The Family Advocate

Spring 2017
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The Family Advocate welcomes articles from readers and those involved in family law. These can be sent to the Editor at the address below.

The closing date for the next issue is **13 November 2017**.

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FROM THE CHAIR

Kirsty Swadling

I sit down to write this, my first *Advocate* column as recently elected chair of the FLS, reflecting on the many columns written by previous chairs. This highlights to me the journey along which family law practitioners have travelled over the past 20 years, as we head towards the 20th year of the section's being. The responsibility for and privilege of this column now falls to me. I first wish to take this opportunity to acknowledge the immediate past chair, Michelle Duggan for her work as chair and her ongoing work for the section. Aristotle said that "the whole is greater than the sum of its parts" and this seems to aptly describe the way in which the section reflects the input and work of all chairs and the special skills and insights that they each offer during their terms. Thank you, Michelle, for your valued contributions.

At the time of writing this column the Family Court is again facing criticism. There have been stories in the media such as the uplift of children pursuant to warrants issued, criticism stemming from the clarification of the interpretation of the Domestic Violence Act relating to when protection orders should be made by the Court of Appeal in *SN v MN*[1] and more. There have been calls for a ministerial inquiry into the Family Court. Whether or not this call is taken up may depend on the results of the forthcoming election, which are unknown at the time this edition is going to print but whose outcome may well have an impact on the Family Court arena.

While any organisation can benefit from close inspection, reflection on process and focus on possible improvements, there must be concern that the delay and expense that would be occasioned by such an enquiry would not prove warranted. Rather, the resources that would be required for such a step could be better spent on the resourcing of the Family Court and enabling all people in dispute full access to justice. Perhaps efforts may be more profitably directed towards reviewing the impact of the Care of Children Act reforms from 2014. The Children's Issues Centre at Otago University are currently undertaking in depth research of those impacts and the executive will be watching with interest the findings of that research.

We are all aware of the increase of without notice applications in cases relating to children since the changes were implemented. I recently discovered that there is a similar correlation between the commencement of the changes and a significant increase in warrant applications (up by over 200 for the two years following the implementation).

> I hope that kneejerk reactions can be avoided and that recognition can be given to the fact that laying the blame at the feet of our Family Court judges is neither productive nor fair.

What exactly that signifies, without further analysis, is difficult to determine but I hope that kneejerk reactions can be avoided and that recognition can be given to the fact that laying the blame at the feet of our Family Court judges is neither productive nor fair. Whatever happens, the executive will be looking for every opportunity to engage, as appropriate, over improvements either proposed or identified as being in the interests of promoting the best access to justice for families in conflict.

As family lawyers, we see people in crisis on a regular basis. I am not sure that we recognise sufficiently the extent to which this may impact on our wellbeing and the need to focus on our resilience and wellness. The executive has been working on a project to help focus on the issues that can arise during the course of our practice and can impact on us more than we might appreciate at the time. I would like to thank the practitioners who have been willing to share their stories so that we can focus on these issues with a greater awareness that it "could happen to me". I read in a recent article the reminder that we should "secure our own oxygen masks before assisting others", which sums up for me something that we family lawyers could be better at. We need to focus on allowing ourselves down time and remember that things like healthy eating and exercise are not optional extras but allow us to cope with the stressors that we deal with on a daily basis. Luckily, we family lawyers are generally a collegial bunch and this certainly helps. The NZLS CLE Ltd family law conference, although not run by the FLS, is an ideal opportunity for family lawyers from all over the country to connect, reflect on things past, explore current developments and look to the future. If you haven't already registered, I would encourage you to do so.

If you are able to make it to the conference I would encourage you to attend the paper to be presented by Law Commissioner Helen McQueen on the relationship property review. The discussion document the commission has been working on is due for release shortly before the conference and this will be an ideal opportunity to understand the issues that are under review and regarding which we as a section will want to ensure we provide detailed submissions. The results for the inaugural nationwide survey of lawyers on relationship property practice which the section has been involved with in conjunction with Grant Thornton will be presented. This promises to be a very interesting report.

I look forward to seeing many of you at the conference.

1 [2017] NZCA 289.

FROM THE EDITOR

C. Murray Earl

The Adams Family Court – Oh dear are we going through another change? Perhaps!!

As we prepare for the family law conference in October, we are again faced with comments being made in the media by the Minister for Justice and by the public criticising the Family Court and how it operates.

On 5 July 2016, Minister for Justice Amy Adams announced to Parliament's Justice and Electoral Committee that a review of the Family Court law reforms is scheduled to begin in 2017.

Concerns were expressed that in February 2016, more than 80% of applications made under the Care of Children Act 2004 were filed as "without notice" applications. The minister "wondered" whether this indicated that there were delays within the Family Court.

The minister also said that the "reforms have resulted in several improvements, for example, more cases are able to be resolved through dispute resolution, which allows families to contribute to successful outcomes and frees up court time for serious cases."

Seriously, the minister should not be wondering whether there are delays in the Family Court. We all know that there are delays in the Family Court. While this contributes to the increased number of without notice applications, delay is not the only or major reason for them being made.

The changes made to the Family Court in 2014 were to resolve delays. We identified that the reason why there were delays was simply the lack of resources. That hasn't changed. As the population grows and family structures become more complicated, cases will become more difficult. Difficult cases take longer to deal with and that creates further delays within the system.

It is disappointing that the minister is claiming as a success the work that family lawyers who represented families before the changes were doing. That is most cases with the assistance of lawyers, settled before proceedings were filed (or soon thereafter) leaving only a small percentage to go to defended hearing. An evaluation of the changes should measure whether the introduced Family Dispute Resolution service (out of court process) has increased the number of cases settling compared with the successful Early Intervention Process (in court mediation) that operated prior to the 2014 changes.

In every case where a care of children matter is settled the families contribute to the successful outcome. The intervention of counsellors and lawyers previously assisted in that process and on occasions provided ongoing assistance to the parties to resolve minor matters without the intervention of court.

It would be more beneficial if the minister concentrated on the failures of the changes including:

- people complain about having to attend court without the assistance of legal representation;
- the forms are complicated and long and do not provide the information required by those who have to use them in making decisions or giving advice;
- the tracks do not work and have been modified by the judiciary to be fit for purpose;
- the removal of abridgement for time in "semi-urgent" cases has resulted in the delay of safe interim arrangements being put in place for children and families;
- the processes are difficult for those people who are taking children into their care, such as foster parents and grandparents; and
- for a so-called child-focused system it has failed to provide any counselling for children.

We had a gold standard Family Court and in the current financial circumstances I believe that is still achievable. Families are entitled to have their disputes resolved by the courts quickly and efficiently. The changes did not encourage a quick and efficient resolution of family disputes. The family justice system prior to the changes could have been made more efficient and family/child focused.

In its submission, prepared by the FLS on the Family Court Proceedings Reform Bill, the Law Society raised concern that the absence of legal representation and costs associated with self-represented litigants would significantly increase the time required by judges and court staff. The submission states that "rather than creating a more streamlined process, additional delay may occur." It also proposed robust case management and the streamlining of the process itself by reducing the number of court events. Ironically there are now far more court "events" under the new system than there were before the changes were introduced.

Whatever the result of the election family lawyers need to be aware of the work that needs to be done to preserve the rights of families to have their disputes resolved efficiently by a court. Lawyers need to show how they add value to the process.

We need to dispel the myths that arise from statements made about successes of a system that has increased delays in the Family Court. Our conference is an opportunity for each of us to discuss how the process could be improved to provide better and quicker results for families in need of a decision being made for the benefit of their families and the children.

New FLS executive member

Lauren Pegg – Dunedin

I have been in practice in Dunedin for 12 years at O'Neill Devereux, where I am a partner. My practice includes all aspects of the Family Court's jurisdiction as well as trusts, wills and conveyancing. I am a lawyer for child. Until the end of 2016 I was a legal aid provider.

I have been the FLS Otago regional representative since May 2010. I am also on the Dunedin Family Court judicial liaison committee. Since 2015 I have co-organised the annual Otago lawyer for child forum. I am currently the chairperson of the Otago Family and Youth Courts Association. I am an Otago Women Lawyers Society member and past committee member. In all of the above roles I have organised many and varied events on topical issues relevant to family law practice.

With a background in social work (in health), I have an interest in people and their relationships. I firmly believe that how family law is practised is integral to our communities' well-being. The FLS has a pivotal role in leading and supporting family lawyers to be the best that they can be. I have observed the work of the FLS executive through my role as regional representative and my appointment to the executive will allow me to be more closely involved and provide the opportunity to represent the lower South Island, its regional lawyers and support the FLS advocacy, objects and aims.

I am married, and have two young adult daughters. Outside of law, I enjoy reading (so much so that I belong to two book clubs), skiing, cycling, gardening and spending time with family and friends.

Claudia Elliott

Interview by C. Murray Earl

Talking to Claudia Elliott gave me the opportunity to hear how a New Zealand family lawyer and member of the Family Law Section has contributed to the work towards elimination of violence against women in Afghanistan.

How did you get to being a lawyer?

I grew up in Ngongotaha just out of Rotorua. I lived there until I went to teacher's college in Hamilton to train to be a teacher. In my era if you attended Rotorua schools and you're a girl (even if you were a reasonably bright girl) you went teaching or nursing, and so teaching I did.

I took teaching roles at Murupara and Rotorua and then escaped and went to Australia. I taught for a short time before I started travelling around the world for the next seven years, during which time I went for my first trip to Afghanistan. At the end of my travels when I returned home I decided teaching was not my thing so went to law school in Auckland and got a law degree.

When did you start your law practice?

When I qualified I went back to Rotorua to work in the law firm O'Sullivan Clemens. There I worked with Jon Briscoe, Grattan O'Sullivan, Doug Clemens, John Hughes, Gary O'Neil and John Murray (who I had been at school with). Grattan told me if you don't learn something new in the law each day you should move on.

While I was at O'Sullivan Clemens, Margaret Wilson (who had taught me industrial law) said to me that she knew someone else in Rotorua that I'd probably get along with, and so I met with Jan Walker (now retired Family Court Judge, doing ACC and civil) and we set up together an all women practice in Rotorua doing general, but principally Family Court work. At the time we were known as the "pinko" lawyers.

We had a busy practice, probably because we were the only "all women" practice in town. We ended up with a large percentage of Māori and Pakeha women clients, who needed assistance with family matters. Because of the cultural issues that arose from the population in Rotorua, I think that was what started me thinking about overseas work.

In Rotorua, I had a great relationship with John Chadwick whose office was close to ours. I enjoyed his humour his practical and sensible approach to the law. His death was a great loss to Rotorua. On Judge Walker's appointment to the bench I moved to Auckland. My family live in Auckland and they had been saying to me for some time that I should come to Auckland. I have enjoyed my shift to Auckland and haven't looked back.

The move has been good for me professionally. The profession is a very supportive and friendly crew, in spite of what other people might think. I don't think there is a single court that I would not feel like I could go and talk to anyone I needed to about issues. Auckland gets a bit of a bad rap on occasions from the rest of the country but that's not been my experience. I guess I am now handing that back to others, who are new to practice or new to town.

You were appointed to the Film and Literature Board of Review – how did you find that experience?

I spent nine years on the Film and Literature Board of Review. This is a body that reviews publications that have been classified by the office of film and literature classification. It is an independent body carrying out a quasi-judicial function. In the nine years I was on the board, I saw a few dirty movies, a few violent movies and a few awful games, but the work was interesting.

As a lawyer, you look at classifying material quite clinically and either it met the criteria or it didn't. I was part of a very good team including Peter Cartwright who was very sensible and of great assistance. The board had a wide variety of backgrounds: psychologist, lawyer, filmmakers. I think we were a fairly broadminded group really.

While you were on the board was there anything that said "this goes too far"?

There is one film that I still have "flashbacks" about and sometimes when I'm travelling and go into a dark castle I think "arrgh". The film was never released in New Zealand because we asked for sufficient cuts in the film that the distributor decided that it was not worth releasing. In considering movies like this the board had to follow the law and offer the distributor the opportunity to cut a movie before it is banned.

Now we come to what I really want to talk to you about: How and when did you get to be involved in the work you are doing in Afghanistan?

In 2013, the United Nations Development Programme (UNDP) decided to undertake a review of the functioning of the prosecution units for the elimination of violence against women in Afghanistan, in particular in Kabul, Mazar-e-Sharif, Herat and Jalalabad. I was contracted to do the review, and recommended the establishment of a specialised court on the Elimination of Violence Against Women (EVAW), to enable the prosecution units to function effectively, in light of the difficulties of limited management, training and resources, and a high level of corruption faced in all of the government ministries, including the court system.

A friend who was working in Afghanistan advised the head of the Access to Justice Project that he knew someone who would probably be crazy enough to come to Afghanistan to do the work. I applied, and got the contract.

What was the scope of your work on this program?

My first job was to go and look at the prosecution units. They were not the police. They are actually lawyers and they are attached to the office of the Attorney General. We were looking at how well the EVAW law prosecutors were dealing with domestic violence cases.

There was already a Presidential Decree in 2009 which had established the EVAW law. It is progressive, although as with any law you would make some changes given the chance, but it has never been passed

by Parliament. Although the Executive Order on EVAW was a significant step in the battle for the elimination of violence against women, the law remains vulnerable to being reversed at any time by Parliament.

It actually made all of the internationals pretty happy having this law and it was a brilliant start. It is very specific legislation, very appropriate to Afghanistan and it covers things from rape and acid throwing and other assaults, but it also covers things like refusing to let a woman have any contact with her own family, depriving her of her inheritance, education, healthcare or employment – those sorts of civil charges, so very practical stuff.

Was the prosecution group given the task of bringing people to justice?

Yes and they didn't! They were failing. There were a very low number of cases that ever went to the court and they were prosecuted so poorly. The quality of advocacy was low and corruption was high. In other words, the accused person could go along to the prosecutor and anyone else and say here is some money – how much do you need to let me off, and it happened regularly and it still happens.

What risks were there to the people you were talking to?

Huge risks and there were deaths. There were two, a prosecutor and a judge, whom I spoke with in Jalalabad, both of whom had been shot at previously, were actually shot and killed shortly after I spoke to them. Not necessarily because I spoke to them, but because they are working in the justice area, and because they had made comments about protecting women against violence.

A number of the young women prosecutors and defence lawyers have been kidnapped, because of the job they do. Some of them were released relatively quickly, but you really wouldn't want to be released after they've had you at all. Some I assume were killed. I just don't know the full details. Certainly, they would not go back into the law.

I saw a prosecutor, featuring on Aljazeera walking his way across to Europe with his two pre-school kids and wife, still in his suit that he wore when he prosecuted, but he just couldn't take it any longer.

One of the head prosecutors in Herat had 24-hour armed protection paid for by the Americans and she said at the time, if the Americans stop paying, and they will sometime, I'll be dead. She used to have someone with an AK47 sitting in her chambers and another one outside her door. But they carry on – that's their commitment to justice, and protection of women

> *"Setara's husband cut her face and chest with a knife, disfiguring her for life and only narrowly failing to kill her... Setara woke up when he was cutting off her nose with a knife. As she fought back, he stabbed her chest, slashed her lips and continued to beat her until she lost consciousness again."*
>
> **The Guardian 5 May 2015**

Did you talk to women in refuge? What did you see when you did?

I saw and spoke to a variety of women in refuges, some of whom came from reasonably educated families and some of whom were country women. They all had horrendous injuries from axe gashes right across their faces to chopped off ears, chopped off noses, and those were only the injuries you could see. A lot of them had broken bones, and awful internal injuries. The refuges are run and paid for by international donors. They are run by Afghan women and they have police at the refuge to keep anyone out. They have kids at the refuge. One of the refuge's tasks is to find a new husband for these women because that is the only way they will ever be able to leave the refuge. I saw women who had been there for five years and had had no contact with family. Often they didn't have their children with them because Sharia law says men have possession of children.

How many refuges are there in Kabul?

No idea – I went to five or six different refuges including a children's refuge. This was a refuge for children whose mothers were largely in jail and the children would be disowned by their maternal and paternal family. The civil society people would go into the prisons and find out where the children were. They were generally living on the streets so they would pick them up and take them to the refuge. The children didn't ever leave the refuge, but they had schools operating in the refuge. The kids got an education and had a better chance than they may have had, but they didn't have any family.

A lot of the women would have been in jail for things like adultery – if you look at, or talk with a man whom you are not married to, or closely related to, you are charged with attempted adultery. Penalties for women convicted of moral crimes range from medium- to long-term imprisonment. A large number of the women were victims of arranged, or more likely forced marriages, and were potted by their paternal family who didn't like them. The husband, or his family would manufacture a charge, such as running away (which isn't a crime) but the women would be charged, and they had no defence lawyer to act for them so prison was inevitable.

Are the cases against women conducted in a religious court or civil court?

A civil court. Under EVAW law however the defence lawyers have the ability to act for the complainant or the defendant, and they prefer to act for the complainant because they are probably nicer people, and it's an easier job. But in any event the judges just ignore defence lawyers. It is like having a social worker in court. I kept telling defence lawyers they needed to be lions in court not mice!

After you had made that enquiry you reported back on that to the UN and what did the UN do?

I reported back and I made some suggestions as to how we could firstly increase the skill level of the prosecutors, and develop the skill level of defence lawyers which was practically non-existent, and also increase the skill level of the judges, who had limited judicial skills, and even less recognition of what family violence was, or the dynamics of it.

Was it a re-education of the legal profession through to the judiciary?

Yes, but that was too big a task, so I suggested we set up an EVAW court. We could take out a small section of prosecutors, defence lawyers and judges and give them training which would help them not only in the EVAW court, but also in the general civil and criminal courts. The government agreed and I put in my report about August 2013[1] and by January 2014 the Ministry of Women's Affairs had claimed it as their own. That was fine by me, perfectly fine, and so that court was established.

Did they appoint judges promptly for the new court?

No, they didn't. Judges have only been appointed probably twelve months ago, but the Afghan government liked the idea, approved it and they sort of moved along

slowly but steadily. It was a huge political task for them, warlords who run the provinces, and sit in Parliament did not see any need for women to be protected at all, but some leaders were fearless in progressing the EVAW courts.

Were they trying to get it right or just because that is the way they operate?

A bit of both. There are certainly some people I spoke to, for instance, in the Supreme Court, who having thrown everyone else except me from their office, that all of a sudden could speak English and said that they want this court to work, as a member of their family was a victim of violence.

Do the advocates have law degrees?

Yes, they do have a law degree. Some of them are purchased, but some of them are genuine law degrees, but the quality is probably about certificate level compared with New Zealand, and there is no practical training for them.

Defence lawyers and prosecutors before I got involved never talked to each other. When they are asked: How do you run a case? They respond, "well we turn up and they turn up and they say their bit and we say ours, and you just don't have any contact." Poor judges I thought.

We have to start with things like… this is how you do it, step one, you take your client's instructions; next step, you talk to the prosecutor; and when you are a defence lawyer you don't just sit at the back of the court and listen, you actually get in and advocate. They would laugh at me and say, *"you are the lion lady"* because I would say to them "*stop being a mouse and be a lion*". They like those very basic things to cling to. A large percentage of defence lawyers are young women – it's very risky for them but they want to do a good job.

What are the judges saying?

The judges I spoke to would say this is what we can do – we know it's not enough, please help give us some extra resources. They need everything from a computer but also the resources to keep them running. There is no way of recording decisions, they are hand written and are very short. I have asked and asked for copies of judgments from the Supreme Court and they just laugh and say they wouldn't help you. They know!

The Supreme Court judges are educated, often US-educated. They know what needs to be done and I went in saying "if the UN were prepared to come and talk to some of your judges, how would that go, and he just turned around and said, you want to do training, great."

There is no way for them to have any idea of what other judges are saying during sentencing and so there is no consistency. It depends entirely on the judge on the day, with all their built in natural biases. I got lots of good ideas from the judges here, particularly Judges Walker, and de Jong. Their styles will feature in parts of Afghanistan, for better or worse!!

While you were in Afghanistan were you just in the capital

No. In 2013, I went to Herat and Mazar, e-Sharif and then over to the Pakistan border to Jalalabad. That was probably the biggest eye opener because it is a very conservative part of the country and there are number of judges for instance, who had purchased their positions and were in fact illiterate. It made me wonder how they managed to do their job when they could neither read nor write.

You must be extremely brave to take on such a great responsibility in a war-torn country?

Probably more so now than in 2013. In 2013, you had to be careful, but you certainly didn't go out without being in a UN vehicle, but it was less horrendous than it is now.

What were your general impressions of Afghanistan?

In Afghanistan, there is a huge history of art, music and poetry and all those sorts of things locally, it has always been there. When I was there in the 70s it was a beautiful country to go and see, architecture, music, food – the lot and now it's like a desert, people are too scared to go out.

They go to work, if they have a job, which most don't, they go home, they stay home unless they have to go out. Everyone I met would firstly have a family member who was in the Taliban, and secondly would have lost someone to a bomb. I saw first-hand the results of bombings, soon after they had happened, that gives me nightmares. Why they are in the Taliban is because of poverty, it is the only source of income. There is no social welfare, if you don't have a job your family starves and they have big families nine or ten kids and there is no work. When the military pulled out in Kabul, poverty increased because everyone lost their jobs with the military. It is mainly the young who are going into the Taliban, because the Taliban pays them. The Taliban gets their money from Arabic states, the wealthy Arabic states like Saudi Arabia and they are funded from Pakistan, and there has always been interference from China and Russia. The only reason people are interested in Afghanistan is because it is a pathway through from Asia.

But there is also huge funding from opium. Opium is a major crop particularly in the south and the internationals have failed badly in getting a programme that works to get rid of opium poppies. They pay people to get rid of their crop, and they just grow them on the neighbours place. It is a source of income and they need a source of income.

There were some good programmes starting to empower women economically. They grow good tomatoes in Afghanistan, so someone came in and set up a bottling plant and the women would sell their bottled tomatoes in the market. But then the project organisation comes, sets it up, leaves again, funds run out and that is the end, there is no sustainability.

There is also huge corruption. The difficulty now is that most of the internationals come to their embassies in Kabul and they never leave the embassy. The Americans get helicoptered into their embassy and they never leave base until they fly out again. There isn't a level of supervision of how funds are being employed. If you hand money out at the door, you know there will be a high level of corruption. As a result, there are extremely wealthy warlords in Afghanistan, huge homes and very expensive vehicles and they stand out like a sore thumb. They all drive around with their hired militia in the vehicles with them.

What has been the highlight of your professional career to date?

Going to Afghanistan and using my knowledge of the law for something that is really a humanitarian project. Also using my teaching knowledge, because I did quite a bit of teaching and this last time I have written a manual on how to be a prosecutor, defence lawyer and judge in the EVAW court.

What about the lowest point in your career

Probably the restructuring of the Family Court, because I don't believe it served the needs of our clients, particularly vulnerable women who are victims of violence. Restructuring generally, was just about cost cutting everywhere, but I think Auckland got a worse hit by having the centralised system imposed on us as well as the restructure of

Continued on next page…

CLAUDIA ELLIOTT, *Continued ...*

the courts.

Women were being dragged from North Shore into the city for defended hearings or from down south which was even worse. They wouldn't have anywhere to leave the kids, no consideration given to the fact that they needed to be back to pick them up because they didn't have anyone else to pick them up after school, they couldn't afford after school services or those services are not available.

Like all failed systems, it is slowly reverting, but something has got to happen to improve access to justice here. It is largely women, children and the poor who do not have access to justice. Legal aid is still a disaster.

You have been a member of the Family Law Section – why?

I think it is worthwhile – I think there is a huge need for the Family Law Section to be a political advocate for family lawyers. I would certainly like to see continuing advocacy about how the Family Court is operating, how legal aid operates and those sorts of things. It can only be done at a national level and it can only be done with an organisation such as the Family Law Section, otherwise you are just an individual who gets picked off, by the system.

Is there anything I haven't discussed?

I would like to see New Zealand taking more responsibility for the international problems that we have got. We do have space here to have some Afghan people come here and live, and contribute. The world needs to do something otherwise we are going to end up with those continuing bombings and don't think what happened in London, France and Barcelona is not going to happen here. It will, so long as we keep a system of haves and have nots, that inequality going. If we are going to have refugees we need to provide them with services and I don't mind if they go to Te Awamutu or Oamaru or wherever, so long as there are resources there for them to help them integrate. They and other refugees deserve our help, and they in turn, will provide a richness to New Zealand society based on human compassion, rather than accumulating possessions.

1 Claudia Elliott, United Nations Development Programme Consultant, "A report on the critical areas, functions, and gaps and the ongoing work of the elimination of violence against women units in Kabul, Mazar-E-Sharif, Herat and Jalalabad, Afghanistan" (August 2013).

Dinner to honour Kevin Casey

ALESHA EVETTS, SOLICITOR, COONEY LEES MORGAN

On 26 May, family, judges, friends, and colleagues gathered at Mills Reef Winery in Tauranga for a bar dinner. We were there to celebrate the achievements of one of the most senior family lawyers in the Bay of Plenty, Kevin Casey, who has practised family law in the region for three (or is it four?!) decades. As Kevin reminded us, it wasn't a retirement dinner or a farewell dinner – apparently, his wife isn't ready for him to retire just yet (although with the impending birth of his first grandchild, I wonder if Kevin might have something to say about that!). Rather, it was an honorary dinner, organised by Dean Blair and Maryann McCarty who very aptly decided that Kevin's extensive contributions to family law required recognition. Plus, it was the perfect reason to don our finest attire, drink good wine, eat good food, and socialise.

The dinner was well attended by the Bay of Plenty family law bar, members of the bench, and partners and staff from Cooney Lees Morgan, the firm Kevin has spent the last 32 years of his legal career. Tickets for the evening were sold out, and the large attendance is a true testament to Kevin's collegiality; his willingness to take the time to mentor younger solicitors (myself included), and to always be available for those who need his assistance.

The evening was held on the night that we heard of the passing of our friend and colleague, John Chadwick, and it was with a feeling of sadness at John's passing that we enjoyed the evening. Prior to the celebrations commencing, Judge Alayne Wills spoke of John's life and his contributions to the law. A moment was taken to remember John and pay our respects.

Before dinner was served, we heard from Judge Stephen Coyle and Barbara Collis, who both spoke of Kevin's career in family law, and their recollections of their involvement with him over the years. Both recalled Kevin's successes as a family lawyer, his courtroom skills, and the numerous people in the community that he has helped, particularly in his role as lawyer for child, and the assistance he had provided to colleagues.

Later in the evening, we heard from the man of the moment. Kevin's speech was gracious and humble, as well as entertaining – one can't take themselves too seriously when they are the centre of attention after all! It was clear that Kevin attributes his successes to the love and support of his wife and two daughters. He reminded us that family law has its challenges, particularly when dealing with the raw emotion that comes with advising people through difficult separations, child care arrangements and domestic violence. He spoke of the support and collegiality that is the hallmark of the practice of family law, and the importance of that support and collegiality, particularly when facing the challenges that arise in this area of law.

Following dessert, the dance floor was cleared and we were treated to some tunes performed by Robbie Laven (a local practitioner) and his string band. Whilst only a few got up and had a twirl, I am certain I saw Kevin showing off some fancy foot work later in the night. The evening was enjoyable and in honour of a man who has dedicated a large part of his life to helping everyday people get through difficult and traumatic situations. I could not think of anyone more deserving of the accolades. But as I have said, it wasn't a retirement dinner. So Kevin – I will see you at work on Monday.

MILLS REEF
7

NO EXIT

Changes to Family Court Rules 2002 – effective 1 September 2017

ANGELA VANDERWEE, SOLICITOR, TOMPKINS WAKE

On 1 September 2017, a number of changes to the Family Court Rules 2002 came into effect. The key changes are:

- Lawyers will be able to accept service of documents by any electronic means
- Persons authorised by the Secretary for Justice, an officer or employee of a corporation authorised by the secretary, or a Police employee authorised by the Commissioner of Police will also be able to accept service of documents
- A new example of substituted service has been added permitting a document to be brought to the notice of a person to be served using social media
- Service on a party who does not have a lawyer may be effected by sending the order or judgment to the party's last known electronic address
- Judges will be able to authenticate electronic documents
- A social worker is no longer able to be a party to a proceeding under the Oranga Tamariki Act 1989 in their capacity as a social worker
- A proceeding on the without notice track will be able to be classified as a complex case so that it may be individually managed and a case management conference many be convened
- Following the making of an interim order on the without notice track, a judge may transfer a case to the standard track
- A judge may direct parties to attend family dispute resolution while a case is on the without notice track

Evaluating the 2014 family law reforms research update

This nationwide study, funded by the New Zealand Law Foundation, is being undertaken by Associate Professor Nicola Taylor, Dr Megan Gollop, Dr Margaret Mitchell and Professor Mark Henaghan from the University of Otago.

The online survey for **separated parents and caregivers** was launched in late July and will remain open until December 2017. Separated parents and caregivers who made and/or changed parenting arrangements for their child or children's care since April 2014 are invited to complete the survey and also take part in an optional interview. If you have clients (or others) who you think might be interested please bring the study to their attention.

In October, the online survey for **family justice professionals** will open and will run for six weeks. This will ask you about your views and experiences of the reforms. You can also take part in an optional interview with a member of the research team. All professional groups will be informed as soon as the survey goes live and your participation will be appreciated.

The more parents/caregivers and professionals who get involved in this independent study of the reforms the better our understanding of their impact on you and your clients will be.

For more information, visit our website: *www.passnz.co.nz* or contact:

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Law Commission's review of the Property (Relationships) Act 1976

Helen McQueen is leading the Law Commission's review of the Property (Relationships) Act 1976. The Family Advocate speaks to Helen ahead of the October release of the Commission's Issues Paper.

We understand that the PRA review is breaking new ground for the commission. Can you explain how?

The PRA review is one of our most important projects. Your readers will know that the PRA affects many New Zealanders because it directs how partners divide their property when a relationship ends. It's important that we make quite complicated issues accessible, so that everyone can share their views on what is important. Because of this, we're publishing our issues paper in a new way on our website and offering different avenues to provide feedback. At the same time, we are publishing our more familiar style of issues paper so that people can drill down into the complexities and respond to extended questions if they wish.

The PRA hasn't had a major review since its enactment over 40 years ago. Is it seriously out of date?

As you can imagine, over the last 40 years New Zealand has changed significantly, including in the way people form intimate relationships. As social legislation, the PRA should reflect the aspirations of communities in which it exists. We've carried out initial research and consultation to understand these changes but there's a lot we don't know because the evidence isn't available. We're publishing a study paper that identifies what we do know about relationships and families in New Zealand and where there are gaps in our knowledge.

The different nature of relationships today compared with 40 years ago must impact significantly on the relevance of the PRA's rules.

Yes, relationships are more diverse now. The PRA's original paradigm of a long-term marriage between a man and a woman raising children and accumulating wealth together is no longer an accurate picture of all the kinds of relationships that exist in New Zealand. De facto relationships, both long term and prior to marriage, are the norm. So in light of this, should the PRA automatically apply to relationships after three years?

People are entering relationships later in life, and have often already accumulated assets such as a family home. So we are asking whether and, if so, how the PRA should divide these assets. Sequential relationships and blended families are common but we are asking whether the PRA rules operate appropriately in second or subsequent relationships.

Are there other areas where the PRA doesn't always take into account everyone's interests?

The way the PRA affects particular sections of New Zealand society can be quite different. Tikanga Māori affects relationships and property and there may be further ways in which the PRA can acknowledge this.

While the PRA refers specifically to the interests of children, you'll know that in practice, courts in PRA cases seldom take those interests into account directly. This is probably because provisions that support children's needs don't fit easily with a law that focuses on adult entitlements.

And, despite the 2001 amendments to address economic disadvantages resulting from the division of functions within a relationship, we know that those staying home to look after children can still suffer disproportionately after they separate from their partner.

We also want to think about how the PRA works when a relationship ends because a partner dies, as the interests of the will-maker and other family members can arise alongside the interests of the surviving partner.

What other significant issues are you looking at?

We are asking whether the PRA applies to the right kind of property. The PRA divides traditional assets such as family homes and businesses. But could we also include as relationship property broader ideas of economic resource, like income earning capacity?

We're looking at whether the PRA strikes the right balance between dividing property fairly and preserving trusts. New Zealand has one of the highest numbers of trusts in the world per head of population and nearly 15% of family homes are held on trust. Should property that's attributable to a relationship be removed from the pool for division by disposition to a trust? Whatever the rules may be, it is critical that people can sort out their PRA matters simply, quickly and fairly. The great majority of couples don't go near a court and many don't see a lawyer either, so the law needs to be both understandable and understood.

What are the next steps for the review?

We'll publish our issu es paper and study paper in October and then consult widely with the public who will be able to make submissions on the website or just write into us. We will hold some public meetings around the country, as well as meeting with practitioners and special interest groups. We're also presenting our work at the NZLS CLE Ltd family law conference in October and at the Te Hunga Rōia Māori o Aotearoa Hui-ā-Tau conference in November. We encourage all practitioners and your clients to make a submission, whether it's a comment on one or two points or a comprehensive response on many issues.

LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Relationship property: not always 50/50

SHARON CHANDRA, SENIOR ASSOCIATE, TURNER HOPKINS

The recent case of *Bowden v Bowden*[1] has brought to light the circumstances in which the court will order an unequal division of relationship property under section 13 of the Property (Relationships) Act 1976. Section 13 provides the court with a discretion to order an unequal division of relationship property if extraordinary circumstances exist so as to make equal sharing repugnant to justice.

Where such extraordinary circumstances exist, the share of each spouse is generally determined according to their respective contributions to the relationship.[2]

An assessment under section 13 requires a three-stage approach:

1 Do extraordinary circumstances exist and, if so, what are they?
2 Why do those circumstances make equal sharing repugnant to justice?
3 Given the parties contributions, how should the property be divided?

The test under section 13 is a stringent one which requires a high threshold to be met. The types of factors the court will give consideration to in making its assessment can be broadly summarised into three categories.

Significant disparity in contributions

A gross disparity in contributions is necessary in order to meet the threshold under section 13.[3] The court will, in making its assessment, give consideration to the expectations of each party during the relationship and their conduct in meeting those expectations. A significantly one-sided effort by one spouse will ordinarily need to be demonstrated.

The contributions in *Bowden v Bowden*[4] were such that the man brought almost all the assets into the relationship and paid the majority of outgoings. Whilst the court held this to be a sufficient disparity in contributions, the court's assessment was coupled with many other factors, including the short duration of the relationship, the couple's age and the fact that no assets were acquired jointly.

In *Venter v Trenberth*[5] the High Court took into account the vastly greater financial contributions made by the man, as well as the fact that the parties did not have any children, the relationship was of relatively short duration and the woman had received the benefit of residing rent free.

The above case law demonstrates a mere disparity in contributions will not meet the threshold under section 13. A truly gross disparity is required and, often needs to be coupled with other factors, in order to make a successful section 13 claim.

The test under section 13 is a stringent one which requires a high threshold to be met.

Short relationship/length of the relationship

In general terms, the longer a relationship lasts, the more difficult it will be to rely upon financial contributions as constituting extraordinary circumstances[6]. The reason being, longer relationships are more likely to involve situations where both parties have made significant contributions of varying types over the years.[7]

In *Bowden v Bowden*[8] the relationship lasted for three years and two months. The c ourt ultimately ordered an 80:20 division, however, the duration of the relationship was not the only factor considered by the court. The fact that the woman had provided care to the man in the final months of his life and the fact that she had given up a state tenancy were not sufficient to counter the section 13 claim.

The case of *Bowden* can be compared to *Sydney v Sydney*[9] where the court ordered a 60:40 division, even though the relationship lasted for a similar period of time to *Bowden*. This simply highlights the fact that each and every case is determined and assessed on its own specific facts.

Negative or minimal contributions by one partner

Negative or minimal contributions by one partner may be sufficient to meet the threshold under section 13. For example, circumstances where one spouse has spent all their income on alcohol and/or gambling may be sufficiently extraordinary to render equal sharing repugnant to justice under section 13.[10]

In *D v D*[11] the wife had a mental illness and required residential care for the majority of the parties' 24-year marriage. The court awarded a division of 80:20 in favour of the husband on the basis that the wife only contributed to 20% of the marriage partnership.

Whilst the above categories provide guidelines as to the kind of circumstances which must exist in order to make a successful section 13 claim, given the stringency of the test, often more than one of these factors must be present. The court does not view these factors in isolation and makes its assessment in light of all the circumstances which exist at the time.

1 [2016] NZHC 1201, [2017] NZFLR 56.
2 Property (Relationships) Act 1976, section 13.
3 *Lyford v Lyford* (1992) 10 FRNZ 143.
4 [2016] NZHC 1201, [2017] NZFLR 56.
5 [2015] NZHC 545; [2015] NZFLR 571 at [21].
6 *Dalton v Dalton* [1979] 1 NZLR 113.
7 Compare *Bilger v Bilger* (1979) 2 MPC 18, 19 which involved a marriage of 29 years.
8 [2016] NZHC 1201; [2017] NZFLR 56 at [50] to [52] per Mander J.
9 [2012] NZFC 2685.
10 *Bevan v Bevan* [1977] 1 MPC 23 (SC) and *Johansen v Joseph* (1992) 9 FRNZ 643, [1993] NZFLR 248 (High Court).
11 (1997) 15 FRNZ 302, [1997] NZFLR 424.

Sustaining a caveat on the grounds of an implied or constructive trust

ANGELA VANDERWEE, SOLICITOR, TOMPKINS WAKE

Wakenshaw v Wakenshaw [2017] NZCA 252

A caveat can be registered against a property if a person has sufficient interest in the land. This may include unregistered interests such as those of mortgagees, holders of rights of way, or other easements. In some circumstances beneficiaries of trusts can lodge a caveat against a property. The recent decision of *Wakenshaw v Wakenshaw* dealt with such a situation. In this case a caveat was registered over a property by Janthina (Jan) Wakenshaw claiming that she was a beneficiary under an implied or constructive trust and that her brother in law who owned the property was a trustee.

The Court of Appeal dismissed the application on both Ms Wakenshaw's claims.

Background

Mary Wakenshaw had three children, Donald, Norman and Delwyn. Mary had a house in Auckland but also owned a property at Bethels Beach. The two brothers began developing this property together around 1982. Donald moved there in 1986 and in 1990 Norman and Jan, who were married in 1985, also came to live at Bethels Beach.

There was no agreement as to who contributed to the original purchase price of the property, who undertook the work, or who paid the outgoings during the time they all lived there.

In 2014 Norman died after a long illness. Jan said prior to his death he had arranged to transfer the Bethels Beach title into his and Donald's names as tenants in common. However, this never eventuated.

Several months after Norman's death, Mary made a new will dividing her estate three ways between her children. Her original will left the Bethels property to both Donald and Norman but several weeks after making the new will, Mary gifted the entire property to Donald. Jan was not aware of this at the time. She was sure that Mary would make arrangements so she and the two children were looked after and would not have to move from the property. Jan maintained that Mary said Donald would transfer Norman's share of the property to her.

Eleanor Hall, Mary's solicitor who drafted the new will, differed in her version of events. She had no doubts that Mary had capacity when she made the new will and that she was not pressured by anyone. Mary's wishes were clear – she wanted to transfer the property to Donald because of the love and support he had shown her especially since he had helped look after Norman in his last days.

Ms Hall recalled discussions with Mary about Jan's expectations. Mary had said Jan would understand the new arrangement and at any rate Donald had a good heart and would let her stay on. Moreover, Jan was aware that Mary had helped Norman and her out financially over the years, and they had been able to live on the property rent free.

After Mary died in May 2015 and the property was transferred to him, Donald made a new will gifting the property to Jan's two daughters. He also allowed Jan and the girls to continue living there. Some months later Jan lodged a caveat.

The High Court decision

The High Court dismissed Jan's application for an order sustaining her caveat. Judge Doogue was not satisfied that it was reasonably arguable that an implied trust arose from Norman's alleged contributions to the property price. There were significant factual disputes in the evidence and little detail had been provided. A further issue was that Jan had asserted that Norman was a beneficiary and not herself.

The judge also considered if it was reasonably arguable that an implied trust arose because of the contributions by Norman and Jan to the property applying the principles in *Lankow v Rose*. Again, it was noted that payments were disputed, and that while Norman and Jan had contributed to some costs, they had also occupied the property rent free. Jan appealed the High Court's finding.

Continued on next page...

In the Trusts Bill, we trust

AMANDA DONOVAN, PARTNER, HAIGH LYON

I am told that some 15% of private homes are now held in trust. I know it is a common occurrence in my practice.

A new Trusts Bill has arrived. Sixty years on from the inception of the Trustee Act 1956 the bill is set to simplify and modernise our trust law (we hope). The Trusts Bill was introduced to Parliament on 1 August 2017 and is intended to mirror the existing common law and partially codify it. A date for its first reading has not yet been set.

One purpose of the Trusts Bill is to "restate and reform" our trust law. Part 7 of the bill sets out certain powers of the court in relation to trusts, including providing jurisdiction to the Family Court under the Act in specified circumstances and facilitating the use of alternative dispute resolution.

Court powers are not intended to replace the High Court's inherent jurisdiction, but set out certain specific powers of the court.

The jurisdictional changes proposed involving the Family Court include:

a The Family Court can order or direct matters where property (or an interest in property) needs to be preserved pending proceedings being finally resolved, or to give effect to matters determined by the court in those proceedings.

b If parties agree, the Family Court has jurisdiction to make any order available under the Act to resolve an issue or dispute and determine trust issues where it would assist the substantive proceedings.

c The Family Court is not subject to financial limits in relation to the value of any property or interest.

d The Family Court does not have jurisdiction to appoint a receiver to administer the trust.

Some of the other proposed changes include:

a Descriptions of the key features of a trust to help people understand their rights and obligations.

b Mandatory and default trustee duties to help trustees understand their obligations.

c Requirements for managing trust information.

d Requirements for disclosing information to beneficiaries.

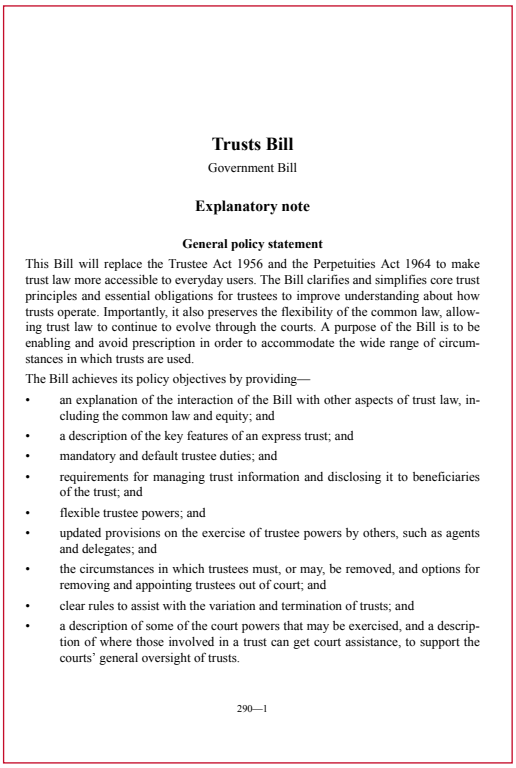
e Flexible trustee powers, allowing trustees to manage and invest trust property appropriately.

f Provisions to support cost-effective establishment and administration of trusts.

g Options for removing and appointing trustees without having to go to court to do so.

Submissions against extending the Family Court's jurisdiction generally voiced concerns that trust law tends to bring up complex legal and factual issues best suited for the High Court's jurisdiction.

As the current Act has its limitations, the new Act will help to achieve some constructive changes if it is passed. With no word on when the first reading will be, the Trusts Bill is still a while away from coming to fruition.



Trusts Bill

Government Bill

Explanatory note

General policy statement

This Bill will replace the Trustee Act 1956 and the Perpetuities Act 1964 to make trust law more accessible to everyday users. The Bill clarifies and simplifies core trust principles and essential obligations for trustees to improve understanding about how trusts operate. Importantly, it also preserves the flexibility of the common law, allowing trust law to continue to evolve through the courts. A purpose of the Bill is to be enabling and avoid prescription in order to accommodate the wide range of circumstances in which trusts are used.

The Bill achieves its policy objectives by providing—

- an explanation of the interaction of the Bill with other aspects of trust law, including the common law and equity; and
- a description of the key features of an express trust; and
- mandatory and default trustee duties; and
- requirements for managing trust information and disclosing it to beneficiaries of the trust; and
- flexible trustee powers; and
- updated provisions on the exercise of trustee powers by others, such as agents and delegates; and
- the circumstances in which trustees must, or may, be removed, and options for removing and appointing trustees out of court; and
- clear rules to assist with the variation and termination of trusts; and
- a description of some of the court powers that may be exercised, and a description of where those involved in a trust can get court assistance, to support the courts' general oversight of trusts.

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SUSTAINING A CAVEAT ON THE GROUNDS OF AN IMPLIED OR CONSTRUCTIVE TRUST, *Continued ...*

The Court of Appeal

The Court of Appeal found that Jan had no caveatable interest as Norman's next of kin. Jan had asserted that Norman was the beneficiary and that this had passed to her on his death but she had never sought letters of administration for Norman's estate. As Norman died intestate, his next of kin had no caveatable interest in the deceased's land until it had been fully administered.

The court also noted that Jan had no direct caveatable interest in her own right despite claiming her personal contributions gave rise to a constructive trust. The court agreed that the evidence as to her contributions was unsatisfactory. There was no supporting documentation detailing how much was spent on the development. And while it was reasonably arguable that she had made contributions, the real issue at trial would be if those contributions manifestly exceeded the benefits which she had derived.

The court affirmed that where a transferee receives property with notice that it is trust property, the transferee is liable to account for the property. But in this case, neither Ms Hall nor Mary gave Donald notice that the property should be held on constructive trust for Jan.

The court further stated that it was not reasonably arguable that there was a caveatable interest on any prospective claims that Jan or her daughters may have under the Law Reform (Testamentary Promises) Act 1949 or the Family Proceedings Act 1980. The law is clear that a mere right to apply for an order vesting property in an applicant does not of itself give rights to a caveatable interest. Furthermore, a caveat does not of itself assert an interest in the property on behalf of the daughters.

The decision highlights that in circumstances where an applicant claims there is a caveatable interest, it is essential that a reasonably arguable case can be established. It is also a reminder that for a constructive trust to arise, the applicant must clearly show that any contributions to the property in question, manifestly exceed the benefits which have been received.

NZLS CLE Ltd Family Law Conference

This conference coincides with the 20th anniversary of the launch of the Family Law Section. As the inaugural Chair of that section, I have been invited to chair this conference programme and steer your all through two days of education and collegiality.

The NZLS CLE Family Law Conference is my favourite conference. I always learn far more than I expect, I relish the chance to catch up with colleagues from around the country, and I always return to practice slightly sleep deprived, a little hoarse, but with plenty of new ideas and friendships to sustain me in this sometimes difficult profession. This conference planning group has worked hard to ensure that the 2017 conference in Rotorua delivers a varied and challenging programme. You told us in your feedback that you wanted to have the conference in a different city so we are looking forward to welcoming you to Rotorua – centrally situated in a vibrant and beautiful part of our country. Our colleagues in the Bay of Plenty are keen to show us just why they love living and working in this place. By timing the conference just before Labour weekend, there is plenty of time to enjoy what the Bay of Plenty has to offer once the conference is over.

A lot has happened in our profession in the 20 years since the section was launched. Come to this conference and reflect on all the changes that have occurred over those

20 years. Take the opportunity to recharge your batteries and refocus on the future. I look forward to seeing you all there.

Conference Chair
Margaret Casey QC

Conference dinner

Channel your favourite entertainer and take a chance on fun at **One Night in Vegas** and dance the night away with Rotorua band **Count Me In**.

Register

Online at: *www.lawyerseducation.co.nz*
Post to: NZLS CLE Ltd, PO Box 5041, Wellington 6145, DX SP20202
Fax to: 04 463 2986
Enquiries: 0800 333 111 or *cle@lawyerseducation.co.nz*

EARLY BIRD REGISTRATIONS CLOSE ON 19 SEPTEMBER

The best of Rotorua

While you are visiting Rotorua in October to attend the NZLS CLE Ltd family law conference, we would like you to experience the very best that the city has to offer. Rotorua is one of the most popular tourist destinations in the North Island, and for good reason. This guide includes Rotorua's must do activities, and the best places to eat and shop while you are here, especially if you decide to stay on for Labour weekend. We look forward to seeing you in October and hope that you make the most of your trip to this beautiful city.

Things to do

Rotorua has impressive scenery, nature walks, cultural experiences and luxury spas. There is a vast array of options to suit every taste and budget.

The **Redwood Forest** on long mile road is a fabulous place to explore if you feel like a walk. There are numerous tracks of all varying lengths. Easy walking and spectacular scenery. Visit the Information centre at the Redwoods if you would like a map.

If you start from the Redwoods end make sure you visit one or Rotoura's newest attractions of **lanterns and lights**. This is probably better to do at night but can also be fun during the day. It involves a walk on a bridge that is strung high up in the tree canopy. There are over 30 Trubridge lanterns and 40 infinite colour spots. Truly stunning!

The **Blue Lake** is also picturesque. If you drive out to the lake and park near the camping ground, you can circumnavigate the lake on foot in approximately an hour.

There is no doubt that you would have heard about Rotorua's "world famous in New Zealand" geysers. **Wai-O-Tapu Thermal Wonderland** is a wonderful geothermal park to go and visit some of these geysers, while also being an abundance of colourful scenery from previous volcanic activity well as the bubbling mud pool. The **Whaka Thermal Reserve** is a also a good place to go and see some of Rotorua's geysers, while at the same time learning about the natural history and geology of Rotorua.

If you are up for an adrenaline rush, Rotorua is an adventure haven. **Zorbing** is a must, where you jump inside a giant inflatable ball and are rolled down a hill. **Agroventures Park** is also the place to go if you would to experience a bit of thrill. They have six adventure activities in once place, including bungy jumping, a sky swing, jet boating, swooping, shweeb (a monorail bike-like pod that you climb into and race around a track – the only place in the world where you can find this unique machine) and xtreme freefall (a Superman experience).

The **Skyline Gondola** offers breath taking views of Rotorua, and from this height you will see for yourself that the city does indeed sit within a volcanic crater! **The Luge** at the top of the Gondola offers a thrill which caters to any age, as you take the driver's seat – their oldest rider was 101! Skyline also offers access to New Zealands first year-round gondala assisted bike lift, accessing world-class downhill **mountain biking**. Skyline also offers a **Zoom Zipline**, where you will "fly' down the side of **Mt Ngongotaha**, it is a dual zipline so you can try to convince a couple of your family lawyer friends to race down the side of the mountain!

If you are after something more relaxing to do at the top of the gondola, this is also where the **Volcanic Hills Winery** is located where you can try locally made wines with very knowledgeable staff. You can have a visit to the tasting rooms and try a range of their wine, or you can sit and enjoy the exquisite views while indulging in a glass of wine and an antipasto platter.

If luxury spas are your thing, then you don't need to look any further than the **Polynesian Spa**. Nestled on the shores of Lake Rotorua, the Polynesian Spa is renowned for its healing waters. The spa also specialises in a range of health and wellness treatments.

If you stay for the weekend, you must visit the **Rotorua Farmers Market** which operates every Sunday from 9am to 1pm.

Things to see (for free)

There is a wide selection of activities to explore in Rotorua, that won't cost a thing.

Hamurana Springs is the deepest fresh water spring in the North Island, and is about a 15-minute drive from Rotorua. When you arrive, it is a short walk through a tranquil setting to the spring, where the water is crystal clear. While you are driving out that way, you could also head to **Okere Falls** to view the white-water rafting.

Also a short drive from Rotorua, you can hike up **Maunga Karamea** or "mountain of coloured earth", also known as **Rainbow Mountain**. It is approximately a one-hour track to the summit.

You can also take a stroll around **Kuirau Park**, which surrounds various shallow hot pools, bubbling mud, and lots of steam.

Redwood Forest or **Whakarewarewa Forest** is a mountain biker's paradise, if are travelling from afar and don't have space to bring your own bike, you can hire these from town or out at the Waipa hub which is the start of most of the tracks.

The **Government Gardens** which are located outside the Rotorua Museum are always a sight to see. Unfortunately, the museum is currently closed due to building and earthquake issues, but the **blue baths** (just adjacent to the museum) has a great café and is a good place to wander around also.

Places to Eat

Cafes

Capers Café has recently been named the Meadowfresh New Zealand Café of the year. A must-try for great coffee and food.

Ciabatta Bakery is Rotorua's best kept secret. Located in an industrial area, White street, it is a haven of amazing breads, pastries, soups and superb coffee. Call in here on your way back from a walk in the redwoods.

Fat Dog Cafe has quirky décor and the meals are huge, so if you're hungry this is the place to go.

Abracadabra is a funky café, with décor and food both Morroccan themed. You can go here for an all-day breakfast, lunch, happy hour drinks with tapas or a sharing platter, or dinner.

Urbano Bistro is located 1km from the city centre, who are also a "Café by day, restaurant by night". The day menu offers

normal café fare, and in the evenings, they offer fine dining.

Artisan Café Restaurant is the place to go for delicious food in a restaurant with lovely ambience.

Restaurants

Eat Street is Rotorua's million-dollar outdoor dining destination, where you will find 12 different restaurants which will suit any taste.

Atticus Finch (Eat Street) is a speakeasy meets metropolitan bistro. Their dining menu is designed to share. Make sure you make a booking in advance if you wish to dine here!

Mokoia is an award winning fine dining restaurant in Rotorua with views of Lake Rotorua, specialising in Pacific Rim Cuisine.

Stratosfare is set atop Mount Ngongotaha, and must be accessed by gondola, but the views are worth it!

BREW Craft Beer Pub is a great place to get great beer and good food.

The Terrace Kitchen (only a short stroll from Eat Street towards the Novotel) is Rotorua's newest restaturant. Casual but quality cusiine in a modern environement.

Champagne Pool at Wai-o-Tapu Marco Klapper

Places to shop

The **Outdoorsman Headquarters** on Tarawera road. This is a short drive out of town but well worth a visit. A huge array of outdoor goods and clothing.

Elim Gallery is a small gallery that sells quality New Zealand modern art.

Atlantis Books specialises in offering a mixture of new and used books, and also offers posters, board games, and second-hand CDs and vinyl.

Steiners is a locally owned Interior design store, owned by Mike and Marie Steiner who have over 42 years' experience in the interior design field.

iNZpired is a store that creates high quality custom made New Zealand made gifts

Willow Boutique has become a destination store in Rotorua, stocking high quality New Zealand made clothing for women. It is a destination intimate shopping experience. Pop next door to Urbano for coffee or lunch afterwards.

The **Rotorua night market** runs each Thursday night in the CBD from 5pm (weather permitting). Delicious food and arts and crafts.

Kuirau Park Flea Market is run every Saturday morning, with stalls selling freshly made food, fruit and veges, and second-hand items. While you are at Kuirau Park you can have a wander through the geothermal areas and gardens.

The **Soundshell Craft Market** will be run both Saturday and Sunday over Labour weekend, and is the largest of the Rotorua Markets held at the lakefront. There are hand-made products such as knitting, wood or stone carvings, soap etc. Also stalls selling parallel import products, second hand books, antiques and plants ... the list is endless.

Court of Appeal rules decision on protection order was "wrong"

JODIE FOSTER, SENIOR SOLICITOR, TOMPKINS WAKE

SN v MN (2016) NZCA 384

Background

In May 2014, a temporary protection order was granted to Mrs SN on a without notice basis against her former husband MN.

Following a defended hearing in March 2015, Judge Burns discharged the temporary order. His Honour viewed each incident of violence individually and concluded that it did not meet the threshold for domestic violence.

He did acknowledge there had been an incident of psychological violence, but considered this did not establish a pattern of behaviour.

The judge further concluded that Mrs SN was a "robust and resilient person" who did not need a protection order.

SN appealed to the High Court on the grounds that the judge erred in his determination that domestic violence had not been used and that an order was unnecessary pursuant to section 14(1) (a) and (b) of the Domestic Violence Act 1995 (Act).

The High Court dismissed the appeal, finding the judge did not err in any respect of his decision.

Court of Appeal

SN then appealed to the Court of Appeal on three questions of law – whether the High Court had erred in finding that:

a The appeal was against the exercise of discretion, in reliance upon the decision of the Court of Appeal in *Surrey v Surrey*[1]

b The Family Court judge had applied the correct test as to what constitutes domestic violence for the purposes of the Act; and

c The Family Court judge's consideration of whether a protection order was necessary for the protection of the applicant was in accordance with the requirement of section 14 of the Act, and in particular that he took into account the mandatory considerations in sections 14(3), 14(5)(a) and 14(5)(b) and did not take into account irrelevant considerations.

Violence

Mrs SN had alleged two incidents of physical violence which occurred in January and

Macnolete

April 2013. These involved Mr MN "body slamming" Mrs SN and pushing her against a wall.

Mrs SN further alleged that MN was psychologically violent. This allegation was based on two major incidents, the first being an argument that occurred in August 2013 where Mr MN verbally abused Mrs SN. The second involved Mr MN making unannounced and unauthorised visits to the family home when Mrs SN had an exclusive occupation order.

The Court of Appeal was only required to be satisfied that the respondent was using or had used domestic violence against Mrs SN. A single act, or a number of acts considered together could amount to domestic violence. The court had to look at all the incidents in totality to decide whether domestic violence had occurred.

The Court of Appeal felt that by adopting an incident-by-incident assessment, the Family Court had over analysed the incidents of violence. The judge had limited his evaluation to one affirmative finding while dismissing other alleged incidents as not reaching an undefined threshold of abuse. By doing so he failed to ask whether Mr MN's behaviour followed a pattern.

The Family Court also appeared to provide excuses as to Mr MN's behaviour rather than focusing on the impact of that behaviour on Mrs SN. Similarly, the Family Court excused MN's psychological violence, categorising it as "annoying" and at the lower end of the scale.

The Court of Appeal was satisfied that Mr MN's conduct towards his wife over time constituted prolonged domestic violence. It found that the Family Court decision set an unacceptably high threshold for behaviour which might qualify as physical or psychological abuse.

The Court of Appeal then considered whether a protection order was necessary for Mrs SN's safety. It concluded that the Family Court had taken into account factors which were irrelevant such as:

- Mrs SN applying for an occupation order prior to a protection order
- Mrs SN's success as a school teacher providing her with the skills and character to protect herself from violence and not feel vulnerable
- Mr N having no previous convictions for violence and being well regarded by his employer
- The fact that the incidents may have been triggered by property-related issues after the couple had separated.

The Court of Appeal concluded the Family Court's decision was plainly wrong and that irrelevant factors were taken into account when deciding whether a protection order was necessary. The appeal was allowed and a final protection order was made effective from the date of the judgment.

The decision makes it clear that the role of the Family Court is not to determine why domestic violence has occurred, or provide excuses for it. The cause or motivation for abusive behaviour is irrelevant. The Act was intended to proscribe and condemn conduct of this nature, not to minimise it. The court needs to look at the incidents as a whole rather than each individual incident, and the impact it has on the applicant.

1 *Surrey v Surrey* [2008] NZCA 565.

DNA Diagnostics – New Zealand's only court-approved paternity testing service

DR AMANDA DIXON-MCIVER

DNA Diagnostics

Background

DNA Diagnostics commenced testing on the 1 October 1989. This was a joint venture between Auckland Uniservices and Diagnostic Medlab (DML). The laboratory was first located at the School of Biological Sciences at Auckland University.

The business was purchased by IGENZ, an established local medical genetics testing company and relocated to a purpose-built facility in Quay Park Centre, Beach Road Auckland on 29 July 2016. It is the only parentage-testing laboratory operating from within New Zealand, with samples being processed here in New Zealand and not sent off-shore.

DNA Diagnostics adheres to current New Zealand legislation for laboratory testing of human tissue. It is an IANZ ISO 15189 accredited medical testing facility with all scientific staff members registered with the Medical Sciences Council of New Zealand. Human tissue is tested according to the Human Tissue Act 2008 and all information is secure and private as directed by the Health Information Privacy Code 1994. The laboratory participates in three international external quality assurance programmes to ensure that testing is of the highest standard.

DNA Diagnostics are court-approved providers and have a strict chain of custody process. The results are also accepted by a number of government departments including Ministry for Vulnerable Children, Oranga Tamariki, Inland Revenue and the Department of Internal Affairs.

Testing

DNA testing can be a very stressful time for all concerned. DNA Diagnostics endeavours to provide a friendly, reliable and efficient service. Results are sent, by email or by post on request, as soon as they become available – usually within seven days of receipt of all samples and guarantee of payment. Staff are available to discuss the test and/or the results.

The testing process is relatively simple. There are collection centres located throughout New Zealand and samples can be taken overseas where a collection laboratory can be found. An appointment can be made at the New Zealand collection centre that is most convenient for the client to attend. All individuals testing do not have to present at the same time nor at the same collection centre. This allows flexibility of testing and means that parties located at different geographical locations can still undergo testing as well as ensuring that direct contact between parties can be avoided, when required.

All participants testing must provide photographic identification at their collection appointment, usually in the form of a passport or driver's licence, as well as a recent true likeness photograph. Consent for testing must also be obtained prior to collection of the sample. If the sample is to be collected from a minor, then consent must be obtained from all legal guardians. If the mother is testing, then her signed consent also covers the collection of the sample from her child, however if the mother is not testing a sworn affidavit must be completed.

The sample is obtained by placing a swab in the inside cheek of the individual and wiping it around for approximately 20 seconds. This is then repeated on the other cheek. Once samples have been collected they are sent by courier directly to DNA Diagnostics where they are processed. Once the samples from the individuals involved in the parentage study have been received, DNA is extracted and the testing process can begin.

The parentage test

A child inherits half of its DNA from their father and half their DNA from their mother. The test compares the DNA profile of the child with the DNA profile of their alleged parents.

A positive result

The DNA obtained from the alleged father and the child is compared at 15 different places along the DNA and from this a paternity index value is calculated. The paternity index value is a measure of the strength of the DNA evidence for support of paternity when the alleged father's DNA matches the child's paternal DNA at all 15 sites.

A negative result

If the alleged father's DNA does not match the child's paternal DNA at more than two of the 15 places tested, the alleged father cannot be the biological father.

A report is issued to all testing parties either directly or through a designated individual such as a lawyer.

Over the past few years a number of international companies have commenced offering their services to the New Zealand market. It is important that individuals are aware that although offering a service, there is often not a strict chain of custody. The test results may not be admissible in court, resulting in the test having to be repeated at additional expense to the individual.

A week in the life of a Family Court counsellor

Ineke Castina has been in the business of Family Court counselling since the 1990s.

Ineke was a member of the New Zealand Association of Counsellors (NZAC) executive and sees a mixture of private and Family Court-referred clients. Ineke started her counselling at Rape Crisis, and she has been in private practice since 1991. She also had a short spell as a tutor at Wintec teaching counselling.

Ineke currently receives referrals under section 46G of the Care of Children Act 2004, when a Family Court judge directs parents to improve their relationship or compliance with court-directed orders.

The counselling aims to improve the relationship between two parents, and to encourage them to communicate more effectively with each other. She initially meets with each person individually and assesses their current situation before having a joint counselling session.

"It's my responsibility to make people aware that children are the priority and that is the reason why they are there. Parents need to fully know that they will be in each other's lives for the rest of their children's lives, so having a working parenting relationship and good communication is essential to the child's wellbeing.

Monday started with a Family Court referral, a couple who were together briefly before having a child.

"They didn't have the advantage of having previously lived together or knowing each other very well, so the session was about how they could try and understand the other person's parenting style.

"Topics like bedwetting and schooling came up, and it was about helping them find a process they could use to make the decisions around these areas.

"We focused on their style of communication and how it was helping or hindering their relationship. It's a work in progress and they're gradually understanding each other's communication style.

"Not everyone's view point changes after counselling, but most come out being able to communicate better, and put the interest of their children above all else."

Tuesday saw another Family Court referral session with a couple from South America. Migrant families often pose complex and unique family challenges, says Ineke.

A lot of people we see are from countries which, for one reason or another, people can't return to. These people don't always have a wider family network in New Zealand.

"When a relationship breaks down, it's often more difficult for the parents and kids without a safety net of family here. There can be a sense of isolation that occurs.

"With this client, the lack of wider family support they would have been used to in South America had made things more difficult, and struggles like this have an impact on their parenting relationship. Working through these issues was a priority of the session."

Ineke sees clients from various countries, such as from South America, including Colombia and Chile, along with South Africa, the Philippines, India, China, the UK and Europe.

"Part of the job is also connecting these people with relevant social agencies that might be helpful to them."

Thursday's Family Court referral dealt with a young couple whose child had been placed in wider family care.

"There were some issues around violence and substance abuse, so I've been helping them develop a healthy parenting relationship so they can get their child back under their care.

"Alongside counselling they're doing parenting courses, anger management courses, and will supply a drug test when asked.

"Teaching this couple how to communicate well together and helping them put the interests of their child first has really helped.

"They're doing very well, they're completely on board with everything they need to do in order to get their child under their care again, they're willing to improve and they are fairly optimistic at this stage that they will get the day-to-day care of their child. "

Ineke is clear on the benefits counselling provides families.

"The Family Court process can be very adversarial, and although it's not intentional, in the midst of the process, one party might tend to discredit the other party.

"Counselling clearly fills a gap. The court process involves parenting orders. The family dispute resolution (FDR) process is about assisting parents to make decisions about their children's care. Counselling encourages parents to improve communication and to work towards to have a healthy long-term relationship as parents of the same children.

"In many cases people have been referred to counselling as the FDR process has not been successful for various reasons and counselling may be helpful to assist parents to develop a relationship that works around communicating around the care of their children.

"People can come out of court and FDR with a resolution in terms of care arrangements, but this doesn't necessarily mean they've learnt to communicate well with each other.

"The long-term impact of having parents with a healthy relationship is valuable to the well-being of a child."

The New Zealand Association of Counsellors

NZAC is the largest professional organisation representing counsellors in New Zealand, with approximately 3,000 members.

Membership of NZAC is achieved through a robust process, including an interview. All members require an annual practising certificate, which requires sign-off by an independent supervisor of regular supervision, and participation in professional development.

NZAC members must abide by the Association's strict Code of Ethics and are expected to be in regular supervision to ensure their ongoing professionalism and adherence to best practice guidelines.

If you wish to discuss counselling with a representative of the NZAC, email Executive Officer Antony McFelin *execofficer@nzac.org.nz* or call (04) 471-0307.

Family Dispute Resolution – it's not happening (much)

NIGEL DUNLOP

The aim

FDR represented an ideological shift. Those involved in parenting and guardianship disputes should no longer expect the state (in the guise of the Family Court) to resolve their disputes. Such disputes should be resolved privately.

The reality

Is FDR the default position for resolving parenting and guardianship disputes as intended? To find out, I made an Official Information Act (OIA) request of the Ministry of Justice. I wanted to know how the number of parenting and guardianship applications made to the Family Court compared with the number of FDR cases. I also wanted to know how often judges have exercised the power they have under section 46F of the Care of Children Act 2004 to direct cases to FDR.

Here are the bald results of my OIA request. For the two-year period from 1 January 2015 to 31 December 2016:

- 16,957 guardianship and parenting applications were made to the Family Court
- 220 section 46F directions were made
- 3,122 FDR mediations were completed
- 2,869 exemptions to FDR were made by FDR providers.[1]

These figures show that:

- Few cases are the subject of FDR relative to the number of court applications
- Few directions to FDR are made by judges relative to the number of court applications
- Almost 50% of applications for FDR do not result in completed mediations

In short, the widespread use of FDR to resolve parenting and guardianship disputes is not occurring. In the 2015 calendar year there were 1,504 completed FDR mediations, and in the 2016 year 1,618. This year may be not much different.

Why the under-utilisation of FDR?

There are, in my view, multiple reasons why there is less use of FDR than was expected when it was introduced on 31 March 2014. Reasons include the following:

- FDR, unlike its predecessor, the early intervention programme (EIP), lacks the imprimatur of the court, and hence respondent parties, who are often content with the status quo, consider themselves at liberty not to engage in it – although EIP mediation was not compulsory, parties perceived it that way.
- Given that legal aid is not available for lawyers to represent parties in FDR, and that FDR usually takes place when no lawyer for child has been appointed, there is little involvement of lawyers in it. FDR is therefore not a part of the everyday working lives of family lawyers. Thus FDR is a somewhat remote and opaque process to many lawyers, which understandably means that it is not always given due encouragement in client advice.
- Domestic violence is commonly viewed as a counter-indicator to mediation. Given the prevalence of domestic violence, this results in FDR often being ruled out on account of it.
- Judges are not directing parties to FDR as often as is warranted. It is difficult not to reach this conclusion, when over the past two calendar years, during which judges have been dealing with a large volume of cases, only 220 directions have been made. This may in part be due to FDR being even more remote from and opaque to judges, than it is to lawyers. The failure of judges to direct more cases to FDR undermines the FDR system. If parties who have made it to court without FDR were to know that there was a high chance that the court will direct them to FDR, then they will be more inclined to undertake FDR in the first place, and FDR will be seen to have the endorsement of the court.

Texas A&M University

Solutions

There will be many solutions to the poor uptake in FDR. Fundamentally, however, prospective parties, lawyers and judges need to continuously have regard to the benefits which FDR offers. These benefits include the opportunity for constructive face to face discussion; the re-establishment of communication, trust and goodwill; flexible and finely tuned outcomes; reduced expense; reduced delay; reduced stress; and better long-term cooperation with regard to the upbringing of the children.

1 In such cases FDR providers have decided under section 12 of the Family Dispute Resolution Act 2013 that FDR was inappropriate, for a range of reasons, including non-participation by one party.

The place of the child in FDR mediation

BRYAN KING

The fundamental children's rights provisions in sections 4(1) and 6(2) of the Care of Children Act 2004 (COCA) are not repeated in the Family Dispute Resolution Act 2013 (FDR Act). I believe that underpins the reluctance of some family court lawyers and judges to trust and support the FDR process and FDR mediation in particular.

The closest to a children's rights provision in the FDR Act is section11(2)(c). In specifying the role of the FDR mediator it requires us to "assist the parties to reach an agreement on the resolution of those matters *that best serves the welfare and best interests of all children involved in the dispute* (emphasis added)."

There has been a great deal of debate about what that means and there is valuable literature around the merits and practice of child focused v child inclusive mediation that I am not qualified to comment on. I have conducted a lot of family mediations though and done a lot of work as lawyer for child including on occasion representing children at FDR mediation following a section 46F COCA referral.

My aim in this article is to address the worry that because children do not have the same direct voice and representation in FDR mediation that they have in court proceedings, mediation sidelines their interests in a positional/settlement negotiation between their parents.

Under the Family Works model I am contracted to provide, child consultation has been available to parties since the end of 2016. That resource provides a mechanism for the parents to independently obtain some insights into the children's views and wishes. Even before that resource was available, it has always been my practice to ask the parties, *"Is it important to you that the agreement you make reflects the views and interests of the children* and "*If so, how will you know*?

The answer to the first question is often yes. The answer to the second question is almost never by having an independent stranger question the children.

The sessional mediation model I covered in my last article has often been useful in this context. A number of parents in the first meeting have been able to agree on how the children can be consulted by the parents themselves in a safe and constructive way (e.g. joint *"chats"* with the children – bringing in third parties known to and trusted by the children etc). Not safe for every family and to be treated with caution obviously but sometimes these can be really important steps toward building constructive parenting relationships and child participation in decisions that affect them.

A second reflection is that I find that I am increasingly becoming comfortable as mediator with the role of advocate for the children. I do not mean advocate in the sense that I have an insight into the children's views that should be reflected in the outcome or in the sense that I have my own view about what outcome would be best for the children.

The advocacy for the children that for me fits with my role as FDR mediator is around the "*what about me*" questions on behalf of the children that ask their parents to reflect on the implications of their decisions for the children and keep a focus on their interests.

That happens throughout the mediation. In explaining my role as FDR mediator I make it clear that a major part of my responsibility is to make sure that the conversation stays focused on the children's interests – not like lawyer for child with a separate view on a best outcome but to give them as the children's parents the best chance to make the best agreement possible for the children (individually and collectively).

Almost always, the joint mediation sessions start with a blank whiteboard. Not with the positional question "*what outcome would you like to achieve?*" but with the question *"if our job is to come up with an agreement that works well for the children – how will we know – what key things will it achieve for them."*

Almost always the parents come up with a set of criteria that are aspirational and cover the section 5 COCA principles. In that part of the process I have no problem adding my experience and expertise into the mix to help parents reflect on the children's rights and interests in a thorough and informed way. It is an impartial but not passive role.

Once established, those agreed criteria around the children's interests can be referenced throughout the negotiations that follow. You would like that arrangement? How does it help get to the outcome you both agreed should be achieved for the children? What other ways might that need of the children be met?

That testing process is another area where advocacy for the children in a "what about me" sense becomes important. "You would like to have the changeovers on the BP forecourt at 7pm because it is half way between your houses and is a public place. If I am Jo and Sam how does that feel? How might that compare for them with being picked up from their home by the other parent and seeing their parents communicating? Which picture looks more like the future for the children you agreed would be good for them? If not possible now what might need to happen for that to become a reality for the children? What might you each prepared to do to move toward that?

The approach outlined is representative of an FDR mediation approach. I hope it illustrates a process that empowers rather than overrides parents' responsibility to decide arrangements for the children in which, while the children might not have a direct participation, their rights and interests are respected in a fundamental way.

Embracing technology in FDR mediation

KERI MORRIS

In today's busy world, we need to be adaptive and responsive to customers' needs. Arranging time off work, childcare and transport to attend a meeting in person can become a major barrier for parents and guardians seeking to resolve a dispute about the care of their children. As part of the family justice system, providing mediation and support services for families to arrange care of their children, we must be flexible and work around our customers' unique circumstances.

At FairWay, we are embracing technology to make it easier for our customers to access our Family Dispute Resolution (FDR) service. Smart use of videoconferencing allows us to take away some of those barriers and is helping us to achieve better outcomes for families. Technology allows us to tackle location issues, and reduce travel time and costs for our customers, while continuing to provide FairWay's same great FDR services in a safe and easy way for our customers.

"Chatting to someone in their own home can be valuable, especially when someone needs a little break where they can relax in their own space. Videoconferencing also opens mediation up to parties who won't meet up face to face, whether it's for geographical or emotional reasons. It allows you to work with families spread across the country and even overseas, and relieves the pressure for parties who would prefer not to be face-to-face. It is a powerful tool for a mediator," explains Amy Oberkircher, duty mediator in Auckland.

Preparation by both the mediator and the parties is the key to mediation by teleconference. There are some practical steps, such as checking the quality of the internet connection, ensuring any devices are fully charged and testing the sound quality. There are also some environmental considerations. Each participant should think about the suitability of their location, what can be seen around them and whether it's a safe space for the conversation. For example, you may not want to have that conversation in a meeting room at work and then go straight into a business meeting afterwards; or it might not be appropriate to have personal photos in the background which could upset the other party.

Smart use of videoconferencing allows us to take away some of those barriers and is helping us to achieve better outcomes for families.

Of course, using technology presents its own challenges for mediators.

"You need to be mindful of the connection and any lags, maintaining adequate eye contact and sometimes it helps to show them your notes or sketches along the way so they know what you are doing. We have certain tips and tricks for mediations over videoconference," explains Amy Oberkircher.

While most of our mediations continue to be held in person, FairWay's FDR team have seen an increasing demand for videoconference meetings.

"It's funny, but I initially turned down videoconference mediations. I wasn't quite comfortable with it. But I decided to give it a go and the more I got into it, the more I saw the benefit. I realised that my own bias about being physically present in the room had been getting in the way. Many of the parents that I work with are digital natives, who are completely comfortable and used to communicating by Skype and Facetime. This really is a huge leap forward for mediation, and I think it is the future for us," says Simon Dadley Moore, FDR practitioner.

Simon has learned that videoconferencing presents its own unique advantages.

"Technology has allowed me to take on work from across New Zealand and even in Australia, without flying. It's opened up so many opportunities for me professionally. It allows me to take on clients without a risk of local conflict of interest. But it has also helped me grow my skills as I've tackled my own assumptions. Yes, it can be harder for the mediator, but it is definitely a positive for the clients," says Simon.

While mediating in person is certainly the preference for many people, technology has opened up the possibility of mediation

for others. At FairWay, we are happy to provide both options so we can help more families move forward.

About FairWay

FairWay Resolution is New Zealand's largest specialist conflict management company, and an approved Family Dispute Resolution (FDR) Supplier with over 80 accredited mediators across the country. Many families are entitled to 12 hours of fully-funded Family Dispute Resolution services. Get in touch with Family Dispute Resolution team to find out more.

Phone: 0800 774 420
Website: *http://www.fairwayresolution.com/got-a-dispute/family-disputes*

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CASE NOTES

These cases contain publication restrictions: in accordance with s 139 of the Care of Children Act 2004, s 35A of the Property (Relationships) Act 1976, s 124 of the Child Support Act 1991 and s 169 of the Family Proceedings Act 1980. Any report of these proceedings must comply with ss 11B to 11D of the Family Courts Act 1980.

CARE OF CHILDREN

Olsson v Culpan

Olsson v Culpan [2017] NZHC 1586, Nation J, 10 July 2017

Child abduction – Habeas corpus – Child abduction – Return of child– Costs – Agreement

Judgment of Nation J regarding costs following O's successful application for a writ of habeas corpus so that her children could be returned to live with her in Abu Dhabi.
HELD: O and C had come to an agreement about costs, C ordered to pay $13,000 costs to O in line with their agreement – orders accordingly.

RELATIONSHIP PROPERTY

P B v B J B

P B v B J B [2017] NZHC 1233, Brewer J, 8 June 2017

Division – Interim distribution – Appeals – Leave to appeal

Unsuccessful application by PB for leave to appeal High Court decision – High Court dismissed PB's appeal against three Family Court rulings – PB now sought leave to appeal to the Court of Appeal.
HELD: slender justification for appeal – substantive proceeding had now been determined so further appeal of two of the orders would be moot – application declined.

WILLS, PROBATE AND ADMINISTRATION

Armstrong v Wardle-Vaughan

Armstrong v Wardle-Vaughan [2017] NZHC 1862, Whata J, 8 August 2017

Probate and letters of administration – Administration

Successful application by A for order nisi calling upon W-V to show cause why probate shouldn't be granted to A alone – A and W-V had been named as executrixes of Frances Rea's will, but W-V had refused to execute probate documents and not responded to requests to sign a deed of renunciation – no appearance by W-V.
HELD: probate of will should be granted to A alone – application granted.

Nichols v Nafoi

Nichols v Nafoi [2017] NZHC 1815, Whata J, 2 August 2017

Probate and letters of administration – Administration

Successful application by LN for order granting administration of Viena Nafoi's estate to her – LN, RN and SN) all children of deceased and all named executors – LN submitted RN and SN neglected to prove the will or announce probate of it within three months of the death of their mother.
HELD: LN had taken all necessary steps to secure administration of the will – RN and SN had been unwilling and/or refused to do – orders made as sought – application granted.

Re Nurmela

Re Nurmela [2017] NZHC 1795, Cull J, 1 August 2017

Probate and letters of administration – Grant

Successful application by administrator of N's estate for extension of grant of letters of administration – applicant submitted claims against N's estate had still yet to be resolved.
HELD: extension granted as sought – application granted.

Sharma v Sharma

Sharma v Sharma [2017] NZHC 1476, Whata J, 29 June 2017

Executors and administrators – Administration – Probate and letters of administration – Grant

Judgment of Whata J regarding an application for order nisi for the grant of letters of administration where Neil Sharma had placed a caveat, but had since come to an agreement to lift the caveat to allow the interim administrator to act and to save the estate some expense.
HELD: orders made to appoint the interim administrator and for NS to withdraw the caveat in line with the agreement between the parties and in recognition of the special circumstances of this case – orders accordingly.

Re Estate of Anthony

Re Estate of Anthony [2017] NZHC 1536, France J, 5 July 2017

Executors and administrators – Proceedings by – Validity

Successful application by Darryl Anthony (DA) as executor of his late father's estate for an order recognising an unsigned document as the last will of his father.
HELD: the document appeared to be a will despite not complying with s 11 Wills Act 2007 (WA) and expressed the testamentary intentions of the deceased, which satisfied s 14 WA – application granted.

Re Hall

Re Hall [2017] NZHC 1009, Courtney J, 17 May 2017

Testamentary intentions – Validity

Successful application by Carol Hall and others for an order declaring a document the valid will of the deceased H.
HELD: the document was not properly witnessed but it was consistent with H's testamentary intentions, order granted on terms sought – application granted.

Re Estate of Ross

Re Estate of Ross [2017] NZHC 1230, Toogood J, 7 June 2017

Testamentary intentions – Validity

Successful application by Andrew Ross for an order declaring an unsigned document purported to be a will to be the valid will of his late father.

HELD: all the affected parties agreed the will reflected the testamentary intentions of the deceased, order made on terms sought – application granted.

McKnight-Wilson v Purvis

McKnight-Wilson v Purvis [2017] NZHC 1396, Whata J, 22 June 2017

Testamentary intentions – Validity

Successful application by M-W for an order validating a document purporting to be the will of her deceased husband, which was not a valid will as it was not witnessed.

HELD: all affected parties consented to the validation of the document and the document expressed the testamentary intentions of the deceased, order granted on terms sought – application granted.

Re Davis

Re Davis [2017] NZHC 1541, Dunningham J, 5 July 2017

Testamentary intentions– Validity

Successful application by D, without notice, for an order declaring a document which purported to be a will to be a valid will.

HELD: the document was witnessed by just one person instead of the required two people, but it clearly expressed the deceased's testamentary intentions and all affected parties consented to making the document a valid will, so it was appropriate to grant the order on the terms sought – application granted.

Re Goodwin

Re Goodwin [2017] NZHC 1826 Clark J, 3 August 2017

Testamentary intentions – Validity

Successful application by G for an order declaring an unwitnessed document to be the valid will of her deceased brother.

HELD: the document expressed the deceased's testamentary intentions and could be declared a valid will – application granted.

Re Trapp

Re Trapp [2017] NZHC 1805, Dunningham J, 1 August 2017

Testamentary intentions – Validity

Successful application by T and others for an order declaring a document purporting to be the will of the deceased to be a valid will.

HELD: the document was not properly witnessed but it expressed the deceased's testamentary intentions and could appropriately be declared valid – application granted.

Connor v Connor

Connor v Connor [2017] NZHC 1394, Associate Judge Matthews, 22 June 2017

Discontinuance– Costs – Application

Wills, probate and administration – Executors and administrators – Proceedings against

Unsuccessful applications by PC and MC for costs – PC had filed proceedings against MC, executor and trustee of Ombra Connor's estate, seeking certain orders relating to trust affairs – PC later discontinued proceeding – PC and MC both now sought costs.

HELD: costs to lie where they fell – applications declined.

Van Moeseke v Andrews

Van Moeseke v Andrews [2017] NZHC 1385, Mallon J, 22 June 2017

Family protection – Further provision – Claim by child – Breach of moral duty

Successful application by VM for an order granting him provision from his deceased father's estate.

HELD: VM was the deceased's only child and the charities affected by giving VM provision from the estate agreed to the change, orders made on terms sought – application granted.

Wakenshaw v Wakenshaw

Wakenshaw v Wakenshaw [2017] NZCA 252, Katz, Miller, Gilbert JJ, 14 June 2017

Testamentary promises – Claims – Relative – Encumbrances – Caveats – Appeals – Determination

Court Provided Information Appeal dismissed. Property Law: Caveat. The appellant appealed a High Court decision dismissing her application for an order that her caveat not lapse on the basis that she had a reasonably arguable case that she had a caveatable interest in the property on the grounds: (1) her late husband contributed financially to the purchase of the property such that he had a beneficial interest in the property that passed to her on his death; and (2) her personal contributions to the property had given rise to a constructive trust in her favour.

HELD: (1) there are serious deficiencies in the appellant's evidence regarding her late husband's financial contribution; even if her husband had enjoyed a beneficial interest, it cannot have passed to her because he died intestate and she has not sought letters of administration in respect of his estate; (2) her evidence regarding her contributions to the property is unsatisfactory; it is reasonably arguable that she and her husband made a reasonably significant contribution towards the development of a dwelling house on the property, but whether her contributions manifestly exceeded the benefits she had derived would likely be a real issue at trial; she had not shown it was reasonably arguable that she and the property's original owner both expected she would share in the property as a result of her contributions; the caveat does not refer to the current registered proprietor; it is not reasonably arguable that the current registered proprietor received the property with notice that it was subject to a constructive trust; the caveat cannot be maintained.

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CPD *Calendar*

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PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
FAMILY				
FAMILY LAW CONFERENCE *13 CPD hours*	*Chair:* *Margaret Casey QC* FAMILY LAW SECTION NEW ZEALAND LAW SOCIETY UNIVERSITY OF OTAGO	This conference has a superb line-up of international and national speakers and an outstanding educational and social programme which promises to provoke, stimulate, challenge, educate, inspire and entertain. Whether you are a practicing family lawyer, an academic or a judge, this is a not-to-be missed opportunity to update, reinvigorate and enjoy the collegiality of friends.	Rotorua	19-20 Oct
INTRODUCTION TO FAMILY LAW ADVOCACY AND PRACTICE *13 CPD hours*	*John Adams* *Usha Patel* The Law Foundation NEW ZEALAND	This workshop will show you how to run a domestic violence/ interim parenting case from go to whoa. Through precedents, videos, a book of materials, and performance critique, this course, recommended by the Legal Services Agency, is sound, participatory and proven.	Christchurch Wellington Auckland	6-7 Nov 13-14 Nov 20-21 Nov
MEDIATION FOR LAWYERS PART B – FAMILY *15 CPD hours*	*Virginia Goldblatt* *Geoff Sharp* *Denise Evans* MASSEY UNIVERSITY TE KUNENGA KI PŪREHUROA	This workshop builds on the NZLS CLE workshop Mediation for Lawyers Part A which provided opportunity to understand the process of mediation and to learn to think like a mediator – not a lawyer. It provides further opportunity to observe a civil mediation, to dissect it and to practise mediation skills.	Auckland	17-19 Nov
GENERAL				
MEDIATION FOR LAWYERS PART A – UNDERSTANDING MEDIATION *14.5 CPD hours*	*Virginia Goldblatt* *plus either* *David Patten or* *Geoff Sharp* MASSEY UNIVERSITY TE KUNENGA KI PŪREHUROA	Mediation knowledge and skills are an increasingly important adjunct to legal practice. Many more clients are taking disputes to mediation (because it works) and the more that legal advisers know about how it works the better. In addition, practice as a mediator extends the service that lawyers can offer the public.	Wellington	13-15 Oct
PRACTICE AND PROFESSIONAL SKILLS				
PERSUASIVE LEGAL WRITING *6.5 CPD hours*	*John Adams* *Simon Cunliffe* *Jane Hart*	Successful writing is persuasive. This workshop will show you how to structure your document, manage tone, achieve maximum impact and avoid common writing faults and much more.	Christchurch Wellington Auckland	3 Oct 4 Oct 5 Oct
READING ACCOUNTS AND BALANCE SHEETS *7 CPD hours*	*Lloyd Austin*	A workshop to enable you to unlock the mysteries of financial documents, gain an insight into the world of accounting and make you more effective and confident when advising your clients on financial matters.	Auckland Hamilton Christchurch Wellington	6-7 Nov 8-9 Nov 13-14 Nov 15-16 Nov
STEPPING UP – FOUNDATION FOR PRACTISING ON OWN ACCOUNT 2017 *18.5 CPD hours*	*Director:* *Stuart Spicer* The Law Foundation NEW ZEALAND	All lawyers wishing to practise on their own account whether alone, in partnership, in an incorporated practice or as a barrister, will be required to complete this course. (Note: From 1 October 2012 all lawyers applying to be barristers sole are required to complete Stepping Up). Developed with the support of the New Zealand Law Foundation.	Auckland 3	9-11 Nov
LAWYER AS NEGOTIATOR *11.5 CPD hours*	*Jane Chart*	Negotiation is a vital skill for every lawyer and improved negotiation skills can help avoid unnecessary litigation and produce better settlements more efficiently. Attend this workshop to gain an understanding of the risks and benefits of various negotiation strategies and techniques.	Auckland	15-16 Nov

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