*** – a husband attempted unsuccessfully to dilute his ex wife's relationship property claim by claiming that a long term affair was a de facto relationship

Classification of property

- Classification of property as **relationship property** or **separate property** is central to the regime
- Rules of classification appear in ss 8 and 9

Relationship property – s 8

- Relationship property generally comprises:
 - The **family home and family chattels** (whenever acquired)
 - **Property acquired during the relationship** excluding property acquired by one party out of their separate property or as a gift or inheritance or survivorship or as a beneficiary of a trust.
 - **Property acquired by one party for the common use or common benefit** of the parties

Separate property – s 9

- All property that is not relationship property
- Usually:
 - **Property owned by one party before the relationship**
 - **Property acquired by gift, inheritance, survivorship or as a beneficiary of a trust**

Division

- **Relationship property is divided equally**
- **Separate property remains the property of its owner**
- However:
 - Limited discretion to depart from equal division (extraordinary circumstances/repugnant to justice)
 - Classification of property can change depending on how property is used
 - Claims can be made against separate property
 - Compensation can be awarded to a party eg to redress economic disparity

Economic disparity – s 15

Test

- If the future income and living standards of one party will be significantly higher than the other's, due to the effects of the division of functions during the relationship

Remedy

- The court may award lump sum compensation to a party out of relationship property

Scott v Williams – (Supreme Court) has left us confused about the quantification of awards

Proposed change - FISAs

- **Family Income Sharing Agreements (FISA)** suggested by NZ Law Commission as a possible reform:
 - If a party qualifies for a FISA, the amount and duration of the FISA determined by **statutory formula**
 - **Objective** – to **equalise the parties' income for a period of time** that is approximately half of the length of the relationship, up to a maximum of 5 years

Agreements about division of property

section 21 and 21A agreements

- **Contracting out agreements** (eg pre-nuptial agreements) – allow parties to contract out of the PRA regime (s 21)
- **Settlement agreements** – allow parties to reach their own agreement about how their property shall be divided (s 21A)

Are ss 21 and 21A agreements binding?

- Yes, if the agreement is a valid contract which **complies with the formal requirements of s 21F**
- Unless it is set aside by the Courts under s 21J for **serious injustice**

Formal requirements of s 21F

- ***S 21F requirements:***
 - *Agreement must be in writing and signed by both parties*
 - *Each party's signature on the agreement must be witnessed by a lawyer*
 - *The witnessing lawyer must certify that before their client signed the agreement, he or she provided him or her with independent legal advice on the effect and implications of the agreement*
- **An agreement that does not comply with s 21F is void**
- The court has discretion to validate a non compliant agreement under s 21H (rarely exercised)

NB the lawyer who provides independent advice must be the same lawyer who witnesses their client's signature on the agreement – therefore lawyer or client should travel

Trust-owned property

- The PRA only applies to property that is **personally owned** by the parties
- Family trusts are used to try and place assets out of the reach of the the PRA
- Growing reluctance by the courts to allow a party to subvert property rights through use of trusts – **Clayton v Clayton** (Supreme Court)
- But courts' powers to provide relief are restricted
- Highly problematic area of law – in need of reform – Law Commission is on it!

Partner maintenance and Child Support

Partner maintenance

Family Proceedings Act 1980

- Available if maintenance is necessary to enable the applicant to meet their **reasonable financial needs**, where the applicant cannot practicably do so for relationship-generated reasons
- **Temporary relief only**, will ordinarily end after a few months or years (often 3 years)
- Reasonable financial needs refers to **standard of living during relationship**
- May be replaced by **FISAs**
- PRA s 32 - the court may make an order for the maintenance of a partner (and/or an order relating to child support)

Child support/maintenance

- **Child Support Act 1991** - formula assessment administered by Department of Inland Revenue
- **Family Proceedings Act 1980** - residual provisions
- **Property (Relationships) Act s 26** – court has power to settle property on children
- **Property (Relationships) Act s 32** - court may make an order relating to child support (and/or an order for the maintenance of a partner)

Children

Children

Care of Children Act 2004

- **Best interests model**
- **Guardianship rights and responsibilities** - important decisions about a child, eg schooling, health, religion etc)
- **Day to day care and contact**

Lawyer for Child

- Lawyer for child - **court appointed**
- L4C **must meet with child** and give child an opportunity to express views on decisions to be made
- Dual role – advocate for child's **views and for best interests**
- Where conflict, courts may appoint Lawyer to Assist the court to advocate for best interests
- Child's **views must be taken into account by the courts** but not determinative

Relocation

- Guardianship decision
- **Need consent** of all guardians or **permission of the court** to relocate
- **Risk of court ordering return**

Hague Child Abduction Convention

- Signed by NZ in 1980
- Enacted into the Care of Children Act 2004
- Cases resolved in 2-4 months
- NZ courts adhere to **rigorous policy of immediate return** but see **Simpson v Hamilton** (appeal to be heard by Court of Appeal)
- 70% of NZ cases involve **family violence**
- Includes spate of cases where women have fled Australia taking children
- Re-victimising women who have fled abusive relationships?

Simpson v Hamilton

[2017] NZFC 6923; [2018] MZHC 1098; [2018] NZHC 1365; [2019] NZCA 21

- **December 2014:** German court awards sole custody of Anna to father (Anna already surreptitiously removed from Germany by mother)
- **February 2017:** NZ Family Court application lodged to have Anna returned to father in Germany
- **May 2017:** Immigration NZ issues Deportation Liability Notice against mother for concealing relevant information in visa application
- **September 2017:** Family Court declines to return Anna to father in Germany (**one year settled** and **child objection** defences made out, Anna 10 years old, psychological evidence that return would be “cataclysmic” for Anna)
- October 2017: Immigration tribunal cancels deportation and issues new visas
- **June 2018: High Court upholds Family Court decision, albeit finding of “egregious breach” of mother’s legal obligations in Germany**
- **February 2019:** Court of Appeal says case raises significant issues of public interest and grants leave to appeal
- Secretary of Justice as **Central Authority granted leave to intervene** - issues of general public importance

Forum tests

- The Trans-Tasman Proceedings Act 2010 (NZ and Australian)
 - Uniform test of '**more appropriate forum**'
- Non trans-Tasman cases
 - 8 proposition test in Spiliada (House of Lords)
 - 2 step enquiry in de Dampierre (House of Lords)
 - **PRA cases** – look at where the property is located and the law that is to be applied to determine the rights of the parties
 - **Child cases**
 - CG v SG
 - Best interests of the child
 - Foreign forum is 'clearly and distinctly more appropriate'

Enforcement of Australian orders

- **Orders dividing property**
 - **TTPA - 'Registrable Australian judgments'** may be registered in NZ
 - Judgment must be final and conclusive
- **Parenting orders**
 - **Final Australian parenting orders can be registered** in NZ (Care of Children Act)
 - NZ has not signed the HCCH Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Protection of Children 1980
- **Child support and maintenance**
 - 2001 **Reciprocal agreement** between Australia and New Zealand on child and spousal maintenance
 - Australia and New Zealand are both signatories of **UNCRAM**

Surrogacy and adoption

Surrogacy

- Human Assisted Reproductive Technology Act 2004, Status of Children Act 1969, Adoption Act 1955
- **Commercial surrogacy** agreements are illegal
- **Altruistic surrogacy** agreements not illegal but not enforceable
- **Birth mother is legal mother**, even if ovum donated by another woman
- **Commissioning parents have no formal status** as parents or guardians and need to adopt
- Child born overseas under surrogacy will **not automatically be eligible for NZ residence** just because of genetic consanguinity with a NZer

Adoption

- Individual or joint adoption
- Only **spouses** can jointly adopt (excludes civil union partners but allows same sex and de facto couples to adopt jointly as 'spouses')
- Adoption orders cannot be made until after a child has been born
- Consent of the parents and guardians of the child must be obtained or dispensed with by the court

ADR

Emphasis on conciliation in NZ:

- Statutory duty of **lawyers to promote conciliation**
- Court may refer parties to **counselling**
- **Mediation**
 - FDR for child cases
 - Judicial settlement conferences
 - Private mediators
- **Private arbitration**
 - Financial cases
 - Child cases
- **Collaborative law**
 - Not widely practiced

Jacinda



