Family Law Practitioners Association

New Zealand Family Law – What Australian Practitioners Need to Know

Sources of Law

New Zealand family law is found primarily in Acts of Parliament. Unlike Australia, which has a comprehensive family law statute in the Australian Family Law Act 1975, New Zealand famly law is found in a patchwork of disparate statutes enacted over several decades.

Case law assists in the interpretation and application of statute law.

Court System/Family Justice System

Most family law cases are heard by the Family Court, which is a division of the District Court. Appeals are heard by the High Court. With leave of the court, cases can be appealed from the High Court to the Court of Appeal and from there, with leave, to the Supreme Court.

Parties are encouraged to resolve their family law disputes by agreement. In most cases involving disputes about the care of children, an applicant must produce a certificate stating that the parties have either attended or are exempt from attending Family Dispute Resolution mediation (FDR).

Family Court cases are private. Although the media can attend Family Court hearings, there are restrictions on what may be reported. As a result, it is rare for Family Court cases to be reported by the media.

What relationships are recognised under New Zealand family law?

New Zealand family law recognises marriages, civil unions and de facto relationships.

Same-sex marriage became possible as a result of amendments to the Marriage Act 1955 in 2013.

Both same-sex couples and opposite-sex couples can enter into a civil union under the Civil Union Act 2004. Couples who have entered into a civil union have the same legal rights as married couples, except that they cannot jointly adopt a child.

De facto couples have almost identical rights to married and civil union couples.

Divorce / dissolution of relationships

<u>Dissolution of marriage and civil union</u>

In New Zealand, marriages and civil unions are terminated by dissolution and not by divorce.

The Family Proceedings Act 1980 provides only one ground for dissolution, which is that the marriage or civil union has broken down irreconcilably. That ground can only be established if, and only if, the parties have been separated for at least two years immediately preceding the filing of the application for dissolution. Fault is not a consideration.

A New Zealand court has jurisdiction to make a dissolution order if at least one party is domiciled in New Zealand at the time of filing the application.

There is no legal process for terminating a relationship. De facto relationships are terminated by separation.

Unlike the position in many other jurisdictions, rights in respect of property, division and financial support can be pursued following separation, without any need for prior divorce or concomitant dissolution/divorce proceedings.

Separation

A couple has separated when the partners begin living apart.

Living apart requires both a mental and physical element. A couple may, for example, be living apart even though they continue to share a common residence. Conversely, they may be living together as a couple despite residing in separate residences.

The date of separation is significant in three ways. Firstly, under the Property (Relationships) Act it is the assets owned by the parties at the date of separation that fall for division. Secondly, under the Family Proceedings Act, an application for dissolution can only be made after the expiry of two years following separation. Thirdly, the date of separation is relevant in claims for partner maintenance.

Parties to a marriage or civil union can apply for a separation order under Part 3 of the Family Proceedings Act. However, such applications are rare because a separation order is not required in order for proceedings to be initiated in respect of property, children, domestic violence or dissolution.

Property Division

New Zealand's property regime

New Zealand has a system of deferred community of relationship property which is codified in the the Property (Relationships) Act 1976.

The right to apply for property division arises upon separation or death of one party.

The general principle is that property generated by the relationship is classified as relationship property and is shared equally between the parties, while separate property remains the property of its owner. There is provision for property to be settled on children, but this is seldom invoked.

Whereas the Australian courts have broad discretion when determining how property should be divided, the Property (Relationships) Act imposes a rigid rules-based regime. Thus, New Zealand parties have a comparatively high degree of certainty but this comes at the cost of the courts having limited discretion to deliver tailored justice in individual cases.

The Property (Relationships) Act is presently the subject of a comprehensive review by the New Zealand Law Commission. Significant recommendations for change have been signalled, however the Law Commission is likely to recommend continuation of a rules-based regime.

Jurisdictional gateway

The Property (Relationships) Act provides a unique jurisdictional gateway which is based on whether property is moveable or immoveable, whether property is situated in New Zealand or overseas, and whether a party is domiciled in New Zealand.

Under the Act, the courts have jurisdiction to make orders in respect of the following categories of property:

- Immoveable property situated in New Zealand.
- Moveable property situated in New Zealand if one of the parties is domiciled in New Zealand at the date of application.

- Moveable 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 moveable 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 (see *Lawrence v Baker [2013] NZHC 2378*).

This is a problematic test which is out of step with tests applied in overseas jurisdictions.

The Law Commission has signalled a likely recommendation that the jurisdictional gateway be changed to a test of whether New Zealand is the 'country with the closest connection to the relationship'.

Domicile

Domicile is governed by the Domicile Act 1976, which inconveniently, omits to define the term.

Case law provides limited assistance as the courts have determined domicile in a very fact-specific way. However, the general concept of domicile invokes the notion of a permanent or indefinite home (as opposed to simple residence) in a particular country, state or territory. It is worth noting that the Family Court in the case of *Humphries v Humphries [1992] NZFLR 18* held that the husband had retained his New Zealand domicile even after he had lived overseas for 35 years.

Among other things, the Domicile Act 1976 provides that a child whose parents are living together has the domicile of the father. If the parents are not living together, the child has the domicile of the parent with whom they have their home.

Although there is a close connection between domicile and habitual residence, the concept of domicile connotes a greater sense of permanence. The courts have determined habitual residence with reference to concepts of "settled purpose" and "actual residence for an appreciable period". A child's habitual residence is usually that of the child's custodial parent.

Choice of applicable law / choice of forum

Parties can agree before or at the time of entering into a marriage, civil union or de facto relationship that the relationship property law of a country other than New Zealand will apply to their property division (*section 7A, Property (Relationships) Act*). The agreement must be in writing or otherwise valid according to the law of that country.

There is no good reason why agreement as to applicable law must be made at the time of entering into a relationship.

There is no provision allowing parties to agree that the courts of a particular country shall have jurisdiction (let alone exclusive jurisdiction) to determine any dispute about division of their property.

Thus, while there is provision for parties to agree on applicable law, any agreement as to applicable law will not be valid unless it was entered into at the time the parties entered into the qualifying relationship, and remarkably, there is no ability for parties to agree on forum.

A New Zealand court can override or disregard a section 7A agreement if application of the foreign law would be contrary to justice or public policy (*section 7A(3), Property (Relationships) Act*).

A party asking the court to apply foreign law must provide sufficient evidence of the law of the relevant country. If sufficient evidence is not provided, New Zealand law will be applied (*Birch v Birch [2001] 3 NZLR 413*).

The Law Commission is poised to recommend changes which better facilitate parties' ability to elect both applicable law and forum.

To whom does the Property (Relationships) Act apply?

The Property (Relationships) Act defines the property rights of married parties, parties united by civil union and parties in a de facto relationship provided the de facto relationship has lasted for more than three years (or shorter in certain circumstances, for example if there is a child of the relationship).

A de facto relationship is one between two persons who are aged 18 years or older, who live together as a couple, and who are not married to each other or in a civil union. The Act provides a list of factors that the courts can take into account when determining whether or not a de facto relationship exists (*section 2D, Property (Relationships) Act*).

A de facto relationship can be between heterosexual or same-sex parties. It is possible for parties to be in a de facto relationship without having lived together in the same house, and without having engaged in sexual relations.

There are numerous cases that demonstrate the difficulty that the courts have had in determining retrospectively, whether parties were in a de facto relationship and if so, when it began and when it ended. Therefore, it can be very difficult to assess whether a client is or was in a qualifying relationship in terms of the Act and, if so, the duration of that relationship.

Duration of a de facto relationship can be all important since if the de facto relationship has lasted for more than three years, the Property (Relationships) Act will apply to define the parties' rights to property division.

A unique feature of the Property (Relationships) Act is that it applies to parties in contemporaneous multi-party relationships, to the extent that each of the component relationships qualifies as a "relationship" in terms of the Act.

In *Chapman v HP, HC Wellington, CIV-2007-485-001372, 2 July 2009*, the court found that the deceased male had left both a wife and de facto partner for the purposes of the Property (Relationships) Act.

In *C v S, FC Dunedin, FAM-2005-012-157, 28 September 2006)*, a mistress applied unsuccessfully for orders against a husband with whom she had enjoyed a covert relationship for several years.

In Greig v Hutchison, [2015] NZHC 1309, a husband attempted to dilute the wife's claim to relationship property by claiming that a long term affair he had had with a workmate during the marriage amounted to a de facto relationship. By the time of the proceedings between husband and wife, the husband and the co-worker were living together, and the co-worker gave evidence to support the husband's claim that he and she were in a de facto relationship during the parties' marriage. The husband's claim failed because the High Court did not accept that his relationship with his co-worker amounted to a de facto relationship.

Note however that under section 25(2), rights under the Act do not appear to arise until after the parties have separated or one party has died. Therefore, in my view, even if the court accepted the claim that the affair amounted to a de facto relationship which lasted for the requisite length of time, any claim by the de facto partner against the husband for a share of relationship property should have failed, because their de facto relationship subsisted.

Principles of division

General scheme

The general scheme of the Property (Relationships) Act is that, after the end of a qualifying relationship, all relationship property is, with very limited exceptions, subject to equal division, provided the relationship has lasted for three years or longer. Separate property remains the property of its owner, but may be the subject of compensatory awards.

Although the apparent simplicity of the scheme suggests a high degree of certainty of outcome, numerous statutory qualifications and exceptions provide considerable scope for uncertainty and litigation.

Other (non exhaustive) principles

The courts have discretion to depart from equal sharing in the following instances:

- If a court considers that extraordinary circumstances exist which make equal sharing repugnant to justice, the court may order unequal sharing and the share of each party shall be determined by each party's contribution to the relationship (*section 13, Property (Relationships) Act*).
- In marriages and civil unions of short duration (i.e. shorter than three years), relationship property is divided not equally, but in accordance with the contribution of each party to the relationship (*section 14, Property (Relationships) Act*). In the case of de facto relationships of short duration, the courts cannot make an order under the Property (Relationships) Act unless certain grounds are established (*section 14A, Property (Relationships) Act*).
- A court can diminish the share of a party in the relationship property if the separate property of the other party has been materially diminished in value by the deliberate action or inaction of the owner party (*section 17A, Property (Relationships) Act*).
- A court can take misconduct of a party into account if the misconduct has been gross and palpable, and has significantly affected the extent or value of the relationship property (*section 18A, Property (Relationships) Act*).

A court has power to award compensation in the following situations:

- Where the separate property of one party has been sustained by the application of relationship property or the actions of the other party (*section 17, Property (Relationships) Act*).
- Where one party has made contributions to the relationship after separation (*section 18B, Property (Relationships) Act*).
- Where a party has after separation, materially diminished the value of relationship property by deliberate action or inaction (*section 18C, Property (Relationships) Act).*

For the purpose of division, the value of property is, subject to the courts' discretion to order otherwise, its value as at the date of hearing (*section 2G, Property (Relationships) Act*).

<u>Classification of property</u>

The classification of property as either relationship property or separate property is central to the property sharing regime, and the Property (Relationships) Act sets the rules for classification.

Relationship property is defined in section 8.

The family home and family chattels are always relationship property regardless of when and how they were acquired.

Relationship property also comprises any other property acquired by the parties during the course of their relationship, provided such property was not acquired by a party out of separate property or as a beneficiary of a trust settled by a third party, or by gift, inheritance or survivorship.

Property acquired for the common use or common benefit of the parties will often also be relationship property, regardless of how it was acquired.

Separate property is all property that is not relationship property (*section 9, Property (Relationships) Act*). It will generally comprise:

- Property owned by a party before the commencement of the relationship, provided it was not acquired for the common use or common benefit of the parties;
- Property acquired by a party as a beneficiary under a trust settled by a third party, or by gift, inheritance or survivorship.
- Property acquired out of separate property even if acquired during the relationship, unless it was acquired for the common use or common benefit of the parties.

It is possible for separate property to acquire the status of relationship property, based on how it was used.

Although separate property remains the property of its owner, any increase in the value of such property, or any income or gains derived from it, is relationship property if the increase in value or the income or gains, is attributable either:

- Wholly or in part, to the application of relationship property.
- Wholly or in part, whether directly or indirectly, to the actions of the non-owner party. However, in this case, the share of the non-owner party is to be determined not equally, but in accordance with his or her contribution to the increase in value. (*section 9A, Property (Relationships) Act*).

Economic disparity

Under sections 15 and 15A, Property (Relationships) Act, New Zealand courts have discretion to award compensation to one party if there will be a significant disparity in the future income and living standards of the parties which was generated by the relationship.

Economic disparity is typically seen where one party, most often the female partner, has sacrificed a career in order to look after the family, and thereby freed the other partner to build a high-earning career.

Compensation for economic disparity can only be made at the time of division of relationship property, and only as a lump sum payment or transfer of property. In the case of section 15, the remedy may only be provided out of relationship property. Under 15A, compensation may be provided out of relationship property or separate property.

Both the restrictive statutory framework and the conservative approach adopted by the courts have meant it has been difficult for applicants to succeed in obtaining relief and relief, when it has been granted, has generally been modest. In *Scott v Williams* [2017] NZSC 185, the Supreme Court modified the calculation of awards however the judgments in this case have left the law in a confused state.

The Law Commission is proposing to recommend the introduction of Family Income Sharing Arrangements (FISA) as a way of addressing the inadequacies of the present law on economic disparity and maintenance. If a party qualifies for a FISA, the amount and duration of the FISA would be determined by a statutory formula which seeks to equalise the parties' income for a period of time that is approximately half the length of the relationship, for up to a maximum of five years.

Property agreements

The Property (Relationships) Act allows parties to:

- Contract out of the statutory regime; and
- Settle a dispute about division of property by agreement.

Contracting out agreements

Under section 21, couples can make any agreement they think fit with respect to the status, ownership and division of their property (including future property) *for the purpose of*

contracting out of the provisions of the Property (Relationships) Act. Such agreements are known as contracting out agreements. Contracting out agreements can be entered into either before or during a de facto relationship, marriage or civil union.

Settlement agreements

Section 21A allows couples to enter into any agreement they think fit with regard to the status, ownership and division of their property *for the purpose of settling any differences between them*. Such agreements are known as settlement agreements. Settlement agreements are entered into after a couple has separated.

How binding are agreements?

A section 21 or section 21A agreement which complies with section 21F is binding subject to the courts' power to set it aside for serious injustice.

Compliance with s 21F

Section 21F requires that in order for a section 21 or 21A agreement to be enforceable, it must comply with certain formal requirements.

Any agreement that does not comply with the requirements of section 21F is void, subject to the courts' power to validate a non-compliant agreement under section 21H of the Act. This power is rarely exercised.

A requirement of section 21F is that the lawyer who witnesses a party's signature on the agreement must certify that he or she provided that party with independent advice on the effect and implications of the agreement before he or she signed the agreement.

For the independent advice requirement to be satisfied, the advice given must be of adequate quality. It must clearly spell out the differences between the parties' positions under the law compared with under the terms of the agreement respectively.

It is unclear whether the witnessing lawyer must be a New Zealand lawyer.

As a matter of best practice, the lawyer who has provided independent advice should be physically in attendance for the witnessing of their client's signature (rather than in attendance by video conference) unless and until such time as legislation or case law makes it clear that an alternative practice is acceptable, and in what circumstances. In other words, it is recommended that either the lawyer or the client should travel if needed, to ensure strict compliance with section 21F. This will be particularly important where there are assets of significant value at stake and/or there is risk that one or both parties may later seek to have the agreement set aside for want of form.

Particular caution should be exercised if one party to the agreement is overseas at the time of execution, since an overseas witnessing lawyer is likely to be unable to provide the requisite advice to a satisfactory standard.

In *Thom v Davys Burton* [*2009] NZLR 437; [2008] NZFLR 1030*, a contracting out agreement was declared void as the wife did not receive adequate advice from the notary public in America (where she was residing and signed the agreement).

To ensure proper compliance with the strict requirements of section 21F, it is therefore highly advisable that the lawyer providing advice should be a New Zealand family lawyer, and that they and their client should be physically in attendance for the witnessing of the client's signature.

Where a client is not prepared to pay for any necessary travel, the next best arrangement would be for the client's signature to be witnessed by a lawyer (preferably a New Zealand lawyer) who is physically in attendance with the client.

Ideally, that lawyer should be in a position to provide the necessary advice to the requisite standard. Having done so, they should provide the requisite certification.

If they are not, then they should adopt independent advice provided by the principal lawyer. In this scenario, it is advisable that the principal should join the agent and client by video link, to first, either provide the advice to be adopted by the agent, or amplify and answer any questions on advice previously given by the principal (eg in writing) that has been adopted by the agent, and secondly, as an added precaution, to view the witnessing of the client's signature by the agent. The agent, as the witnessing lawyer should be the lawyer to provide the certification. The client should of course, be advised that there is a risk (albeit a managed one) that this arrangement may be held by the courts not to comply with the requirements of s 21F.

Serious injustice

A court can set a validly executed agreement aside if it is satisfied that giving effect to the agreement would cause serious injustice (*section 21J, Property (Relationships) Act*).

Unlike the position in many other jurisdictions, there is no requirement for contracting out agreements to reflect the parties' respective entitlements under the Property (Relationships) Act.

By contrast, a settlement agreement is at risk of being set aside by the court on the ground of serious injustice if the agreed property division departs substantially from the parties' respective entitlements under the Act.

The Court of Appeal in *Harrison v Harrison [2005] 2 NZLR 349* has made it clear that the courts will not set aside a contracting out agreement on the basis that one party signed under express or implicit threat that if they did not sign it, the relationship would be at an end. In *DR v NLS (30/6/05, Judge Whitehead, FC Nelson FAM 2003-42-217)*, the agreement was signed eight days before the wedding on the husband's demand that the wedding would not go ahead unless the agreement was signed. The wife was already pregnant with their first child. These circumstances were considered to be normal pressure and not a basis for setting aside the agreement.

Trust-owned property

Since property owned under a trust is neither relationship property nor separate property, family trusts are commonly used in New Zealand as a means of trying to place property out of the reach of the Property (Relationships) Act. Both that Act and the Family Proceedings Act allow the courts to provide remedies to a party whose rights to relationship property have been subverted through the use of a trust. However, such powers are limited and can be ineffective to provide adequate redress.

Recent cases reflect a growing reluctance by the courts to allow one party to avoid sharing property acquired during a relationship through the use of trusts.

For example, in *Clayton v Clayton [2016] NZSC 29,* the Supreme Court held that a husband's power, held in his personal capacity, to add and remove beneficiaries (and thereafter, appoint all of the trust assets to himself), was property in terms of the Property (Relationships) Act, relationship property (on the facts of the case, presumably because the power was acquired during the relationship), and (again, on the facts of the case) that its value was equivalent to that of all of the trust assets. The wife was therefore entitled to receive one half of the value of the trust assets.

This is an area in which New Zealand law differs dramatically to Australian law and is much in need of reform.

The Law Commission is proposing to recommend significant changes to the Property (Relationships) Act to address the anomalies and injustices that arise when property is owned under a Trust, however any consequent change will be a long way off.

Maintenance (see also, section on enforcement of Australian orders in New Zealand)

Partner maintenance

Maintenance can be awarded both before and after dissolution of marriage or civil union, (*Family Proceedings Act 1980*). In the case of a de facto relationship, the de facto relationship is normally required to have lasted for three years before maintenance will be awarded, and an award can only be made after the de facto relationship has ended.

In line with the clean break principle, maintenance is designed to provide temporary relief only and will ordinarily end after a few months or years. Awards for three years duration are not uncommon. Liability can be continued beyond the court-ordered period on certain grounds. A maintenance order will cease when the applicant enters into a marriage, civil union or de facto relationship with another person.

Liability to pay maintenance arises if the court is satisfied that the maintenance is necessary to enable the applicant to meet their reasonable financial needs, where the applicant cannot practicably do so due to one or more of the following grounds:

- The effect of the division of functions within the relationship while the parties lived together.
- Disparity in the likely earning capacity of each party.
- The standard of living of the parties while they lived together.
- Responsibilities for the on-going care of children of the relationship.
- The undertaking by one party of a reasonable period of education or retraining to increase their ability to become self-supporting.
  (*sections 63 or 64, Family Proceedings Act*).

An applicant's reasonable needs are determined with reference to the standard of living that he or she enjoyed during the relationship. Therefore, in *RK v DK [2011] NZFLR 468*, the parties had enjoyed an extravagant lifestyle during the relationship and the court awarded the applicant a comparatively high quantum of maintenance to enable her to continue enjoying a similar standard of living.

In *Sydney v Sydney [2012] NZFC 2685*, the difference between the applicant's reasonable needs and her actual income was reduced to reflect the fact that for part of the relevant time she was receiving financial support from a new partner. In assessing the reasonableness of her budget, the judge noted that while her budget might seem extravagant to some, it would be seen as modest to others.

The court can order payment of maintenance by periodical sums, a lump sum or a combination of both.

Interim maintenance is available upon separation under section 82 of the Family Proceedings Act. An interim maintenance order cannot continue for longer than six months.

The grounds for obtaining maintenance after dissolution are narrower than before dissolution.

In practice, the cost of applying for maintenance is often prohibitive because of the high evidentiary burden borne by applicants and the modesty of awards made by the courts. If Family Income Sharing Arrangements are introduced, as has been suggested by the Law Commission in its review of the Property (Relationships) Act, this would go a long way to alleviating need for applicants to apply for maintenance.

In proceedings under the Property (Relationships) Act for property division, the Family Court must, under section 32 of that Act, have regard to any orders, agreements or assessments regarding maintenance or child support. The Court also has power to make an order for the maintenance of a partner.

A maintenance order can be enforced by the Child Support Agency, which is a division of the Department of Inland Revenue (despite the fact that it is partner maintenance and not child support).

Child Maintenance/Child Support

Child support

Liability to pay child support is governed by the Child Support Act 1991.

Liability under the Act can only exist if the child in respect of whom support is sought is ordinarily resident or domiciled in New Zealand.

A person can be a "liable parent" under the Child Support Act if they are a New Zealand citizen, ordinarily resident in New Zealand or resident of a country with which New Zealand has a reciprocal agreement for enforcement of child support (currently only Australia, and only since 2000).

The Child Support Agency, which is a division of the Department of Inland Revenue, calculates and collects child support if requested.

The amount of child support that a liable parent must pay is determined according to a statutory formula which can be accessed online.

The proportion of time that a liable parent has care of the child may operate to modify the amount of child support payable.

The court's role is residual in that it only deals with applications for departure from the formula assessment.

Parties can agree on their own arrangement for payment of child support (voluntary agreement).

A voluntary agreement is not enforceable if the parent having primary care is in receipt of a state-funded benefit.

A voluntary agreement that is registered can be enforced by the Child Support Agency. Registration of a voluntary agreement does not prohibit either party from applying for formula assessment at any time.

A voluntary agreement that is not registered with the Child Support Agency can be enforced under ordinary principles of contract law. Unpaid child support would then be recoverable as a debt.

Liability to pay child support exists until a child attains the age of 18 years unless the child is enrolled at and attending "school", in which case liability continues until the child attains the age of 19 years.

Child maintenance under the Family Proceedings Act

Residual provisions of the Family Proceedings Act allow applications to be made for child maintenance against a natural parent, however such applications are seldom brought and are mostly used in a cross-border context.

Child support under the Property (Relationships) Act

In proceedings under the Property (Relationships) Act the Family Court must, under section 32 of that Act, have regard to any orders, agreements or assessments regarding maintenance or child support. The Court has power to make an order in relation to child support.

Under section 26A of the Property (Relationships) Act, the Family Court also has power to postpone the vesting of any share of relationship property until a future date or event if it is

satisfied that immediate vesting would cause undue hardship for a party who is the principal carer of one or more minor or dependent children of a qualifying relationship.

In any proceedings under the Property (Relationships) Act for property division, the Family Court is bound by a duty to have regard to the interests of any minor or dependent children of a qualifying relationship and has a discretion to make an order settling any part of relationship property for the benefit of the children of a qualifying relationship (*section 26, Property Relationships Act*). However, applications under section 26 are not commonly made, and the Family Court does not exercise its power to settle property for the benefit of the children lightly, because doing so has the potential to totally displace the property rights and statutory interests or claims of the parties under the Property (Relationships) Act (*Walker v Walker [1983] 2 NZFLR 240 (CA)*).

Children

Custody/parental responsibility

New Zealand legislation uses the terms, day-to-day care, contact and guardianship, in place of terms such as custody, access and parental responsibility.

A child's guardians have the legal responsibility of their upbringing.

Generally speaking, the duties, powers, rights and responsibilities of a guardian relate to important issues affecting a child's life, such as education, religion and health.

In most cases, a child's parents will be their guardians. However, a child's mother can be their sole guardian in certain circumstances, including where the mother was:

- Not married to the father of the child at any time during the period between the conception of the child and the birth of the child.
- Not living with the father of the child at any time during the period between conception of the child and the birth of the child.

Additional guardians may be appointed by the court.

Co-guardians hold rights equally.

Disputes about children

Disputes about children are governed by the Care of Children Act 2004.

The welfare and best interests of the child is always the paramount consideration in Care of Children Act proceedings (except proceedings invoking the Hague Child Abduction Convention).

In deciding what a child's best interests are, the court must consider the principles listed in section 5 of the Care of Children Act.

- A child's safety must be protected, and particular reference is made in the Care of Children Act to safety from domestic violence.
- The court must enquire whether a final protection order has ever been granted against either of the parties, and if so, must have regard to:
  - Whether the order is still in force.
  - The circumstances in which the order was made.
  - Any written reasons given by the judge who made the order.

In the absence of a parenting order, no parent or guardian has a prevailing right to have care of a child after separation.

A parenting order may specify the nature and frequency of contact that the parent who does not have day-to-day care of the child should have, and may impose conditions on contact.

A parenting order determining the person(s) who shall have the role of day-to-day care cannot be made for a child over the age of 16 years except in special circumstances.

The child/children must be given an opportunity to express his or her views and the court must take those views into account.

In any contested dispute about the care of children, the court may appoint a lawyer for the child or children if it has concerns for the safety or wellbeing of the child and considers an appointment necessary (*section 7, Care of Children Act*). In practice, lawyer for child is appointed in all contested cases about the care of a child.

Judges will often meet with children themselves, with lawyer for the child present.

The role of lawyer for the child is to provide the child with an opportunity to express their views on the questions before the court and to advocate for the child's best interests. Where there is a conflict between a child's views and their best interests, the court will usually appoint counsel to assist the court, to advocate for best interests.

Relocation of children

Relocation of children, whether within New Zealand or internationally, is a guardianship decision and may not be made by one guardian unilaterally. Therefore, a parent proposing to relocate a child must obtain the consent of the other guardian or guardians to do so.

Failing that, they are expected to apply to the court under the Care of Children Act for permission to relocate. If permission is not obtained before relocation takes place, there is a good chance that on application by the non-consenting parent or guardian, the court will order the child to return to their original place of residence.

The overriding consideration for the court in determining applications for relocation of children is always the welfare and best interests of the child. Some of the factors to be considered in determining best interests include continuity of the child's relationship with each parent and their wider family group, the child's safety and preservation of the child's cultural identity.

The court's inquiry is intensely fact specific and multifaceted. No presumptive weight is to be given to one or more factors (*Kacem v Bashir [2010] NZSC 112, [2011] 2 NZLR 1*) and it is inappropriate for the court to apply a "one size fits all" checklist in determining relocation cases. This means that it is often impossible to predict a likely outcome in any given relocation case.

As with all contested disputes about the care of children, the court may and invariably will appoint lawyer for the child to ascertain the child's views and to advocate for their best interests. The court must take the child's views into account.

A parent who fears, on reasonable grounds, that the other parent or guardian is proposing to remove a child from New Zealand without consent or court permission can apply to the court for an order preventing removal of the child from the jurisdiction, and for a border alert. A border alert places a computer alert at every New Zealand international airport, and this operates to prevent the child from passing through New Zealand customs. It therefore serves as a highly effective means of preventing their removal from the jurisdiction.

International abduction

Child removed from a Hague Child Abduction Convention state to New Zealand

New Zealand is a party to the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention).

New Zealand's obligations under the Hague Child Abduction Convention were enacted into domestic law in sections 94 to 124 of the Care of Children Act.

New Zealand courts take seriously their obligation to hear and dispose of Hague Child Abduction Convention applications expeditiously and most cases are resolved within two to four months.

Generally speaking, New Zealand courts adhere rigorously to a policy of immediate return. It is difficult to successfully defend an application for return.

The term "rights of custody" has been interpreted very widely by the courts. As a result, left-behind parents have been held to have the requisite rights of custody when they had no custody rights, and only had rights of access to the child (*Fairfax v Ireton [2009] NZFLR; 433 [2009] NZCA 100*).

The New Zealand Central Authority can enlist the assistance of the New Zealand police to locate the abducting parent and child.

New Zealand provides free legal representation for left-behind parents in Hague Child Abduction Convention cases. The Central Authority will appoint a lawyer to represent it and apply to the court for return. The left-behind parent is not normally required to attend at the New Zealand court proceedings.

It is worth noting that the court has power to make an order preventing the removal of the child from New Zealand and, if necessary, to issue a warrant to uplift the child in order to facilitate his or her return to the country of habitual residence.

Child removed from a non-Hague Child Abduction Convention state to New Zealand

Where a child has been abducted from a non-Hague Child Abduction Convention state to New Zealand, and the child is present in New Zealand, the left-behind parent can apply to a New Zealand court for the following orders under the Care of Children Act:

- Provided the left-behind parent is a guardian, an order resolving a dispute between guardians as to where (in which country) the child should live.
- A parenting order vesting the day-to-day care of or contact with the child in the applicant or imposing a condition that a child shall reside in a specified country.
- A warrant to enforce a parenting order.

In determining such applications the court must determine the case in the best interests of the child. Therefore, it would order the return of the child to the original jurisdiction only if satisfied that such an order is in the child's best interests.

Child removed from New Zealand to a non-Hague Child Abduction Convention state

When a child has been removed from New Zealand to a non-Hague Child Abduction Convention state, the remedies available to the left-behind parent are very limited.

In *Jayamohan v Jayamohan [1996] 1 NZLR at 172; [1995] NZFLR 913,* Blanchard J held that, where children have been unlawfully taken from New Zealand but the abductor is present within the jurisdiction, the High Court can issue a writ of *habeas corpus* directing the abductor to bring the children back to New Zealand and to be brought before the court.

Alternatively, an application by the left behind parent can be made for an order placing a child under the guardianship of the Court.

In *H v J [1997] NZFLR 307*, the abduction occurred in India and both parents returned to New Zealand. Gendall J exercised the court's wardship jurisdiction, stating:

> " … jurisdiction to appoint children wards of the Court…exists expressly when the parents are present within the jurisdiction, where the child or children are citizens of New Zealand and domiciled in New Zealand taking their domicile from that of their parents".

The wardship jurisdiction has since been used in several more cases. However, the usefulness of this remedy is limited by the extent to which the justice system in the non-Hague Child Abduction Convention country is prepared to enforce the New Zealand court order and order the return of the child to New Zealand.

If the abductor is not in New Zealand, it is normally best for the left behind parent to engage a lawyer in the country where the child has been taken to, for the matter to be dealt with under the law of that country.

Forum conveniens

Trans-Tasman Proceedings Act 2010

The New Zealand Trans-Tasman Proceedings Act 2010 and the Australian Act of the same name each applies a common statutory *forum conveniens* test known as the "more appropriate forum test".

When deciding whether to stay proceedings on the basis of this test, the New Zealand Court must take into account eight factors, set out in in s 24(2):

- The places of residence of the parties or, if a party is not an individual, its principal place of business:
- The places of residence of the witnesses likely to be called in the proceeding:
- The place where the subject matter of the proceeding is situated:
- Any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be instituted (other than an exclusive choice of court agreement to which section 25(1) applies):
- The law that it would be most appropriate to apply in the proceeding:
- Whether a related or similar proceeding has been commenced against the defendant or another person in a court in Australia:
- The financial circumstances of the parties, so far as the New Zealand court is aware of them:
- Any other matters that the New Zealand court considers relevant.

While the Australian Trans-Tasman Proceedings Act expressly prohibits the court from taking into account the fact that the proceeding was commenced in Australia *(s19 Australian Trans Tasman proceedings Act),* there is no correlating prohibition in the New Zealand Trans-Tasman Proceedings Act.

An exclusive choice of court agreement is a written agreement between the parties which designates that the courts of a specified country shall have exclusive jurisdiction to determine disputes between those parties. Section 25 requires the court to give effect to exclusive choice of court agreements in most circumstances.

Section 25 may not apply to family law cases because such cases involve parties acting primarily for personal, family or household purposes *(section 25(4)(b) Trans Tasman Proceedings Act)*. Despite this it may still be a good idea for parties to enter into an exclusive choice of court agreement (or to include an exclusive choice of agreement clause in a contracting out agreement) since such agreements are likely to be taken into account by a court in determining the issue of more appropriate forum.

Foreign jurisdictions other than Australia

Civil cases

A New Zealand court will grant a stay of proceedings in favour of a foreign jurisdiction that is not Australia if the applicant can establish that the New Zealand court is *forum non conveniens.*

In *Gilmore v Gilmore* [1993] NZFLR 561, the High Court adopted the legal principles articulated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. It set out an eight-proposition test to assist in determining issues of *forum non conveniens*. The *Gilmore* test was extended by the High Court in *Howson v Howson* (2/5/02, Master Faire, HC Hamilton, CP 52/01).

The Gilmore approach still holds attraction for the Court's however it should be noted that the High Court in *Wang v Yin* [2008] 3 NZLR 136 criticised the *Gilmore* test, preferring the two-step enquiry taken by the House of Lords in *de Dampierre v de Dampierre* [1987] 2 All ER 1.

A range of factors are considered by a court in identifying the more appropriate forum. These include:

a. Cost and convenience of proceedings in each of the potential jurisdictions;
b. The location and availability of witnesses;
c. How litigation has proceeded in these jurisdictions (in other proceedings);
d. Whether all the parties are subject to New Zealand jurisdiction so all issues may be resolved in a single hearing;
e. Whether the relevant law is New Zealand law or foreign law (because it is preferable to apply the law of a country in that country);
f. The existence of any agreement that refers to the appropriateness of either country to hear the dispute;
g. The strength of the plaintiff's case;
h. Whether the judgment must be enforced;
i. Whether the application is being made to gain a tactical advantage or whether it is because the defendant truly wants the hearing to be in another forum;
j. Any procedural advantage in the particular jurisdiction; and
k. Whether the other jurisdiction has held it is the most appropriate forum.

Relationship property cases

In relationship property cases, the New Zealand courts have been influenced by where the property in dispute is located and the law that will be applied to determine the rights of the parties.

Child cases

The relevant principles applying to *forum non conveniens* in the specific context of child issues cases have been summarised by the Family Court in *CG v SG* (2005) 24 FRNZ 502. After

reviewing the cases, the court stated that the following are the key principles applying to *forum non conveniens* applications in the context of child issues cases:

- The overriding consideration in all cases must be the objectives of the statutory provision under consideration, in this case section 23 of the Guardianship Act (now section 4 of the Care of Children Act). The decision of which forum is best capable of achieving a decision must be framed in terms of the best interests of the child.
- The onus rests on the party seeking foreign adjudication.
- The burden of showing greater suitability of the other jurisdiction is not merely to show New Zealand is not the natural or appropriate forum, but to establish that the foreign forum is "clearly and distinctly more appropriate".
- In reaching the decision the court must not be reactive to the conduct of the parent removing or retaining the child, but on what is in the best interests of the child.
- The issue is not primarily one of jurisdiction but whether, in all the circumstances, and having regard to the child's welfare as the first and paramount consideration, the foreign court or the New Zealand court is best able to determine all custody access and related questions.
- Even where the Hague Child Abduction Convention does not apply, it is appropriate for the court to have regard to its policy.
- The court must also recognise the importance of the United Nations Convention on the Rights of the Child (UNROC).

The court also stated that, in determining the application according to those principles, the court can draw from a range of considerations including, but not limited to:

- Trial mechanics and evidentiary considerations.
- Timeframe for determination.
- Personal circumstances.
- Where the child is living.
- Connection with each country.
- Qualitative comparison of competing jurisdictions.
- Whether there were genuine proceedings or juridical advantage.
- Enforcement.
- Existing or proposed concurrent proceedings and effect of different outcomes.
- Submission to jurisdiction.

Enforcement of Australian orders in New Zealand

Relationship property orders

An Australian judgment for division of relationship property can be enforced in New Zealand by registering of the Australian judgment under the Trans-Tasman Proceedings Act 2010.

Only judgments which meet the definition of a “registerable Australian judgment” may be registered in New Zealand. One of the requirements is that the Australian judgment that is ‘final and conclusive’.

In a family law context, judgments that are excluded from being “registerable Australian judgments” are:

- Dissolution of marriage;
- Spousal maintenance;
- Child support;
- Welfare of children;
- Granting of probate and letters of administration;
- Orders which if contravened will make a person liable to conviction for an offence.

Child support/maintenance and partner maintenance orders

In July 2000, the Australian and New Zealand governments entered into an agreement to facilitate the collection of child support determined by formula and court-awarded maintenance for children and/or former partners. Under the 'Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance', agencies in each country can each collect child support and maintenance liabilities assessed by the authority in the other country.

Both New Zealand and Australia are signatories to United Nations Convention on the Recovery Abroad of Maintenance 1956 (UNCRAM). New Zealand's UNCRAM obligations are enacted into law in the Family Proceedings Act 1980. UNCRAM covers solely court-based child and partner maintenance. A custodial parent resident in an UNCRAM country may apply to the New Zealand Family Court for a maintenance order against a New Zealand resident and vice versa. Any resulting Family Court order is forwarded to the Child Support Agency for collection under the Child Support Act.

Parenting orders

Under the Care of Children Act, a final parenting order made by an Australian court (ie an order about the day to day care of or contact with a child) can be registered in the New Zealand court if the child, or a parent or a person who is entitled to have care of or contact with the child under the terms of the Australian order, is in or is about to proceed to New Zealand. Once registered, the order may be enforced, varied or discharged as if it were an order made by a New Zealand court (*sections 81-82 Care of Children Act).*

It is a source of frustration that there is no provision that allows for enforcement in New Zealand of an overseas parenting or guardianship order (other than an Australian order). Thus, a parent with a non-Australian overseas parenting or guardianship order who wants enforceable parental rights in New Zealand must apply to a New Zealand court for a New Zealand order, and the court must consider their application afresh. The overseas order would be of evidential value only.

Australia has signed the HCCH Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (Hague Child Protection Convention). New Zealand is considering signing, but at this point, has not.

Surrogacy

The main statute relevant to surrogacy is the Human Assisted Reproductive Technology Act 2004, which defines a surrogacy arrangement as an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy.

Section 14 of the Human Assisted Reproductive Technology Act specifically states that altruistic surrogacy agreements are not illegal. However, these arrangements are also not enforceable.

Commercial surrogacy arrangements are illegal. Nevertheless, certain payments are allowable, including payments to cover the costs of insemination, counselling and legal advice for the woman who is to become pregnant.

The Status of Children Act 1969 provides that a woman who gives birth to a child is its mother, even if the ovum has been donated by another woman (*section 17, Status of Children Act 1969*). Commissioning parents therefore have no formal status either as parents or as guardians.

A child born overseas in a surrogacy arrangement will not automatically be eligible for New Zealand residency and citizenship just because he or she has demonstrable genetic consanguinity with a New Zealander.

Parties are free to enter informal arrangements under which the commissioning parents will fulfil the role of parents, but the only way for the commissioning parents to become the legal parents is by adopting the child.

Adoption

Adoption is governed by the Adoption Act 1955 which is outdated and badly in need of reform.

An application for adoption can be made by an individual, or jointly by a couple.

Restrictions apply to both types of application.

In respect of individual applications, an individual male cannot adopt a female child unless the court is satisfied that he is the father of the child, or that there are special circumstances that justify the making of the order (*section 4(2), Adoption Act*).

While a married person can make an individual application, the adoption cannot go ahead without the consent of the applicant's spouse (*section 7(2)(b), Adoption Act*).

Joint applications can only be made by two spouses. Traditionally this limited applications to married heterosexual couples.

However, the Marriage (Definition of Marriage) Amendment Act 2013 now allows same-sex couples to marry in New Zealand. The passing of this Act had obvious ramifications for adoption because by allowing same sex couples to marry, it also allowed them to jointly apply as spouses to adopt a child. For example, in *Re Crawley [2014] NZFC 7652* a married male same sex couple was allowed to jointly adopt two children.

In *Re AMM [2010] NZFLR 629 (HC)*, the High Court ruled that unmarried opposite-sex couples in a stable de facto relationship were spouses for the purposes of the Act. Same sex couples were expressly excluded by this decision. However, following the decision in *Re Pierney [2015] NZFC 9404,* same sex de facto couples are now spouses for the purposes of the Adoption Act and therefore can now adopt jointly.

Anomalously, a civil union couple cannot jointly adopt a child because the partners are not spouses.

Before an adoption order can be made, consent must be given by the parents and guardians of the child, or their consent must be dispensed with by the court.

Adoption applications cannot be made until after the child has been born.

Conciliation, mediation, collaborative law and arbitration

There is a strong emphasis on conciliation and encouraging parties to reach agreement.

A lawyer acting for a party or proposed party in any proceeding in the Family Court is required by statute to promote conciliation so far as possible *(section 9A Family Court Act 1980).*

In child disputes, separated parents can and are expected to attend state-funded parenting information programmes before making application to the courts for a parenting order or variation of a parenting order.

Generally, a parent who wishes to file an application in the courts about the care of their child is also required to attend FDR or obtain an exemption from having to do so. FDR is a mediation process and in some cases, may involve preparatory counselling (preparation for FDR). Parties who cannot afford to pay for FDR may apply for state funding.

When lawyers for children are appointed by the court, they are usually briefed to assist parties to resolve issues by agreement.

The courts have power to refer parties to counselling.

In any family law dispute, a judge can convene a judicial settlement conference to help parties to explore whether agreement can be reached. If agreement is reached, the judge can make orders by consent.

Parties may privately engage a counsellor, mediator or arbitrator.

Whenever agreement is reached, the parties can ask the court to seal their agreement as a court order or can record their agreement as a formal written agreement.

Collaborative law is practised in New Zealand, but not extensively.

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