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Paul Stannard

Family Advocate is the quarterly magazine of the Family Law Section of the New Zealand Law Society. Celebrating its 15th year anniversary in 2015, *Family Advocate* has been produced continuously since 1998.

We welcome 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 **10 February 2023.**

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FROM THE CHAIR

BY **CAROLINE HICKMAN**

Tēnā koutou katoa. Ngā mihi ō te wā Raumati

Law is a constantly developing and evolving set of principles and rules that sometimes lags behind social change and at other times leads it. New concepts in law take a while to take root so that they are sometimes imperfectly realised in cases. This can lead to discontent amongst people subject to Family Court proceedings. The more expansive description of family violence in the Family Violence Act 2018 is one area which still seem to be bedding down in understanding and practise.

It can be disheartening to see yet another news story criticising the Family Court. No lawyer gets into family law because they want to make people's lives miserable, but quite the opposite. Family lawyers are typically people who have found themselves by stint of personality, interpersonal skills, and optimistic altruism, alchemically attracted to family law. There is often more to cases than what is presented in the media.

Di Simpson, chair of the Australia Family Law Section made the following comment "Family lawyers in Australia are interested in improving themselves, helping clients and assisting them to find solutions wherever possible. Family lawyers play a significant role in resolving matters before court and brokering settlement".[1] Her words are just as pertinent to New Zealand family lawyers and probably family lawyers worldwide.

My experience attending the Australian family law conference brought home the parallel struggles each country is having with unacceptable delays, intractable disputes, lack of resources for support, lack of responsiveness of family law and the extent of unmet legal need for family services.[2] Australia is trialling a new early screening tool for family violence for every case entering the court process which is called the Lighthouse Project. This project identified that 78% of parents did not disclose family violence to court and other litigants did not know that what they had experienced was family violence. No doubt, Aotearoa will be able to learn from the experience of our neighbours, and where possible borrow ideas that may improve outcomes for all court participants.

In an ideal world, the Family Court would be a "therapeutic jurisdiction". However, at present, it does not have the resources to be therapeutic. There is no funding for children's counselling, or counselling for adults other than the limited section 46G counselling. There are few court events which are non-adversarial, and there is little uptake of section 46F referrals out of the court system, as where there are unresolved safety concerns, court findings are needed. There are few cases in the Family Court which do not involve some safety concerns and risk.

Family lawyers will continue to do the best they can to resolve matters short of a court hearing, and to behave humanely if the matter goes to hearing. However, we should always be open to further learning and development and even ideas which may at first seem radical.

Since our last *Family Advocate*, the FLS has completed the following submissions and feedback; Surrogacy: A new adoption system for Aotearoa New Zealand; Independent Panel reviewing the structure of the NZLS; Ministry of Justice on discussion documents about changes to the Oranga Tamariki Act; Deb Inder's children's participation report and the Family Court Associates Bill. Over the last year we have prepared more than thirteen submissions on various matters. These are often prepared under short timeframes and can involve many hours of collective work. Thank you, all our members who have helped with these.

In addition, the executive continues advocacy via regular meetings with key organisations. We have continued to advocate about financial eligibility for legal aid, for PPPR Act applications and paternity and as a result the ministry has amended its policies. We continue to advocate about court-appointed counsel remuneration rates and other issues, many of which are dependent on the annual budget round of government.

The FLS has presented a number of webinars since our last *Advocate* and more webinars are planned before the year is out and early next year. The resumption of face to face events has been welcomed around the motu, but nowhere more than in Tamaki Makaurau where the FLS held a well attended post covid celebration function. Another opportunity for getting out and meeting colleagues in Auckland was the retirement dinner for Judge McHardy.

Our regional representatives around the country continue to do an amazing job putting together education and networking functions as well as providing advocacy at a local level on behalf of local practitioners to resolve any issues that arise with the operation of the courts. Thank you for your mahi.

As we moved out of the Orange Light covid alert, the lapsing of Epidemic Notice has brought an abrupt halt to file and pay, electronic filing and service by email. These are all matters that the ministry is urgently working on, however as those changes require legislative changes, the resumption of those efficiencies will take time.

There are other post covid efficiencies that we hope can more easily retained, such as a greater willingness by the courts to allow AVL for directions, judicial and pre-hearing conferences, along with the ability to request these attendances by memorandum or even email where needed.

We know that our advocacy has helped secure an understanding with the courts regarding holiday scheduling and we hope this results in a good break for you all. Wishing you happy and safe times with whānau and friends, sunshine, and safety this Raumati.

Miri Kirihemete me ngā mihi nui o te tau hou. ■

1. A paraphrase of an address given by Di Simpson, chair of the Australian Law Section at the 19th Australian Law Conference 2022.
2. A summary of comments of the Attorney-General of South Australia, the Honourable Mark Dreyfus KC, MP at the 19th Australian Law Conference 2022.

FROM THE EDITOR

BY **EMILY STANNARD**

Kia ora koutou katoa. Nau mai haere mai ki te tānga raumati ki *Te Advocate*.

I hope you are all surviving the countdown to the summer break. I would like to thank all of the authors who have contributed their time to the Advocate despite the hectic time of year. This edition covers two cases creating new potential causes of action. One in Aotearoa New Zealand and one in Ontario, Canada. In *D and E v A, B and C*[1] the Court of Appeal upheld an appeal against a decision that found w a father who abused his children breached a fiduciary duty to them by transferring the bulk of his assets to a trust before he died. The children have applied for leave to appeal to the Supreme Court. In *Ahluwalia v Ahluwalia*[2] the Superior Court of Ontario established a new tort for family violence. It will be interesting to see whether that gains any traction in Aotearoa New Zealand. Thank you to Calina Tataru and Ellen Lellman for providing insightful articles on these developments in the law.

As Caroline has alluded to, the Family Law Section has been very busy with writing submissions this year. One of those submissions was on proposed amendments to the Adoption Act. We spoke with Susan Atkin about her work in the adoption reform space. She was also very generous in sharing her experience as an adopted person and spoke about the need for a child focused approach to adoption.

This edition also addresses developments of a more practical level. Family lawyers have been grappling more and more with cryptocurrency in separations. Grace Walker provides a very helpful overview of how to go about obtaining disclosure of cryptocurrency and how to read the wallet transactions.

Another article with practical tips is Kesia Denhardt's excellent analysis of an issue that will almost inevitably impact on each family lawyer. That is, the conflict between the privilege against self-incrimination and the concern of safety for a child or a client. Her article summarises several cases where this is addressed and sets out possible ways to address the situation.

The former editor of the Advocate and bastion of family law, Murray Earl reached 50 years of practice this year. We spoke to some of his colleagues about the huge impact he has had on the profession, and on them as a colleague

The former editor of the Advocate and bastion of family law, Murray Earl reached 50 years of practice this year. We spoke to some of his colleagues about the huge impact he has had on the profession, and on them as a colleague.

A welcome part of this edition has been the resumption of covering social events which have been few and far between in the past couple of years. One of these events was the retirement dinner for Judge McHardy. Thanks to Kath Moran for covering the dinner and for Susie Houghton meeting up with Judge McHardy to talk about some of the highlights and lowlights of his career. The Hawke's Bay bar dinner was a welcome chance for local practitioners to catch up with each other and to spend time with and celebrate Judges Krebs, McLeod, and Rielly.

Another chance for practitioners to get together in person has been Tulaga Vae. This was a twelve week programme with a multitude of Pāsefika presenters with the aim of developing best practice in cultural competency and encouraging more Pāsefika lawyers to join the profession. Kristy Morgan and Sao Timaloa were very generous with their time in explaining Tulaga Vae and also sharing their whakaaro on racial profiling in court with the practising well committee. Hopefully this exciting initiative continues for many years to come. Arti Chand also shared her whakaaro on racial profiling and the work the Ministry of Justice is doing in this space. Dunedin held the Guest Memorial Lecture, delivered by Anita Chan KC.

While open borders and lifted Covid-19 restrictions have meant we can gather together again, it does mean that disputes about international travel have arrived again (pun very much intended). Will Story addresses how FDR can be used to assist in these situations as a faster and more cost-effective way of resolving those particular disputes. Adrian Sharma sets out how mediation can be useful for elder disputes.

As the year draws to a close, I would like to say a huge thank you to everyone who has contributed to the Advocate over the past year. It has been wonderful working with all of you and I am always blown away by how many people are willing to contribute their time and expertise to the magazine. Thank you also to Kath Moran for her constant support, and to the FLS executive who work so hard advocating for us FLS members. To all of the Family Law Section members, I hope you have a restful break, Meri Kirihimete!

Noho ora mai,

Emily ■

1. *D and E Limited as trustees of the Z Trust v A, B & C* [2022] NZCA 430, 14 September 2022, Kos P, Gilbert & Collins JJ.
2. Ahluwalia v Ahluwalia 2022 ONSC 1303.

Judge McHardy

BY **SUSIE HOUGHTON**

Judge McHardy grew up on a town supply dairy farm in Waihi. He is the third of 11 children. His father intended that he would be a farmer. He was interviewed by Flock House Agricultural School during his 5th form year but his parents were told that he should go back to complete at least University Entrance. After five years attending Sacred Heart College as a boarder, instead of going back to the family farm, went to Auckland University and began his journey through law school.

He began work with Cairns Slane in November 1993 working in their family law team with Robert Ludbrook and former Family Court Judge John Adams. He was admitted to the Bar in 1974. A significant change in the family justice system early in his career was the arrival of the Family Court. Before that he had appeared in the Domestic Proceedings Court. He says there was much excitement around the creation of the Family Court and the vision for the future. He is sad that the significant resources that were required for the Family Court were not forthcoming and this has seriously affected the workings of the Family Court over the years.

A significant memorable case for Judge McHardy was *Scott v Williams* which every Family Court practitioner and others have heard of.

The move from counsel to being a Judge had its moments. There was immediate relief from the telephone calls which were never-ending in legal practice. As a Judge there was less people contact and a more secluded role than had been the case as a busy family lawyer. There was a steep learning curve in the new role which at times was somewhat nerve wracking. Initially 25% of his roster was in the Criminal Court – given that he had not practiced in the criminal jurisdiction for a significant number of years – added stress when sitting in the criminal jurisdiction.

Judge McHardy has really valued the collegiality of the other Judges on the District Court Bench. In the main he has enjoyed dealing with parties in court, particularly initially in mediation conferences as he tried to ensure that the right outcome was reached for the parties and children.

Prior to going on the Bench he enjoyed the variety of family law practice which included lawyer for child work and work under the PPPR legislation. The arrival of methamphetamine into our society meant that there were more testing briefs, particularly when acting for children. This sometimes led to unsafe situations arising.

His busy family law practice was mainly on the North Shore in Auckland. He considers he was unkindly nicknamed by some of his fellow practitioners as "Auntie" during the period before his appointment – supposedly because of his reputation for guiding and helping out younger practitioners.

An unfortunate and frustrating aspect of the role for Judge McHardy recently has been the misinformation about the Family Court. It is particularly presented in the media. The information is too often inaccurate and misleading given the very difficult situations that often present in the courtroom.

Judge McHardy has four children and eight grandchildren who all live nearby on the North Shore. In retirement he will spending more time with his wife Sue. His vegetable garden will benefit as might his golf handicap which has always been unhealthy. He will continue to be involved in the community. He is at present a board member for De Paul House, a transitional housing organisation on the North Shore. He also remains involved with rugby being on the Auckland Rugby Judicial Appeals panel. He is also currently a panellist for the Racing Integrity Authority. He intends to spend time at his beach house at Waihi Beach. He considers Waihi to be his tūrangawaewae.

He is continuing on acting warrant at this time in the Family Court. ■

Murray Earl – 50 years in practice

As Murray Earl achieves the phenomenal milestone of 50 years practising Family Law, we spoke with some of his former colleagues about how Murray has impacted them and the profession.

Judge de Jong

I began as a litigation lawyer in 1981 which is the year the Family Court began. Murray Earl was already one of the more senior lawyers in those days. In Hamilton he was originally with McCaw Lewis Chapman and later became a Barrister.

I was with McKinnon & Co for 20 years and retired in 2001 when that firm merged with Norris Ward. I wasn't sure about moving into Murray Earl's chambers because we had quite different personalities and ways of working. However, David O'Neill Barrister persuaded me to move to chambers in Murray's Victoria Street building.

Although Murray and I both practised Family law there was never any competition between us because there was simply too much work. It was also in the early years of a major overhaul of the Property (Relationships) Act 1976 that took effect in 2001 and 2002.

My years in Victoria Street chambers turned out to be incredibly stimulating and satisfying because of Murray. He is a naturally inquisitive person who is always thinking about the law. He is thoughtful and has a great love for the law. He has always been a strong advocate especially for the underdog.

I looked forward every day to my morning coffee sessions with Murray because they nearly always involved intense discussions about the law, how it should be interpreted and how it was to be applied. Our discussions could be lively and lengthy but always respectful even though he was prone to wear the most of ridiculous ties!

We became the closest of friends that extended to meeting in Paris to celebrate his 60th birthday at Maxim's. Maxim's de Paris opened in 1893 and Murray had always dreamed of going to this world-famous restaurant. The occasion was one of those never to be forgotten experiences that I will always cherish.

There was an FLS conference in East Auckland many years ago. Murray and I decided to go to a

local pub close by for a drink with the locals. Once we entered the bar, we were taken aback to discover that it was in fact frequented by a well known bikie gang. For a moment we paused and both thought about a quick retreat but not before one of the gang members approached us. He looked hard at Murray and asked him if he was Murray Earl. With some trepidation, Murray said that he was. The gang member broke out in a big smile and said "Mate, I'm...you acted for me years ago and I'll never forget what you did for me." That turned out to be a very memorable night!

Murray is a very kind and generous soul. He has always been willing to help, support and offer advice to other practitioners, sometimes to the detriment of his own work. Murray also performed many years of work for the Family Law Section that included being the editor for the Family Advocate.

I missed Murray very much when I was appointed a Judge and moved to Auckland in 2006. I will always be indebted to Murray for the years we were in chambers together for his companionship and the way he inspired me to view the law and the world in a different light.

Simon Jefferson KC

I have known Murray since I came back to New Zealand in 1981-1982, I have known him from way back. We met through being on the same cases.

The main highlight of working with Murray is his character. He is loyal. He's a loyal colleague. He's steadfast, he's reliable. He is a giving colleague. If you or I picked up the phone right now and said "Murray I've got a question" he would give you the time as if he had nothing else to do. He would then probably ring the next morning to say he had found something else that could help.

Murray is a giant of the profession in the Waikato. He has mentored many juniors, almost all of the good ones down there would point to him as a mentor. He loves what he does, he is like a pig in the mud, his office has law books everywhere. Murray loves the companionship and collegiality of the law. It is in his nature to be generous. When I had cases in Hamilton, he offered me his chambers anytime I needed them.

Murray is entitled to all the accolades he is going to get; he has earned them. He is a giant of the family law profession and put enormous work into the Advocate. The time and effort he has put in has been amazing. I have had some good times with him at conferences.

He will be a loss when he finishes, and I know we can say that about almost anyone, but he will be a loss. Generally, people are positive about him. It would be wrong he has no ego because we all have those, but he wears his ego lightly. He is a good guy. He really is the epitome of a good colleague. I regard that as high praise and I hope he would too.

Mentoring is one of Murray's outstanding qualities. He has helped a lot of people over the years

Isabel Mitchell

I met Murray when we were both on the family law committee in the 1990s. This was prior to the formation of the Family Law Section. Several of us went to a conference in Sydney (including Maureen Southwick and Murray Cochrane) and the conversation regarding the formation of the section began there. Through his editorship of The Advocate Murray has made a huge contribution to the profession and enhanced the cohesion of the Family Court bar.

Murray and several members of the then Family Law committee helped me when I was part of a messy case where a child was brought from the USA to New Zealand before the Hague Convention was in place. To be blunt, it was a media circus and media enquiries were directed to the Family Law committee rather than to me. This is but one example of the collegiality and assistance readily extended by Murray.

Mentoring is one of Murray's outstanding qualities. He has helped a lot of people over the years in terms of fielding questions, even from his contemporaries, on tricky issues. He is someone who can give perspective.

I do not see Murray very often these days, but we slip back to having an easy friendship whenever we do meet. We have had a lot of fun at conferences over the years. I am in awe of Murray having reached 50 years in one of the most difficult areas of law in which to practice – and still retain his enthusiasm and optimism! ■

Profiling of Lawyers in Aotearoa New Zealand

BY **ARTI CHAND**

In May of 2022, a senior Pacific lawyer was mistaken for a criminal defendant at the door of the court. Given she was dressed in a professional manner and carrying a file, the only reasonable conclusion was that she had been racially profiled.

At the time, we knew anecdotally it was not uncommon for Pacific and Māori court lawyers to have such experiences during their legal career – seemingly correlated with the overrepresentation of Māori and Pacific peoples in the criminal justice system. And, we knew that this was not an isolated event.

The Pacific Lawyers Association, with the support of the lawyer concerned, and in partnership with Te Hunga Rōia Māori o Aotearoa conducted a survey with the following focus:

- to assess whether instances of race based profiling at court by court staff are isolated instances or a prevalent experience for Māori and Pacific lawyers;
- to determine whether lawyers considered that court staff would benefit further education and training focussed on racial profiling.

The impetus for the survey was a defined focus on Pacific and Māori court lawyers being racially profiled as criminal defendants.

We worked with the support of the Ministry of Justice Te Tāhū o te Ture who meaningfully engaged with us through this process.

Our report on the findings from the survey was released in July. What we found is this:

- 50% of lawyers who responded said that they had been racially profiled by court staff in the last 7 years.
- 52% of lawyers indicated that they had been racially profiled in the legal workplace environment in the last 7 years.
- Just over a fifth of those who responded said that they had witnessed Pacific, or Māori lawyers being racially profiled by court staff.
- In terms of those who had been subject to racial profiling only 18% reported it. Many felt that their complaint was not dealt with appropriately.
- 72% of the respondents said racial profiling of Māori and Pacific lawyers by court staff is a real issue and 78% said that court staff would benefit from targeted training on racial profiling.
- Respondents were given the option to provide anonymous accounts of the racial profiling. It is apparent from this sample, together with the survey results, racial profiling of Māori, Pacific and Asian lawyers is also perpetuated in legal workplaces and, in one example, in dealings with the judiciary.

Based on Law Society information, we currently have around 450 Pacific and 1,000 Māori lawyers in Aotearoa. Of the 1,450 lawyers, a small percentage are "court lawyers". So, in terms of actual numbers of lawyers who could potentially be subject to this type of engagement is small. But, what we know from our survey is that the more than 50% of the respondents (who form part of that target group albeit small) said they had experienced racial profiling/discrimination in the last 7 years at court.

The stories shared with us were also impactful – showing the additional challenge a Māori or Pacific lawyer may face when going to court. Not just in their interactions with court staff but also at the hands of other lawyers. For instance:

Example One:

[A] female lawyer was approached by a duty lawyer. The duty lawyer queried whether she was self-representing as she was so beautifully dressed for a person appearing in court.

Example Two:

I was asked twice in one day, by the Security person in the Court, who was pakeha, if I was aware that I was sitting where the lawyers sit and that I should move to the Gallery. I was dressed smartly in a suit like the other lawyers, and I told him discreetly, that I was a lawyer and that I was sitting in the right place. I was embarrassed and felt insulted but I didn't know how to stick up for myself. The two lawyers on either side of me, who were representing their own clients, were embarrassed that he asked me that question. They were both pakeha.

In the afternoon, the same Security person tapped me on the shoulder and asked me if I was sitting in the right place just before the Court resumed after lunch. I was so angry and upset that he had asked me for the second time, that I wanted to cry. However, my colleagues on either side of me told him to buzz off and leave me alone as I was a lawyer.

Against the backdrop of such data, we consider that targeted initiatives, education, and training are needed so that lawyers do not have to deal with racial profiling whether it be at court or in the wider legal profession. Such training will have wider tangible benefits for courts and lawyers as interactions with persons of ethnic diversity increases, and will continue to increase, in Aotearoa.

We must work collaboratively to address this so that everyone going to court, and working in the legal profession, is treated with equal respect. ■

Hawke's Bay Bar Dinner

On 12 August 2022 the Hawke's Bay bar and judiciary gathered at The Old Church to celebrate Judges Krebs, McLeod and Rielly. The evening was very well attended with judges from several regions and practitioners across all age groups and practice areas. For many of us it was the first time gathering as a group since the covid-19 restrictions eased. It was particularly special for the three judges, all former Hawke's Bay practitioners, because they were appointed around the time of the 2020 lockdown.

There were heartfelt and entertaining speeches from the three judges as well as from Clayton Walker, Alison Souness and Maria Hamilton. It was a great time to celebrate the achievements of the three judges and to connect with each other. It was a very enjoyable event. ■

At last! A function in Auckland!

BY **LOUISE REED**

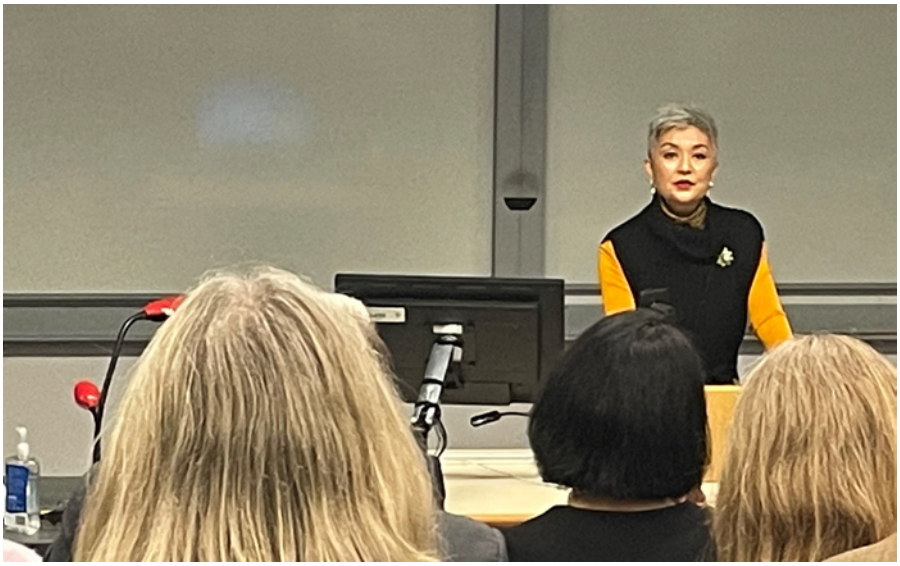
AFTER A LONG HIATUS IN SOCIAL EVENTS AND FUNCTIONS in Auckland, members of the Family Law Section in Auckland were able to come together on Thursday, 8 September at Freeman & Grey on Ponsonby Road.

The event was kindly put on by the Family Law Section and was well attended by the Auckland family law bar. It was clear from the volume of the talking at the event how much members enjoyed seeing one another in person again, as well as reconnecting and sharing stories with one another. It was great to see such a strong attendance from the Auckland family law bar at the event.

The Auckland FLS regional representatives are looking forward to welcoming members to the Christmas drinks to be held on 8 December at The Cav. ■

Guest Memorial Lecture

BY **LAUREN PEGG**



On Tuesday 27 September 2022, the 2020 FW Guest Memorial lecture was delivered by Anita Chan KC. Under the title "Children's Rights, Neuroscience and the Family Justice System. Are we getting it right?".

Anita addressed whether New Zealand is properly complying with its obligation to implement articles 3 and 12 of the United Nations Convention on the rights of the child.

The two rights – best interests and child participation – are considered to complement each other. Thus, in order for a court to give effect to a child's best interests, it must listen to the child's views.

Recent findings in neuroscience emphasise the importance for policy makers to invest in the best interests of children. Social science findings make it clear that authentic child participation in family justice processes is central to protecting children's best interests and mitigating harm to them.

With reference to the Care of Children Act 2004 (COCA) and the Property (Relationships) Act 1976 (PRA) respectively, Anita examined first, how well articles 3 and 12 have been implemented into legislation and secondly, how well the courts have discharged their duty to interpret domestic legislation in a way that is consistent with Aotearoa's obligations under international treaties – in this case, articles 3 and 12 – as long as the legislation allows. This included a discussion on how the Court of Appeal in *Newton v The Family Court*[1] approached the issue of whether a child's view must be obtained by the court before ordering a psychological assessment.

For New Zealand to comply with its obligations to implement articles 3 and 12, the PRA must be amended, and the courts must interpret the PRA in a way that is consistent with those rights

Anita expressed a view that s 4(4)(a), which prioritises child participation over best interests, is inconsistent with the Convention and should be repealed.

While the government and the courts have demonstrated a genuine, though imperfectly executed, commitment to upholding children's articles 3 and 12 rights under COCA, the same cannot be said about the PRA. Not only have children's rights been significantly side-lined in the drafting of the PRA, they have also been largely ignored by the courts in their administration of it.

As a signatory to the Convention, New Zealand is failing in its legal obligation to implement articles 3 and 12 into the PRA. By failing to acknowledge and act upon what has been revealed by both neuroscience and social science about the importance to children and society of upholding children's article 3 and 12 rights, it is also failing in its moral obligation to do so.

Anita called for significant reform. For New Zealand to comply with its obligations to implement articles 3 and 12, the PRA must be amended, and the courts must interpret the PRA in a way that is consistent with those rights.

Anita's paper will be published in the Otago Law Review. A link to an audio recording may be made available on the University of Otago Law Faculty website. ■

1. *Newton v The Family Court at Auckland* [2022] NZCA 207.





Lawyer for Child Forum

BY **LAUREN PEGG**

Friday September 9 September was an auspicious day, not only had we been planning the Lawyer for Child Forum for two and a half years with many changes of date, but on this morning, we also woke to the sad news of the death of her Majesty the Queen.

Despite the sombre start, the sun shone, and the harbour sparkled like glass as we drove to Glenfalloch.

The Forum was organised by Nicola Williams, Lauren Pegg and Rachel Cardoza, (with wonderful administrative support from Jools Coppola) in conjunction with the Family Law Section.

For the sixth year running, the organisers were overwhelmed by the support and interest in this event from both local and out of town Lawyers for Child. In part, this is indicative of the value gained from a collaborative, collegial focused day of learning.

The presentations during the day were focused on topics including:

- *Drug Testing in the Family Court* – Dr Anna Sandiford
- Discussion w Dr Louise Smith, facilitated by Rachel Cardoza on *Resist/ Refuse dynamics, Neuro development disorders & the impact on Parenting Plans, and Parent Co-ordination for high conflict families.*
- *Implications of s 7AA: making partnership work* presented by Dr Nicola Atwool
- *Research on children's participation, International best practice and how we fit and Reconceptualizing the role of lawyer for child* – Dr Deb Inder
- *Some thoughts on the Newton case* – Anita Chan KC
- *Legal Conversations we should be having more of*– Judge Parsons
- The final session for the day was an opportunity for further discussion with presenters and panel from the various sessions throughout the day.

The day ended with a well-attended dinner at local restaurant No 7 Balmac.

The organisers are very grateful for the high quality and well-prepared presentations made by each of the speakers. The various discussions indicated what an excellent opportunity these forums are to reflect on our practice.

Feedback from attendees has also been very positive. As we all know, the role of Lawyer for Child can be a challenging and isolating role; there is huge value in sharing knowledge and experience at a Forum such as this, as the feedback and enthusiasm of the panel and attendees' demonstrates. ■

Retirement dinner – Judge McHardy

BY **KATH MORAN**

The Five Knots Tamaki Yacht Club was fully booked on the night of 20 October to acknowledge the retirement of Judge Ian McHardy.

Bubbles and canapes greeted guests at the door and people were in a festive mood and happy to get together with colleagues following the string of cancelled events over the previous 18 months or so due to covid.

Auckland barrister, Susie Houghton kicked off the evening by welcoming everyone in true Judge McHardy style: by not wasting words, keeping it realistic with not too much formality. She paid tribute to Judge McHardy's "judicial truffle hound" ability to see past the parties' poor behaviour, their bad decisions, to work out the dynamics at play and to do what needed to be done. Counsel felt safe appearing in his courtroom as he shows respect and listens to everyone equally. Susie also acknowledged Judge McHardy's wife Sue, who was unable to make it due to ill health. Tonight was also a celebration of Sue: she has been beside you every step of the way with support, advice and companionship.

Instead of formal "speeches" Simon Jefferson KC and the judge launched into 20 minutes of wit and banter: of reaching the age of judicial senility and attending the judge's "pre-death wake" where it was hoped the judge would get to hear all the things he hoped would be said about him when he was dead!

Judge McHardy had auspicious beginnings in a small Bay of Plenty town. He was one of eleven children who was educated at Sacred Heart College. All the children attended boarding school and it was thought that the Judge would attend Flock House, an agricultural school in Fielding to then come back and take over the farm. Luckily Flock House said that the judge should go on to higher education so his dreams of becoming a dairy farmer were short-lived. Judge McHardy attended Auckland University and shared a proud moment of completely side-stepping the Socratic method that is well ingrained in the teaching methods used at law schools. He was involved in Youth Line for 4 to 5 years, was very involved in rugby: played, coached and administered. Some hilarious memories were shared with the audience about the 81 Springbok tour, the protest and the ten police in attendance who were also on the rugby side the judge coached.

The rugby, racing and beer culture was also discussed featuring in the judge's swearing in ceremony and in cases that appeared before his court throughout his time on the bench. Other stories of cases the judge recalled included a graffiti case, a dog prosecution case at Christmas (Snoopy the dog who had been in dog prison for 9 months) and an interesting case in which interpreters were involved. One of the highlights was the *Scott v Williams* decision, a case named at the same time as the winner of the US Open was announced! Other stories were shared about the judge's early career as a family lawyer and the establishment of the Family Court.

Judge McHardy paid tribute to counsel and to the registry staff. He enjoys hearings, and the best part of those is having counsel doing their job. He also paid tribute to his wife Sue and thanked her for all her support, advice and companionship over their many years together. The "formal" part of the evening ended in a standing ovation to the judge. ■

Submission on the Family Court (Family Court Associates) Legislation Bill 2022

Introduction

The Family Law Section prepared the Law Society's submission on the Family Court (Family Court Associates) Legislation Bill 2022. The Law Society supports the establishment of the role of Family Court Associate (FCA) and the object of this Bill: for FCAs to be able to take on some work currently undertaken by judges, including some decisions made at the early stage of proceedings to enable judges to focus on progressing casework and thereby reducing delay in Family Court proceedings. However, there are some areas where we disagree with what is proposed and suggest amendments to the Bill. In addition, there are powers that are not included in the Bill which the Law Society considers would be appropriate for an FCA to hold. Below is a summary of our submission on parts of the bill that, in our view, require amendment.

Te Ao Mārama

Te Ao Mārama is a judicially led kaupapa that will improve the experience for all people who participate in the court system, including victims and whānau. Te Ao Mārama will mean that all people who come to court to seek justice will be seen, heard, understood and able to meaningfully participate. Te Ao Mārama is inclusive of all people, no matter their means or abilities, regardless of their ethnicity or culture, and regardless of who they are or where they are from. Careful consideration is required to balance the rights and principle of Te Ao Mārama with the powers that are given to an FCA and whether those powers inhibit the opportunity for people to meaningfully participate in proceedings that impact on them. Such administrative dispensing of justice does not accord with the principles of Te Ao Mārama and the concept of "kanohi kitea" (to show up and be seen). If FCAs are given enough powers to undertake matters such as interlocutory applications, this would ensure that people who came to court for a preliminary hearing or an interlocutory matter may attend in person and where appropriate, an FCA could preside.

Family Court Rules

Amendments to the Family Court Rules 2002 (rules) will be required to reflect the proposed amendments in the Bill. It is the ability of an FCA to be able to undertake many of the pre-hearing steps that will make the biggest difference in maximising judge time for hearings and reducing the delays in the Family Court. Many of these steps are found in the rules. It will be necessary for the relevant rules that require amendment to be identified in terms of what powers may be able to be undertaken by an FCA. We are supportive of an FCA dealing with much of the pre-hearing work including pre-court hearings for interlocutory matters.

Powers of Family Court Associates

There are places in the Bill where clauses enable an FCA to exercise a power "when a judge is not available". Care needs to be taken to ensure that complex and substantive decisions remain with a judge, and each delegated power needs to be carefully and consciously delegated.

Part 1 – Amendments to Family Court Act 1980

Clause 4 – New Sections 7A to 7H inserted

New section 7B – Term of appointment of Family Court Associates
In the Law Society's view, the tenure of an FCA should be the same as a District Court Judge which will give status and mana to the role. Because an FCA would need to give up practice as a lawyer there should be some certainty in terms of tenure rather than a fixed term of not more than seven years. This new section should mirror section 16 of the District Courts Act 2016. In addition new section 7B(2) and (3) should be a separate section and mirror section 29 of the District Court Act (regarding removal of an FCA). The Judicial Conduct Commission should also govern these positions and if this is the case, there will need to be an amendment to the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

New section 7D – Transfer of proceedings to Family Court Judge
New section 7D enables an FCA, either on application of a party to a proceeding before the FCA or on the FCA's own initiative, to transfer the proceeding, or a matter in the proceeding, to a Family Court Judge because of its complexity. A Family Court Judge may also, on application of a party to a proceeding before an FCA if the judge thinks it desirable to do so, order that the proceeding, or part of it, be transferred to a Family Court Judge.

We agree with this in principle and suggest that there needs to be an efficient and effective review mechanism for FCA decisions.

New section 7E – Remuneration of Family Court Associates
New section 7E provides for the remuneration of FCAs. The role needs to be adequately remunerated if high quality applicants are to be attracted to the position of an FCA. The remuneration also needs to have due regard to the seniority of the role. We are concerned that clause

7E states that an FCA is to be paid "a salary, fee, or an allowance at the rate determined by the Remuneration Authority". This appears to diminish the role to being on a par more with a Disputes Tribunal Referee or a Community Magistrate (who are paid a minimal daily rate). As the role of an FCA is judicial in nature, a salary should be included in Part 1 of the Schedule of the Judicial Officers Salaries and Allowances (2020/21) Determination 2020.

New section 7G – Restrictions of Family Court Associates

New section 7G provides that an FCA must not undertake certain employment or hold certain offices, and specifically, must not practice as a lawyer. The role of an FCA is a judicial role (with limitations regarding jurisdiction). Because it is a judicial role, the restrictions should mirror those contained in section 17 of the District Court Act 2016. If the current wording is to stay, we note that the restriction that an FCA must not practice as a lawyer in the area of family law has been removed. New section 7G should mirror the restrictions contained in section 17 of the District Court Act 2016.

Part 2 – Amendments to other legislation

Clause 9 – Section 8 amended (Cases where consent may be dispensed with)

Clause 9 amends section 8 of the Act to give an FCA jurisdiction to dispense with the consent of a parent or guardian to the adoption of a child. In the Law Society's view, this power should be exercised only by a Family Court Judge and clause 9 should be deleted. The reference to section 8 of the Act in section 2(a) of Schedule 2 of the Bill should also be removed. The effect of an adoption order is significant – it severs any legal relationships between a child and his or her biological parents. Because of this significance, the Act provides a careful system where the consent of parents is required, and where steps are taken to ascertain that the correct people are providing the consent. Likewise, the process with which applications to dispense with consent are determined is one that requires careful legal analysis and the exercise of expert judgment. Determination of those applications, by their very nature, can lead to significant subsequent and almost irrevocable legal consequences.

Subpart 2 – Amendments to Care of Children Act 2004

Clause 18 – Section 46Q amended (Settlement conferences)

Clause 18 amends section 46Q of the Act to enable an FCA to convene a settlement conference at any time before the hearing of a proceeding. The clause retains the current provision in section 46Q(1) to enable a Family Court Judge to direct a registrar to convene a settlement conference. There is potentially a "gap" in this process if a Family Court Judge can direct the registrar to convene a settlement conference, but an FCA does not have the ability to make the same direction to the registrar. The Law Society supports an FCA having this power.

Clause 22 – Section 77 amended (Preventing removal of child from New Zealand)

Clause 23 – section 77A amended (Orders under section 77(3)(c) in respect of children of or over 16 years)

Clause 24 – section 77B amended (Orders under section 77(3)(c) may be suspended for specific period)

Clause 25 – Section 117 amended (Preventing concealment of whereabouts of child)

Clause 26 – Section 118 amended (Preventing removal of child to defeat application)

The Law Society is concerned about the powers proposed to enable an FCA to issue orders or warrants as identified in the circumstance set out in clauses 22 to 26 of the Bill. Although it is acknowledged that the wording of section 77(1) already includes in the definition of "authority" a registrar of the High Court or District Court if a judge is unavailable, we do not consider that it is a common practice (if, in fact, this have ever occurred) nor appropriate for a registrar to exercise powers as an "authority" pursuant to section 77 or 77A of the Act. The implementation of the national e-duty system means that it is unlikely that there would ever be a situation where a Family Court Judge is not available. We do not support the extension of the definition to enable an FCA to make orders that ought to be reserved for a judge. The powers that can be exercised under sections 77 and 77A have significant ramifications on the freedom of movement and human rights of those affected by these orders. For the same reasons, the issuing of warrants and/or making of orders under sections 117 and 118 of the Act should likewise be powers exercised exclusively by a Family Court Judge and should not be extended to an FCA. For these reasons, clauses 22 to 26 and clause 4(2) of Schedule 2 of the Bill should be deleted.

Subpart 3 – Amendments to Child Support Act 1991

Other powers not included in the Bill

There are a number of other powers, particularly those relating to enforcement of orders that, in the Law Society's view, would be appropriate to be held by an FCA in respect of the Child Support Act 1991. These include:

- Section 189 (Orders for enforcement of arrears)
- Section 190 – power to issue summons
- Section 192(4) – power to issue a warrant for arrest
- Section 194 – conduct of examination
- Section 200 – restrain dispositions
- Section 201 – set aside dispositions

Providing these powers to an FCA has the potential to free up the time of Family Court Judges. The Law Society would support these powers being given to an FCA.

Section 172 – Orders by consent

The Law Society would support an amendment to section 172 to give an FCA power to vary an order under the Family Violence Act 2018 where a variation is sought be consent. We consider that applications by consent to discharge an order should continue to be referred to a judge.

Subpart 7 – Amendments to Oranga Tamariki Act 1989

Clause 72 – Section 39 amended (Place of safety warrants)

Clause 73 – Section 40 amended (Warrant to remove child or young person)

Clause 72 amends section 39(1) of the Act to enable an FCA to issue a warrant under this section in the event that a District Court Judge is not available. A warrant may be issued authorising the search for and, if necessary, the uplifting of a child or young person suspected to be suffering ill-treatment, neglect, deprivation, abuse, or harm.

Clause 73 amends section 40(1) to enable an FCA to issue a warrant under this section in the event that no District Court Judge is available. A warrant may be issued authorising the search for and, if necessary, the uplifting of a child or young person who is believed to be suffering ill-treatment, serious neglect, abuse, serious deprivation, abuse, or serious harm, or who is believed to be so seriously disturbed as to be likely to act in a manner harmful to themselves or others or to cause serious damage to property. The implementation of the national e-duty system means that it is unlikely that there would ever be a situation where a Family Court Judge is not available. In addition, the powers in sections 39 and 40 have serious consequences and in our view should only be exercised by a Family Court Judge. There are also strong policy objections to allowing without notice orders to be made without first hearing from the parties from whom it is proposed the child be removed.

> Without notice orders made where the opposing party has not first been heard, offends the principles underlying the Oranga Tamariki Act

Without notice orders made, where the opposing party has not first been heard, offends the principles underlying the Oranga Tamariki Act such as ensuring whānau involvement, recognising *mana tamaiti*, the *whakapapa* of tamariki and the *whanaungatanga* responsibilities of their family, whānau, hapū and iwi group.

The Law Society does not support the extension of these powers to an FCA. These powers have significant and far-reaching ramifications and are one of the most serious orders a Family Court Judge can make. We do not agree that any circumstances would warrant an FCA being permitted to issue a warrant under section 39(1) or section 40 to search premises and uplift a child at risk of harm. In our view, the power to issue warrants to uplift children should always solely rest with a Family Court Judge.

Subpart 8 – Amendments to Property (Relationships) Act 1976

Clause 79 – Section 25 amended (When court may make orders)

Clause 79 amends section 25. The intention appears to be to give an FCA the power to make interim orders for the sale of relationship property by consent. The Law Society supports this proposal but notes that the power to make an order for sale derives from section 25(3). Section 25(4) is merely a clarification of one of the orders that may be made under section 25(3). The wording of the proposed clause needs to be amended to reflect this.

Clause 81 – Section 40 replaced (Costs)

Clause 40 amends section 40 to give an FCA the same power as a judge to make any order they think fit. Even though on the face of it this is a wider power, the Law Society considers that this is appropriate provided there is a right of review to a Family Court Judge of any decision made on costs by an FCA. With this proviso the Law Society supports this proposed amendment.

Clause 83 Section 43 amended (Dispositions may be restrained)

Clause 83 amends section 43 to give an FCA the same power as a Family Court Judge to make an order restraining the disposition of property intended to defeat the rights of the other party. There can be complex issues of law involved and the making of such an order is a significant incursion on property rights, with possibly significant implications for the property owner. The Law Society considers that this power is more appropriately dealt with by a Family Court Judge and does not support this proposed amendment.

Other powers not included in the Bill

In the Law Society's view, it would also be appropriate for the power to make orders relating to superannuation scheme entitlements by consent under section 31 of the Act. Providing this power to an FCA has the potential to free up the time of Family Court Judges. The Law Society would support this power being given to an FCA.

Subpart 9 – Amendments to Protection of Personal and Property Rights Act 1988

Clause 85 – Section 15 amended (Orders by consent)

Clause 85 amends section 15 to enable either a Family Court Judge or an FCA to make personal orders under sections 10, 11, 12 or 14 with the consent of all parties to the proceeding, including the person the application is about. The Law Society does not support this proposed amendment. Although it may appear straightforward to

make an order by consent, section 15 is rarely used in practice, because the subject person requires capacity to consent to an order being made. It is not straightforward to satisfy the jurisdictional requirements of the Act for the making of the order. The court also must exercise its jurisdiction based on the primary objectives of the Act being that of the least restrictive intervention and encouraging and enabling the person to exercise and develop their capacity to the greatest extent possible (section 8) and on the basis that there is a presumption of competence (section 5 and therefore a presumption of lack of jurisdiction). Section 15 itself does not create jurisdiction to make the order. The other jurisdictional requirements of the Act still must be met.[1] Accordingly, the making of an order by consent requires a substantive decision which is complex. Due to the nature of the proceedings the subject person is particularly vulnerable. In our view, allowing an FCA to hold and exercise these powers is contrary to the policy statement in the bill that *"substantive decisions and proceedings will continue to be made by Judges because of the social significance of those decisions, the impact those decisions have on human rights, and the complexity of the decisions."*[2] We do not support this proposed amendment.

Pre-hearing conferences

Clause 90 – Section 70 amended (Power of presiding Judge to make consent orders)

Clause 90 amends section 70 to enable either a Family Court Judge or an FCA to make any orders by consent provided "that the person in respect of whom the application is made understands the nature and foresees the consequences of the order and consents to the order". The Law Society does not support this proposed amendment and in our view, an FCA should not have the power to make an order determining the proceedings at a pre-hearing conference. Under the PPPR Act, the making of an order by consent is a substantive decision which ought to be made by a Family Court Judge. We refer to our comments under clause 85 in respect of personal orders. These comments are also relevant to clause 90 which, as currently drafted, would allow an FCA to make property order by consent. For the same reasons that the Law Society does not support an FCA having power to make consent orders in respect of personal orders, we do not support this proposed amendment.

Clause 91 – Section 72 amended (Privilege)

Clause 91 amends section 72 to provide that privilege does not extend to records made by an FCA under section 69 nor to consent orders made by an FCA under section 70 at a pre-hearing conference. The Law Society supports the part of this clause that provides that privilege does not extend to records made by an FCA under section 69, but as noted above, does not support an FCA having power to make consent orders.

Other matters relation to the PPPR Act

Pre-hearing conferences

If it appears that following a pre-hearing conference before an FCA where the issues have been narrowed sufficiently that the FCA believes that a judge would now be able to make an order in chambers, the matter could be so referred. Section 71 allows a District Court Judge, to, on the request of the registrar, issue a summons requiring a person who fails to attend a pre-hearing conference to attend at a time and place to be specified in the summons. This power has not been extended to an FCA. The Law Society suggests this power is extended to an FCA as it will allow for more effective case management.

Referral to Māori Land Court

An FCA should be given power to refer an application to the Māori Land Court pursuant to section 31B(1) if it would be appropriate to do so.

Schedule Two

The Law Society supports the Schedule 2 powers proposed to be vested in an FCA to:

(a) appoint lawyer to assist the court pursuant to section 65A(a) PPPR Act
(b) review the decision of a registrar relating to the invoice of employer for fees and expenses pursuant to sections 65(7) and 65B(3)
(c) order reimbursement to the Crown of an amount in respect of fees and expenses for a lawyer appointed by the court pursuant to sections 65(8) and 65B(4)
(d) obtain a medical, psychiatric or psychological, or other report under section 76

Subpart 10 – Amendment to Remuneration Authority Act 1977

Clauses 93 – Schedule 4 amended

We refer to our concerns noted above under clause 4, new section 7E – Remuneration of Family Court Associates. We also note that Schedule 4 of the Remuneration Authority Act 1977 includes salaries for positions such as disputes referees, various commissioners such as a law commissioner and the governor of the Reserve Bank. As the role of FCA is a judicial role, remuneration should be included in Part 1 of the Schedule of the Judicial Officers Salaries and Allowances (2020/21) Determination 2020 and should not be dealt with under the Remuneration Authority Act 1977.

Subpart 11 – Amendment to Status of Children Act 1969

Clause 95 – Section 10 amended (Declaration as to paternity)

Clause 95 amends section 10 of the Status of Children Act 1969 to enable an FCA to make:

(a) A declaration of paternity in respect of a child.
(b) A declaration of non-paternity if satisfied that a paternal relationship does not exist between a child and a putative father.
(c) In doing so, determine any question of fact that arises on the balance of probabilities.

In the Law Society's view, these are substantive orders which can have far-reaching implications for a child. If the Act is amended as proposed, an FCA would have the power to preside over a hearing of a defended application under this section. In our view, this power should be reserved for a Family Court Judge. If, however, an application under section 10 is unopposed or consented to, then the Law Society considers it would be appropriate for an FCA to have the power to assess the application and make orders if the FCA is satisfied that jurisdiction for the making of orders is made out. ■

1. *In the* matter of M – [1994] NZFLR 164 and Purcell v Purcell [2014] NZFC 9285.
2. Family Court (Family Court Associates) Legislation Bill, explanatory note, page 2.

Practising well

The practising well working group met with Kristy Morgan and Sao Timaloa to discuss their experiences in practice, how they keep themselves sane and Tulaga Vae, a twelve-week training programme for Pāsefika law students, graduates, lawyers and support staff.

Tell me a little bit about yourselves

Kristy: I grew up in the beautiful city of Napier, on the sunny East Coast, and enjoyed a very rural Kiwi upbringing. My mother migrated to Aotearoa from the Cook Islands. My father's parents migrated here from England. My parents were devout members of The Salvation Army, which meant I was actively involved in church activities and serving the community. My parents were great role models as they both had hearts of service.

After leaving school and starting work I eventually ended up at the Ministry of Social Development. I moved to Auckland as a recipient for a Pāsefika leadership programme within the Ministry. Whilst I enjoyed working as a public servant, I felt like I wanted a bit more control over my working life.

So off to university I went. The only trouble was, I knew nothing about it. I didn't even know anyone that had gone to university. All I knew about university was that you went to be a lawyer or a doctor, I preferred reading, so I ended up in law school.

When I was in law school, I gravitated towards the aspects where I felt I could give back to the community, give back to people's lives and guide them by offering assistance and support. That is how I ended up where I am now.

Now I juggle being a barrister alongside being a mother of four. Whilst it is extremely challenging, it is so rewarding. I feel very privileged.

Sao: I am a late bloomer in law. I went to Auckland Girls' Grammar. My parents were some of the first migrants from Samoa. I grew up in the EFKS Samoan church based in Grey Lynn. I have five brothers. I was going to go to university after school but instead, I decided to look for a job as dad was working but he was unwell and mum was working two jobs at the time. Dad passed away when I was 19.

In 1989 I got a job at the Auckland High Court via the Ministry of Pacific Affairs, it was an initiative to employ more Pāsefika people in the Ministry of Justice/ or Courts at the time. I believe I was one of five Pāsefika people whom started working at the Auckland High Court in 1989. During that time, there were lots Pāsefika people working at the District Court but not many in the High Court.

In 1997 a good friend (Dorothy Alofivae) had just finished her BA degree and was working part-time at the High Court. She encouraged me to try university. I went in thinking I would do a social work degree, but decided on law. I wanted to help people. That came from my community work with my church, youth work and Sunday school.

In 2005 I graduated and got my first law job was with Joyce Spence Teei in Henderson. I believe my boss at the time Poi Teei did not look at my transcript but he believed in me and that was God's grace. My second job was with the Māngere Community Law Centre as a staff solicitor and after two half years, I went to work for a barrister – Nicole Walker. My time with my past employers were valuable and it actually made me the lawyer I am today.

In 2012, I became a barrister sole and in 2016, I formed an incorporated firm trading under the name Timaloa Law Ltd. I am the sole director. I decided to transition to an incorporated law firm because I am also a director for the Māngere Law Ltd / Māngere Community Law Centre. I am the trustee and director for the charity company as part of my community work. Our work is all about service to our communities and providing for our families. That's both Kristy and me about providing for our families.

What have been some of the highlights of practice?

Kristy: becoming a lawyer was a huge highlight in and of itself. I was the first in my family, both in my immediate family and extended family to attend university. That showed everyone that it was an achievable goal for everyone else, rather than something our families didn't do. Subsequently, my father went on to study, as did my sister and others in my extended family.

Another highlight is when my work has resulted in a good outcome for a family. When I can genuinely know that my professional input has made a difference, particularly with children.

Also, the financial reward enables me to provide for my parents and children and extended family.

Sao: I agree with Kristy, I'm the first university graduate from my immediate family. My parents always wanted us to do university, but Dad died young. Me going to university inspired a lot of my family including my older brother to return to University.

I always think that doctors save lives, but I realise family law also saves lives in a social sense. If we can help parents to work together, co-parent and raise their children well, this is saving families in a social sense. We may not be able to save the world, but we can do our bit to help families and children.

What have been some of the most difficult parts?

Kristy: There are a lot of difficulties. It can

be really draining. You can get quite down about the huge problems that are within our communities. The problems can seem overwhelming and relentless. There are similar issues continually, so year on year that can get difficult and lead to burnout. You want to give so much of yourself, and you can be running on empty.

Sao: I agree it is the burnout. When I talk to other lawyers who don't practice family law, they say "oh family law, that's the hard stuff". Family is the core for all of us. In cases when I can't find good solutions for my client or this family and hit a block that can be really frustrating. When this happens, the parties are stressed, the lawyers are trying to work together or you may have the odd lawyer who can be the elephant in the room, it can be overwhelming and it impacts on our mental health, and we need to balance it again.

What are some of the hardest parts of practising as Pāsefika lawyers?

Sao: For me I try not to see colour and work towards my own reputation. Like Judge Malosi said, we need to work to promote the cultural element of our practice and our client's cultures. That said, we advocate for our clients whether they be Māori, Pāsefika, or Pākehā.

Kristy: I only see my Cook Islands culture as enhancing my practice. During my upbringing I felt as if I lived in both worlds, NZ Pākehā and Pāsefika. My culture has made me a better lawyer, it brings unique knowledge. Just as being a mother enhances my practice and raising a blended family.

Sao: I acted for an elderly Samoan woman who was granted a protection order against her Samoan husband of more than 20 years. The husband instructed a Samoan lawyer. After several months of being separated had passed and the matter was progressing to a hearing. It was obvious the parties didn't want to go to a hearing because it would carry so much hurt. Instead, we agreed to meet in a round table meeting. It was culturally appropriate to meet and how the other lawyer conducted the meeting was awesome, it was all in Samoan, like an ifoga. The husband openly apologised in Samoan to his wife and it felt very sincere and she replied back in a respectful Samoan way, just like an ifoga. The spirit in the room started off tense but at the end of the meeting, the spirit of forgiveness was evident.

The matter was before a Samoan judge and again, because she understood the practice of an ifoga and she enquired on the sincerity of the apology and checked whether the meeting had been done properly. She did not just rubber stamp it. It was a huge burden lifted for my client for that process to be followed. That file actually came to me from a Pākehā lawyer who acknowledged that the language and cultural situation meant that she was not the right person for the job and the client needed a Samoan lawyer.

There is the recent report from PILSA regarding discrimination of Pāsefika, Māori and Asian lawyers. Is there anything you would like to comment on about that?

Sao: We have seen the report and have not seen discrimination much but if we saw it we would call it out. Also, sometimes people make a mistake in guessing who is who, and I don't really mind if people think I am a client as people are people.

Kristy: I have never felt personally discriminated against, but as Sao has said – I would address it if someone was offended.

Sao: We would call it out though if people were offended by it, and I think people should call it out.

What changes would you like to see in the system?

Sao: One really big challenge is the number of Pāsefika families needing Pāsefika lawyers, and there not being enough awareness of the languages, the cultures, and family situations. There are also the barriers for potential Pāsefika lawyers coming into family law.

Kristy: I am motivated to get the best outcomes for all consumers of the justice system. That means having the most competent and excellent lawyers for our people. If they are Pāsefika lawyers, that is great, but it does not have to be. You can have cultural knowledge indigenously, but you can also learn it. We are here to teach it. We want everyone to have cultural competency. It is great that Te Ao Mārama is here. Now everyone has to have that cultural competency, to make sure that particular family or culture is heard and understood.

You mentioned Tulaga Vae, what does that involve?

Tulaga Vae means our place to stand and feel empowered and connected. We created a pilot 12 week programme designed to provide a place for Pāsefika law students, graduates, lawyers and support staff to stand and feel empowered and connected. We challenged ourselves with creating a programme to increase Pāsefika lawyers and support staff within the family law area, with a hope of creating better outcomes for our Pāsefika families and children. Hence, Tulaga Vae was formed.

There were over 50 registered participants from all over New Zealand, as well as some from the Pacific Islands. The participants attended in person and/or online.

Over the 12 weeks we shared our personal views on best practice, through a Pāsefika lens. We also created a platform to hear from fellow Pāsefika professionals in the family law area who have a great wealth of knowledge and experience. We had over 30 Pāsefika guest speakers including lawyers, senior support staff, professionals working in the family law space and judges.

Our hope was to inspire Pāsefika graduates, lawyers and support staff into the Family law area, increasing employability, creating competent professionals and ultimately better outcomes for our Pāsefika communities. We received great feedback on the programme, a number of participants moved into employment in the family law space and there have been many requests for us to run the Tulaga Vae programme again. Which we would love to do if we can source further funding.

We like to thank all our guest speakers and participants in particular Judge Malosi and Judge Ginnen for taking part in our pilot programme. Also, we would like to acknowledge the Māngere Community Law Centre for being instrumental in sourcing our funding and allowing us to utilize their space, iknowit for our IT support, Wailana Rose for the beautiful gifts and to the many small catering businesses that we engaged with. More importantly wish to thank our Lord for guiding us both with this project. He is truly an amazing God.

What changes can individuals make?

Kristy: My hope is that all our Pāsefika communities, and everyone actually, can get the best outcomes achievable. That comes with competency, best practice in terms of technical skills and in terms of understanding culture and understanding your client. It is also about acknowledging that if you do not have that skill set, it is best for the client to refer the file on. Then making a decision to invest in yourself to increase your cultural competency.

Sao: I find our Manukau judges invest in cultural learning all the time, when I'm in front of them. Whether they are Pāsefika or not, they address parties appropriately. We also need to be our authentic selves, and respect other people being their authentic selves, whether that is in a cultural or religious sense.

Education is important. Also, you need to be bold. If you do not have the appropriate cultural competency, respect your client enough to say that and pass the file on. If you do have the appropriate skill set, represent your client authentically and be bold in your submissions and innovative in your problem solving. Tell the judge what you think will suit that particular family and why. It is important to think beyond ourselves, and think about the resolution or outcome. For example, I could be a lawyer for child and a Pālagi parent may struggle and want a Pākehā lawyer for child and I am happy to hand that file over. It goes both ways.

What do you do to keep yourselves sane?

Kristy: I try to have a balanced life, and invest equal amounts of energy into family, work and me! I try to keep fit, stay active and my favourite thing to do is to express myself creatively through Pāsefika dance. The other important factor keeping me sane is a strong sisterhood of colleagues. They are my safe space where I can download my work stress and then upload positivity and feel reinvigorated.

Sao: It's good to talk to other lawyers because they just get it. It's also good to have a good laugh, Pāsefika people love to laugh.

Kristy: You can just rant and rave.

Sao: Yes, you can vent and let it go, don't hold it. I think exercising is also important although I don't do much of it, but I am trying to figure out what I would like to do that involves exercising.

Kristy: we have mental health weekends where we go away four times per year. We try to prioritise that. Having fun is important.

Sao: I looked after my elderly mother before she passed earlier this year. I valued that time I had with her and now I am adjusting, spending time with family and friends. I think relationships are important and being a Christian, my relationship with God is very important to me. ■

Lawyer for child forum – Wellington

BY **ATAGA'I ESERA**






On Friday 16 September, the Family Law Section representatives of the Wellington Region held a lawyer for child forum at the Lower Hutt Events Centre. The workshop was open to both lawyer for child currently on the ministry's list and those considering undertaking lawyer for child training. The day was well attended by counsel from across the Wellington region, including some from the Wairarapa and Manawatū.

The sessions in summary were as follows:

1. *Introduction to Tikanga and how to be an ally* – with Tai Ahu (Waikato and Te Paatu (Ngāti Kahu)), Director at Whāia Legal. Tai shared some of his whakaaro on tikanga Māori, how to work with whānau from his own lived experience. Tai discussed with attendees how we might navigate engagement with whānau in a manner that is tika and pono.
2. *Using te reo in the Courtroom* with Jodi Ryan, focussed on the use of te reo in family law, in particular in the courtroom and during meetings, and also on the etiquette of Te Ao Māori. Jodi had the whole room practising our reo together, emphasising the importance of pronunciation.
3. *Oranga Tamariki Act and policies*, presented by Robert Bowe, Emma Pedder, Jessie Hunt and Belinda Inglis. Oranga Tamariki spoke about how to get the best from your relationship with the ministry and Jessie and Belinda discussed practical ways to involve the ministry in Care of Children Act proceedings.
4. *Gassing on and off,* presented by Luke Rowe (Ngāti Tūwharetoa and Ngāti Raukawa ki te tonga) a session on practising well. The aim of Luke's kōrero was to enable a better understanding about how to manage our 'gas' in our roles as lawyer for child and the extent and limits of your practice. It was intended to be conversational, with a focus on addressing practical steps you can take with a view to prevent burnout. Luke may yet be back to give another workshop!
5. *Practical Tips And Tricks For Lawyer For Child,* a panel discussion with Judge Montague, Paul Reid, Kay Cunningham (Neuropsychologist / Clinical Psychologist), Justine Croxen (Clinical Psychologist). Topics included when to ask for a section 133 report and how to get the best out of these reports, as well as making the most of the time between when the reports are directed and received. Useful tips and tricks for a successful roundtable meeting and dealing with self-represented litigants as lawyer for child were also discussed.

The day was well attended and well received by all present. It is hoped that the Wellington lawyer for child forum will become a regular event on the calendar. It was a great opportunity to gather with colleagues and discuss our practice as lawyers for children. ■

The Regulation of Lawyers and Legal Services in Aotearoa New Zealand | Te Pae Whiritahi it e Korowai Rato Ture o Aotearoa

The New Zealand Law Society commissioned an independent review (review) last year on the back of two key drivers: the ability of the Law Society to be more effective with its complaints system and to deal with a range of unacceptable behaviour, including complaints of sexual harassment and bullying.

A panel of three: Professor Ron Paterson (Chair), Jane Meares and Professor Jacinta Ruru was established to conduct the review which will examine the regulation and representation of legal services in Aotearoa New Zealand, including the structure and functions of the Law Society.

A discussion document (paper) was released earlier this year which asked for feedback including:

- the current state of legal regulation and representation;
- the focus and scope of regulation, including how the statutory framework might appropriately reflect the role of Te Tiriti o Waitangi;
- the role of the regulatory framework in promoting a positive and diverse legal profession;
- whether the current model for regulating conduct and handling complaints is fit for purpose;
- whether there should be a regulator of the legal profession that is independent of the professional membership organisation;
- suitability of the current the Law Society governance structure and the optimal institutional arrangements for a modern regulator and/or representative body.

The key areas that the FLS commented on are set out below.

How should Te Tiriti o Waitangi be incorporated into the Act?

The FLS in principle, supported Te Tiriti being incorporated into the Act to achieve culturally appropriate service provision whilst maintaining public confidence of the provision of legal services. It could, for example, include processes that support Māori and other cultures to exercise tikanga and te reo during complaint processes. However, clarity is required on how applying a Te Tiriti o Waitangi lens will change service provision on a practical level and how this may affect the day-to-day operation of private law practices.

Statutory objectives for the regulator

The FLS believes that the Act should set out objectives and supports the examples from the United Kingdom model in the paper.

Are the reserved areas for lawyers appropriately defined?

In our view, the reserved areas of work are appropriately defined. There are many non-lawyers who offer valuable advice, such as advocates employed by the Community Law Centres. Law clerks and summer clerks also provide valuable work to law firms, and student volunteers at Community Law Centres also provide value to the community. If the reserved areas of work are expanded, then there could be an unintended consequence that people fulfilling these types of roles would be limited or unable to provide these services.

Are there instances where consumers are likely to suffer adverse outcomes from using unregulated providers of legal services?

The FLS believes there can be harmed caused by unregulated providers of legal services. While many employment advocates provide a valuable service, there can be situations where the combination of the no-win, no-fee model combined with a lack of regulation can result in clients being pushed into a course of action that is not in their best interests. There is also a discrepancy between non lawyers who are employed by law firms being subject to the NZLS regulation and employment advocates who have full oversight of a case are not. In the family law jurisdiction, McKenzie friends are used. Given the sensitive nature of these proceedings, it could be appropriate for paid McKenzie friends to also be the subject of regulatory regimes.

Should the focus of the Act on regulating the activities of lawyers be broadened to include providers of legal services more generally?

There would be benefit in regulating the activities of providers of legal services more generally. This should help reduce the concerns around employment advocates. It could be beneficial to have duties on those appearing as paid McKenzie Friends, particularly in the Family Court. This option would also remove the discrepancy between employees of law firms, who are supervised by lawyers, being subject to the regulatory scheme,

but employment advocates who operate their own businesses are not.

Should regulatory obligations vary depending on the degree of risk from the type of legal service?

The FLS strongly disagrees that there should be a difference in regulatory requirements for the risk of the service. Family law is one in which clients are almost without exception in a difficult time in their lives and many who are involved in the family justice system struggle with mental health and addictions. This can lead to higher levels of complaints but does not necessarily lead to a higher level of upheld complaints. We disagree with using the percentage of complaints in each area of law as a means to determine how lawyers in each practice area should be regulated, or how much each practitioner should pay for the regulatory service.

Should the Act allow law firms to use alternative business structures that permit ownership, management and investment by persons other than lawyers?

If this was to be in place, there would need to be strong safeguards to ensure that the ethical standards of all the professions involved are upheld. This could be done by holding all owners to professional standards as well as the entity itself. There could also be a requirement that there is a majority ownership by lawyers.

Should the Act permit multidisciplinary practices, where lawyers can enter into a partnership with non-lawyers?

This could allow for family lawyers to work in a more interdisciplinary way for example, including social workers, accountants, and psychologists to work in partnership with lawyers. There would need to careful consideration around how the different professional standards in multi-disciplinary standards would work in practice, especially for support staff who support different types of professionals.

It could be helpful for there to be tools similar to those of the Medical Council, such as a competence review or conditions to assist with a safe return to practice

Should entities providing legal services be directly regulated, in addition to individual lawyers?

This is a good idea, as it would encourage firms to ensure staff safety and should reduce the tolerance of profitable fee earners who harass staff. It would also be necessary if there was to be ownership by those other than lawyers and interdisciplinary practices.

What additional regulatory tools should be available to the regulator?

It could be helpful for there to be tools similar to those of the Medical Council, such as a competence review or conditions to assist with a safe return to practice. These would not have a disciplinary focus but one that is protective of consumers and supportive of practitioners.

What steps are needed to promote positive culture change, health and wellbeing, and help to ensure lawyers are safe within their workplaces?

In our view, issues in respect to bullying and harassment can be dealt with in the current employment law framework in New Zealand. There needs to be a realisation that especially in litigation, lawyers are in direct competition with each other and often this is in high pressure and stress situations. What is considered good advocacy and promoting the interests of the client can in some cases be seen as bullying and vice versa. We would be concerned if the newly articulated standard and obligations around mandatory reporting of bullying created a culture of unjustified complaints, and increased stress on lawyers as a result. Wellbeing is directly linked to complaints. There are significant restrictions on the way lawyers are allowed to operate both in terms of not being able to terminate retainers when clients will not follow advice and restrictions on the way lawyers' businesses are allowed to be set up. This all has an impact on wellness when there is an increasing demand to be consumer-focussed and in a climate where online/quasi-legal services are being offered by people who do not fall under the Law Society's regulation. The Law Society should be taking and maintaining a positive stance in terms of wellbeing and realising there are a wide range of factors which may affect a lawyer's wellbeing. Changing workplace behaviour is something that will take many years to effect and is not something a simple legislative or rule change will miraculously solve. In terms of litigation, the effect judges have on wellbeing is significant and does need to be addressed in some way. There needs to be a clearer and safer pathway for lawyers to be able to deal with judges who bully. Successful wellness programmes operating at local/branch levels should be reviewed by the Law Society with a view to implementing these on a national level.

Are the current CPD requirements fit for purpose?

We question whether or not there is any evidence that compulsory CPD has had any positive effect on the competency of lawyers? Unless the Law Society can show there is actual evidence that mandatory CPD has any benefit, then we support the proposal that it should return to a less mandatory system. Any CPD system needs to be flexible enough to recognise that intelligent adults learn best when they are directing their own learning, without compulsion. Many firms are very small in size, so any mandatory CPD must be able to be accessed in a cost-effective way. Generally, lawyers who were doing considerable CPD

prior to the mandatory CPD requirements were already undertaking wide-ranging CPD. Removing the general requirement for mandatory CPD would possibly see higher quality CPD being offered because lawyers would have to want to do it to take it up.

Should it be mandatory for lawyers to undergo training in anti-bullying and discrimination as part of their CPD requirements?

Most workplace anti-bullying policies involve staff identifying and raising issues, and the process by which they should do that. That policy will not work unless staff are aware of what behaviour to identify, and what is and is not acceptable behaviour and what behaviour is considered bullying or harassment. It is beneficial if some form of training is undertaken in order for policies to be more effective.

Should it be mandatory for lawyers to undergo cultural competency training as part of their CPD requirements?

The FLS would support a requirement for lawyers to ensure they are culturally competent and safe as part of their practice. However, one hour of compulsory training, for example, is less likely to create a complete understanding of cultural diversity. Attendance at a single compulsory training session may have the opposite effect of ensuring lawyers take full responsibility to become culturally competent and safe themselves A more integrated practical approach is needed.

How might the statutory framework and the regulator facilitate and encourage pro bono services?

The definition of "pro bono" would be a helpful start. It is unlikely that the regulator will "encourage or facilitate" pro bono services short of regulation and imposing minimum standards. Meaningful "pro bono" work requires the relevant practitioner to have a mind-set of wanting to take on a worthy cause for a client who may otherwise be unable to pursue it, or to offer back to a particular "area" or community. Many, if not most, family lawyers feel that they already provide an extraordinary amount of pro bono/low bono work, given the nature of family law and the large volume of legal aid and court-appointed counsel work. If pro-bono services are to be imposed on the profession, there needs to be exemptions available for those lawyers who already do "low bono" services. In-house lawyers comprise 60% of the legal profession and some are eager to provide pro bono services but are legally unable to do so. Legislative change could be made to enable in-house lawyers to provide pro bono legal services.

Is the current complaints model fit for purpose? What are the key issues?

The FLS does not agree that the current complaints model is fit for purpose. We believe there are significant issues in terms of delay and abuse of process. Standard committees meet irregularly and it appears that many complaints can take months (if not years) to resolve. That cannot be a model fit for purpose for either the practitioner dealing with the complaint or the client who may have a genuine grievance that requires an answer. There is a concern about the complaint process being readily susceptible to an abusive process by disgruntled clients, or parties. This impacts on practitioners in terms of the time spent dealing with complaints, the inability to collect fees in the interim, and the stress and pressure. Family lawyers are particularly affected. We note that while family lawyers make up a large number of the complaints made, comparatively few are upheld.

Is there a need for structural changes to the complaints model?

While the complaints model appears appropriate, it does not operate as efficiently as it should. There are many complaints that ought to be readily identifiable as vexatious or frivolous that make it past the initial assessment steps. There appears to be a reduced use of the process previously employed where a complaint without merit was determined by a standards committee without requiring a response from the practitioner, although offering the ability for a response to be provided if desired. Rather, those complaints, too, are being dealt with by standards committees through inquiring into the complaint, which fundamentally undermines the integrity of the complaints process and arguably delays the resolution of other complaints. There

is a perception that the complaint process lacks transparency. This may be due to the high degree of confidentiality that attaches to complaints through the operation of law. Therefore, questions arise about the approach on the initial assessment of the complaint as to whether it is "valid", and the process for determination of whether a complaint is suitable for referral to the Early Resolution Service.

The need to establish an independent entity to investigate and resolve complaints

The FLS could not decide whether there is a need to establish an independent entity to investigate and resolve complaints but set out the advantages and disadvantages of the establishment of an independent entity in its response.

What might a tikanga-based complaints or disciplinary process look like?

Mediation is currently being offered as an option in appropriate cases. This essentially provides the opportunity for the traditional Māori concept of kanohi ki te kanohi, which emphasises the value and importance of "face-to-face" discussion towards a resolution, and which has been noted in a review commissioned by Ara Taiohi in 2016 as the accepted, and often only, method for expressing a commitment to tikanga and Te Tiriti. Whilst this may work well in some cases to provide both sides of the complaint to contribute towards a resolution, there are some cases where it may not be appropriate. A conflict may also arise in the "tikanga" of the parties where those are in conflict. This may raise questions on whether the tikanga preferences of the complainant should prevail over the tikanga preferences of the practitioner or vice versa. It is an area that would require careful navigation. Current complaints process can be difficult and currently do not take cultural matters or tikanga into account.

Is there a case to change the current arrangement where the NZLS exercises both regulatory and membership functions? Why?

The FLS believes there is a case to change what we currently do: where the NZLS exercises both representative and regulatory functions. We are concerned about the public perception of being self-regulating, however we have reservations about completely moving to an independent regulation as we do not know if an independent regulator would have enough knowledge about the way lawyers operate. The FLS favours the approach in England and Wales, where the regulator is formally part of the Law Society but is functionally independent. We are concerned that the current system relies heavily on volunteers and is not properly resourced.

If an independent regulator is established, what functions should lie with the regulator and what functions should lie with the professional membership body?

The FLS considers these functions should stay with the representative arm of the Law Society: audits and trust account; CPD regulation; Fit and Proper declaration and issuing of practising certificates.

In terms of complaints, the FLS believes that an independent regulator should take over all of the Law Society's regulatory complaint functions, including triaging complaints and referring appropriate complaints to mediation/reconciliation. An independent regulator should be focussed on early resolution and reconciliation, so that it is a more efficient and effective service that resolves matters in a timely manner and is therefore more satisfactory for lawyers and consumers alike.

If the regulatory and representative functions of the NZLS are to be split into two separate entities, what would be an appropriate modern governance structure look like and how might governance members be selected?

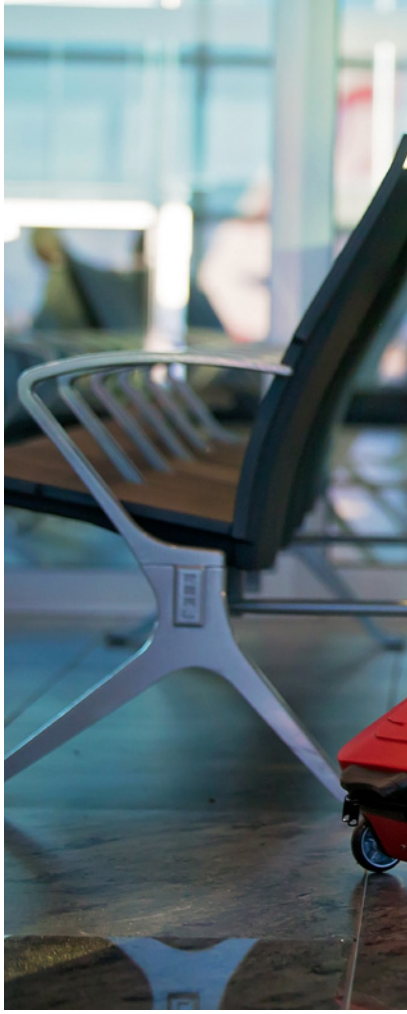
The council and board structure we currently have does not work well. A board of five (the President and four Vice Presidents) is too few to make decisions for all of lawyers in Aotearoa New Zealand and has too much power compared with the council. The council has an important function to bring diverse views from around the motu to decision making, but we accept there needs to be a smaller governing body as the totality of the council is too unwieldy for the types of decision making needed for the Law Society to operate nimbly. The current composition of the council does provide good democratically elected representative views from all over the country. We trust this group to make the bigger decisions for all lawyers in New Zealand. It also provides for diversity with seats to Te Hunga Rōia and the Pacific Lawyers Association, as well as elected council members also bringing diversity. The board should have greater consultation with the council via (virtual) meetings where necessary to decide on single important issues. This way important decisions affecting the whole profession can be made by the appropriate representative members. We consider that a smaller board could be comprised from the council (by nomination and election).

If the regulatory and representative functions of the NZLS are to remain within the NZLS, what would an appropriate and modern governance structure look like and how might governance members be selected?

We consider that the current council structure should be retained, and the council given greater input into important decisions. There is already a commitment to diversity within the seats on the council, to ensure more diversity. It will continue to be a challenge for the council to ensure that other minority members have representation.

Under either scenario (split or dual functions), how can a future governance structure better reflect Te Tiriti?

Having regard to the increasing relevance of tikanga and te reo Māori in the law, the FLS proposes that there must be appropriate representation of Māori on council to reflect our country's Treaty partnership, as well as having greater opportunities to practice the use of tikanga and te reo Māori in this forum. Recognising the rapidly changing makeup and increasing diversity of law practitioners, the council should be representative of all its members (i.e. members of the legal profession). ■



International travel with children post-Covid

BY **WILL STORY**

Travel came back on the cards in 2022, with a phased border reopening starting with Australia in late February. The full re-opening of New Zealand's border at 11.59pm on 31 July 2022 signalled the end of a two year long, unprecedented domestic lockdown. While a proportion of New Zealanders quite content to keep sheltered in the "hermit kingdom" remained, it was mostly a case of the opening of the flood gates on 1 August 2022. Not so long ago on the brink of career collapse, travel agents enjoyed a rapid resurrection and struggled to keep up with the pent-up demand for overseas escapes.

The re-opening of borders reunited families. But for the first time in over two years, it also presented an opportunity for disputes around travel involving children to resurface. The toll of lockdowns on relationships was well publicised during Covid's main waves. But consider the additional tensions on relationships involving migrants or multi-national families where couples are divided by homeland. We know from Hague Convention precedent that the strong pull home can and has led to unilateral decision making. While unilateral travel is at the expense of one parent's rights, and often detrimental to that parent's relationship with their children, there are limited options available to parents when it comes to enforcement.

And further complicating enforcement, in the case of multi-national families (at least prior to the Covid pandemic) international travel arrangements are often made and take place by consent between all parties involved. However, boundaries which parties thought were well-drawn often become blurred when a two week stays turn into a month, and a month turns into three months.

One could easily assume that mediation would never work in these scenarios. After all, surely any sign of good faith is decimated the moment one parents refuses to return the child/ren, and/or return *with* the child/ren.

But consider the (only viable) alternative, an alternative that is only available between contracting countries and that is an application under the Hague Convention on the Civil Aspects of International Child Abduction for return of the child/ren. For the average New Zealander, the legal field of "international child abduction" would sound very off-putting, not to mention heavy-handed. No matter how wronged you felt as a parent, or how much you miss your child/ren, taking legal action which would essentially label the other parent an "abductor" is drastic. Especially when you are told by a lawyer that Interpol will be on alert and intercepting your children at the border. No matter how strongly you felt about the unilateral travel, I am sure that having your children go through that experience would be something keenly avoided by loving parents.

Whilst undoubtedly quick and often effective, parents should be urged to contemplate whether this is really in their children's best interests. In addition to the above factors, it may not accord with what the child/ren actually want. And if it doesn't, it is highly likely to lead to child/ren harbouring resentment towards the enforcing parent and even more conflict.

Mediation could be considered both before or after travel has taken place. Before travel is preferable as it allows both guardians to reach an agreement together and to reality test that agreement, ideally preventing any disputes from transpiring. Conversations can be front footed around communication during travel and unforeseen delays or changes to plans. This can help both guardians to understand what the impacts of their actions might be.

One of our FDR mediators recently had a case where a father wished to take the children overseas to his homeland for six months, and the mother agreed in principle. They came to mediation to assist with drawing up a comprehensive agreement. The father thought it was important that he had sole responsibility for the children during this time, so he could make decisions as needed while away.

The mother was happy for the children to spend time away with their wider family but had concerns around what might happen if the timeframe extended and whether "sole-guardianship" might impact her future parental rights. During the mediation process, the mediator urged both parents to seek legal advice so they could understand the potential legal consequences of their decision making. The parents then came back together for some earnest discussions around what could happen and what the impacts would be. They were then able to reach an informed agreement and plan for their family.

Another case which came to FDR involved a mother who took her child overseas and did not return the child as planned. The mother contacted the father to inform him that she would not be sending their daughter home to New Zealand on a flight that evening, as initially agreed. The mother felt that care arrangements needed to be agreed before she felt comfortable to do so. She invited the father to participate in FDR. The father had been pursuing options to have the child returned to his care, including approaching police and exploring his rights under the Hague Convention. He was hesitant to instigate this process if it could be avoided, understanding the impacts that a forced intervention would have on his daughter, so he agreed to participate in mediation and work on reaching a parenting plan together. The parties were able to discuss their respective worries openly and honestly, and constructively work together with the assistance of one of our skilled mediators to successfully reach a child-focused, durable agreement.

Parenting is not an easy undertaking at the best of times, and this is especially the case for separated families. Add to this the friction caused by the pandemic and isolation from family overseas while our borders were effectively closed. Many parents are considering a trip back "home" soon and may be contemplating extended trips to compensate for the increased cost of flights or length of time since they last traveled home. We are already seeing these issues present in mediation and mediation is undoubtedly the right place for these conversations, saving international child abduction litigation for the rare cases that require it. ■

Will Story BA LLB (*will.story@fairwayresolution.com*) is an experienced family lawyer (not practising) and Operations Manager of Family Services at Fair Way Resolution Limited.

Elder Mediation – a "Sensible" Option

BY **ADRIAN SHARMA**

Family and relationship conflicts can occur around different issues. While we traditionally tend to think of family disputes centring around the distribution of property and custody of children, the reality is that a number of these conflicts also involve and invariably impact the lives of elderly members of the family.

As an elderly person ages, there is an increasing need for them to be provided with adequate support from family members. Physical and mental frailties that accompany ageing can present challenges when it comes to respecting an elderly person's autonomy while addressing their needs and enabling their protection and safety.

Important decisions such as the care and living arrangements of the elderly person, access to appropriate medical care, as well as what to do with any assets they may own, often need to be made by the elderly person's family and support people. Issues around the health and safety of an elderly person can involve legal and financial considerations which may lead to disagreements among family members. Unfortunately, disagreements on what is best for the elderly person during what is already a highly stressful and emotional time can lead to disputes. Family tension in relation to issues concerning an elderly person are often most damaging to the elderly person themself and may lead to increased feelings of isolation and loneliness.

While some families are able to deal with such issues by getting timely legal and financial advice and making reasoned and harmonious decisions together, this is not necessarily the case for many other families. There are many families, often with long histories of disagreements, for whom working together to care for elderly persons can be difficult or seem nearly impossible. These families often find the need to resort to litigious solutions to resolve their issues, which can drag on for a considerable length of time and incur substantial expenses as a result.

Having an outsider listening to each family member's concerns can avoid the need to resort to litigation and resolve the power imbalance among family members. An elder mediator can facilitate a more balanced discussion, so all family members get the opportunity to express themselves and have their views considered.

What is elder mediation?

Elder mediation is a specialised service that aims to empower and respect elders involved in disputes and uphold their self-determination as far as practicable. Facilitated by a professional mediator, elder mediation is aimed at assisting older adults, their family members and other support persons to arrive at outcomes to disagreements that are respectful of their rights and ensure the best interest of the elderly person.

Elder mediation provides a holistic decision-making process. In addition to helping parties save time and cost, elder mediation also allows great flexibility in terms of processes and results, and allows parties to maintain their autonomy by coming to their own resolution.

The Family Dispute Resolution Centre (FDR Centre) has a specialised mediation service for elder mediation: mediation of family disputes about or involving a senior family member. Such disputes can be highly complex, often involving multiple generations and raising a mix of legal, financial, and/or medical issues, together with familial, social, and/or spiritual/religious concerns. Feelings of grief, anger, betrayal, abandonment, jealousy, competition among family members, or unfulfilled expectations can further complicate disputes involving elders.

Family members are often not well placed to make decisions as they may be unable or unwilling to accept the elderly person's increasing vulnerability. The focus of elder mediators and the FDR Centre's elder mediation service is centred on protecting familial relationships and encouraging positive family engagement to come up with a plan that best suits the needs of all members involved.

Elder mediators at the FDR Centre are specially trained to ensure that elderly persons are given a voice in matters affecting them in a way that is appropriate for their capacity. Elder mediators at the FDR Centre are able to provide a fresh and independent perspective and can help to bring to light age-related considerations that close family members may be unable to appreciate.

The services provided by the FDR Centre are private and confidential. The FDR Centre has fixed fee options available for low-complexity elder mediations and has a well-defined fee structure for high-complexity elder mediation matters. More information about the elder mediation service and the various other services offered by the FDR Centre can be found on www.fdrc.co.nz ■

Adrian Sharma leads the ADR Centre's Knowledge Management Team as Head of Knowledge Management.

Can the Court revisit a valuation date?

BY **STEPHANIE AMBLER**

Property prices throughout New Zealand have fluctuated hugely over the last two and a half years. Between 2020 and 2021, average house prices increased by over 30%, whereas in 2022, the average price has dropped by 12%, with some parts of the country seeing prices decline by over 20%. When two parties are separating, high property price fluctuations make the valuation date more significant than when property prices are stable. The valuation date for separating couples is often the hearing date, although the court can deviate from this. When there is a significant change in property prices between the valuation date and judgment, there is a strong incentive for one party to revisit the property valuation date. The High Court recently considered whether this was possible.[1]

Background

The separating parties met in 2006 and married in 2007. They separated in 2013 and have been trying to resolve the division of their assets since 2015, complicated by the existence of trusts, companies, and a contracting out agreement. In January 2021, the Family Court issued a judgment (the Substantive decision) dividing the assets between the parties, including two properties – the Waimanu property and the McLeod property. The parties had agreed that they would rely on 2018 valuations for the Waimanu property, though it was unclear whether they had agreed that for the McLeod property. Following the Substantive decision, Ms Munro applied under s 33 of the Property (Relationships) Act 1976 (the PRA) to replace the 2018 valuations with 2021 valuations, on the basis that the increase in property prices had led to an unequal division of assets. The Family Court declined the application and Ms Munro appealed.

Ancillary powers

Section 33(1) gives the court the power to make orders and give directions that are "necessary or expedient to give effect, or better effect, to any order made under… sections 25 to 32." S 33(2) gives the court the power to "extend, vary, cancel, or discharge any order made under…sections 26 to 32." The Family Court stated that s 33 was not intended "to be used to relitigate or revisit substantive matters."[2] The Court considered that it no longer had the power to revisit the value of the Waimanu property, due to the parties' agreement, and that it would be unjust to use the hearing date as the value for one property but not the other. The issue in the appeal was whether the Family Court had determined the valuation date in the Substantive decision, thus putting it outside the scope of s 33.

The High Court stated that the scope of the s 33(1) power was limited to orders giving effect to an order under sections 25 to 32. Section 33(2) is less restrictive, but can only be used to change orders made under ss 26 to 32, so did not apply in this case, as the Family Court had not made orders under ss 26 to 32. The High Court held that ss 33(1) applied, as the division order could have been made under s 25 of the PRA. However, the s 33(1) jurisdiction is limited to giving effect, or better effect, to existing orders; it does not give the court the power to change the nature of an existing order.

> When there is a significant change in property prices between the valuation date and judgment there is a strong incentive for one party to revisit the valuation date

Did the Family Court have jurisdiction to change the valuation date?

The applicant argued that the Family Court did not make any findings as to value, because it had simply accepted the valuations provided. The High Court pointed out that a finding based on an agreed position was still a finding, otherwise parties would be able to change previously agreed positions, and require matters to be reheard, after judgment was issued. This would be contrary to s 116 of the District Court Act 2016 which provides that a court's judgment is final and conclusive between the parties. The High Court noted that the appropriate course of action where one party does not agree with part or all of a judgment is to appeal that judgment.

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In this case, the High Court held that the Family Court had found there was to be equal sharing of the property, based on the 2018 valuations. The High Court agreed with the Family Court that revisiting the use of the 2018 valuations would cause further complications, because the respondent would have pursued his case differently had the applicant not agreed to the use of the 2018 valuations. Reopening the valuation date would mean reopening the Substantive decision, which was proof that the orders sought by the applicant went further than trying to give effect to the Substantive decision. The High Court concluded that the Family Court was correct in finding that it did not have jurisdiction to alter the valuation date in the Substantive decision.

Conclusion

Although recent wild fluctuations in property prices provide an incentive to separating parties to use outdated, or updated, valuation dates, the proper avenue for challenging a valuation date is through an appeal. Unless there is genuine ambiguity about the valuation date, because the court failed to turn its mind to that issue, the court is likely to hold that a change to the valuation date would be directly contrary to the principles of finality set down in s 116 of the District Court Act. Instead, parties agreeing on a valuation date could consider giving conditional agreement on the proviso that valuations will be revisited should they fluctuate by more than an agreed percentage. ■

1. *Munro v Senior* [2022] NZHC 2103.
2. *Munro v Senior* [2022] NZFC 1607 at [31].

Cryptocurrency in Relationship Property Disputes

BY **GRACE WALKER**

Why won't Superman invest in Bitcoin? Because his weakness is *krypto*nite.

This is certainly the case for many family lawyers who are not well-versed in the mysterious, yet lucrative, realm of cryptocurrency. The dramatic rise in cryptocurrency introduces new complexities and challenges in identifying, valuing, and dividing relationship property.

What is Cryptocurrency?

Cryptocurrency is a digital or virtual currency that is secured by cryptography. Cryptography involves encrypting information or data into a code to prevent access which decrypting would essentially reverse.

Cryptocurrencies commonly use ledgers based on blockchain, which is a system that records transactions across several computers that are linked in a peer-to-peer network.

As a result of this decentralised structure, cryptocurrencies can exist independently of governments and other central authorities. The most well-known cryptocurrencies are Bitcoin and Ethereum but there are more than 12,000 different types with over 320 million users worldwide.

Ownership is based on the possession of a key or access code to a "wallet" rather than an owner's registered identity. The wallet can be either online or within a physical device. If a party does not have possession of either mode of access, then it is challenging to readily access the information as it is virtually anonymous.

Disclosure

The first step when considering the division of assets and liabilities is the exchange of full financial disclosure.

In 2020, the High Court held that all digital assets constitute property as defined by s2 Companies Act 1993.[1] This extends to the Property (Relationships) Act 1976, which means that a party must disclose any cryptocurrencies held in their name (or those owned by an entity in which they have an interest) as at separation.

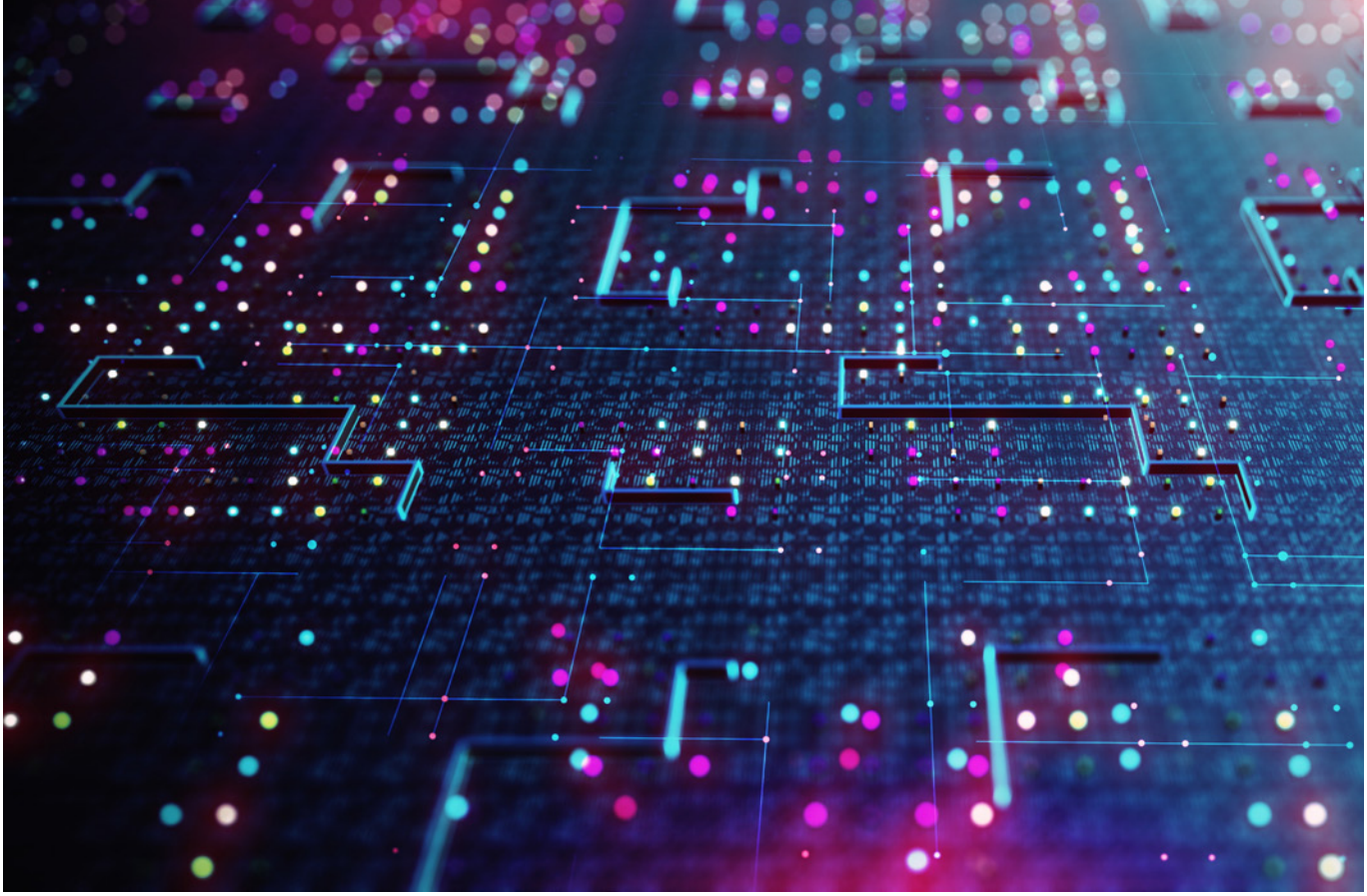
If the parties readily disclose evidence of cryptocurrencies, then screenshots of the wallet will suffice.

What if a party does not disclose?

If your client is certain that the other party owns cryptocurrencies but fails to make full disclosure, it can be difficult to prove its existence in the absence of access to the wallet following separation. It is also very easy for a party to hide any evidence of cryptocurrencies, but it is not impossible to uncover its purchase.

For example, you could:

1. Seek disclosure of the other party's bank and credit card statements: Statements will show deposits or withdrawals to purchase cryptocurrency, but



only in certain instances. For example, this would typically apply to digital assets purchased in the last 4- 6 years due to the introduction of AML. However, if it was purchased more than 6 years ago, it may be more difficult as the transaction will likely not be easily identifiable. Either mode will require a forensic analysis to trace funds, which is time and cost extensive for your client.

2. Seek disclosure of the other party's tax returns: This may provide evidence of cashing crypto holdings into "real" money as sales should be declared as a capital gain or loss.
3. Seek disclosure of the other party's email confirming there are no results containing the phrase "crypto" or "wallet": Most cryptocurrency transactions are confirmed by email, which will leave a time and date stamped trail and assist in any tracing exercise. It is also worth noting that when a wallet is first used, the software will have prompted the party to write down the wallet seed words, which is a list of words which serve as a backup to the wallet.

If the above options are unsuccessful, then it is recommended that a party seeks the Family Court's assistance by filing a substantive application and an interlocutory application for discovery and a notice to answer to interrogatories.

How do we value Cryptocurrency?

The value of cryptocurrency often fluctuates dramatically within minutes, if not seconds, which causes issues in respect of relationship property proceedings or s21A Agreements. The implications of this volatile nature can be catastrophic, as a settlement offer may be generous but within a day could be grossly unjust. It can also cause issues concerning s9A Property (Relationships) Act 1976 when determining a party's claim to half any increase in value.

The parties are encouraged to agree on the value of cryptocurrency in the first instance, particularly as the dollar value of cryptocurrency can be identified with reference to the prevailing and historic market price on the exchange. However, if this is not possible, an expert can be instructed to provide a valuation.

In any case, s2G Property (Relationships) Act 1976 allows the Court to adopt the value as at the date of hearing (the current date). However, this is discretionary, and the Court may adopt another date if it is just in all circumstances.

How do we divide Cryptocurrency?

There are a couple of options to consider:

1. A party could transfer half of the cryptocurrency to the other person. This may mitigate any issues as any equalisation sum owed, but only if the receiving party is willing to receive the asset, bearing in mind the risks associated with its value.
2. Convert the cryptocurrency into cash. This would allow the funds to have a more stable form but undoubtedly risks any benefit the parties would have received if it increased in value.
3. If the parties agree on a value or provide that it be re-evaluated at the time of settlement, then it would be factored into any equalisation sum payable.

Whichever option fits best for your client, it is worth advising that the ownership of cryptocurrency over a long period means that parties may possess significant unrealised capital gains which may incur a large amount of tax payable on the sale of the asset.

Conclusion

It is clear that cryptocurrencies are no longer 'niche' investments, but rather they are in the mainstream and are starting to frequently appear in relationship property matters. Family lawyers must keep up with this new technology to ensure a fair and equitable division of property. If you haven't had a division involving cryptocurrency yet, you most certainly will in the future. Don't let it become your kryptonite too. ■

1. *Ruscoe v Cryptopia Ltd* (In Liquidation) [2020] NZHC 728.

A greater appreciation of the privilege against self-incrimination

BY **KESIA DENHARDT**

THIS TOPIC CAN BE SAID TO GO TO the very heart of the court process; namely, satisfaction of the fair trial guarantees found in the New Zealand Bill of Rights Act 1990 ("BORA").[1]

We see it manifest itself in various forms in American movies, where an accused is given their Miranda rights when arrested, warned by police of their right to remain silent (and to consult with a lawyer) before questioning or giving a statement, or talk of the Fifth Amendment privilege at trial. It is the reason why so many defendants chose not to testify.

It is the privilege against self-incrimination[2] and it could be regarded as being deceptively simple: it allows a person to refuse to disclose evidence, that would otherwise be admissible, if it would be likely to incriminate them. By way of illustration, a person may seek to be excused from answering a question because it may expose them to the risk of criminal proceedings or other penalty, such as through benefit fraud, tax evasion or family violence, for example.

Whether a person is guilty or innocent, we all possess this right.

At home, this privilege is conferred by the Evidence Act 2006,[3] which makes clear that it relates to any offence punishable by a fine or imprisonment under New Zealand law and applies to any oral or written response. A person cannot be required to provide the information, or be prosecuted or penalised for refusing or failing to do so.

There are a number of family court cases where this privilege has featured. The case of *Schofield v Hutchinson*[4] concerned an application for relief under the Property (Relationships) Act 1976 (the PRA) on the basis of a qualifying de facto relationship. Whilst it was not disputed that the two men occupied the same home for many years, the nature of their relationship was in question. Ultimately, Judge Murfitt found that the respondent was a friend, flatmate and caregiver of the applicant and nothing more. When striking out the application, His Honour recorded in his decision that during the course of the evidence, before the respondent was questioned about his declarations to Work and Income NZ, he was warned as to the prospects of self-incrimination and of the opportunity to decline to answer questions. That message was reinforced after the morning adjournment, but he effectively waived his privilege, as he did not avail himself of that opportunity.

In the reserved judgment of *Cullen v Cullen*,[5] in giving reasons for dismissing the appeal against determination of relationship interests and entitlements under the PRA, Clark J also recorded that a judicial warning had been given about self-incrimination in relation to an allegation against the respondent that she had caused damage to a fishing boat, which had been brought the attention of police. In contrast to the preceding case, she heeded the warning and chose not to answer questions that may have incriminated her.

Similarly, in *RJB v BNR*,[6] the respondent seized this opportunity in respect of questions which pertained to charges against him for dangerous driving and breaches of a protection order.

The case of *AL v GP*[7] involved an application to discharge a temporary protection order made by the protected person. At hearing, Judge Geoghegan requested to hear evidence from the applicant and, when she gave that evidence, she initially indicated that the evidence in her affidavit in support of her application for a protection order was false. Again, His Honour recorded a warning given against self-incrimination, and his clear advice about the possible consequences of perjury.

The case was briefly adjourned for the applicant to obtain advice

from her lawyer[8] and, when the hearing resumed, she deposed that her initial affidavit was correct, but that she no longer felt her safety was under threat. Ultimately, Judge Geoghegan was not satisfied that the applicant was indeed safe – noting his concerns that the couple had reconciled only weeks after the application for protection order was lodged, and the possible inequality that can arise from a considerable age difference, as the case was here – and declined the application.

Relatedly, the applicant in *KAM v SCS*,[9] who was seeking that a temporary protection order be made final, was questioned about an earlier affidavit she had sworn in previous parenting proceedings, which had been produced by the respondent. Curiously, the applicant inquired whether she was obliged to answer questions relating to that affidavit out of concerns she might incriminate herself. In his judgment, Judge Walsh recorded that the applicant was advised as to the legal position and that it was up to her as to how she answered the questions – but pointed out the affidavit had been prepared by her, sworn the year before, and was relevant to the proceedings.

That case was an interesting one, in which there were serious issues relating to the credibility of the parties. In the previous parenting proceedings, Judge Adams had considered that an attempt had been made to mislead the Court and pervert the course of justice and he directed that a copy of the file be referred to Police Prosecutions for investigation. The evidence established the applicant deliberately orchestrated a false DNA testing procedure relating to the paternity of the child (later admitting to arranging for another man to undertake the testing in the respondent's place) and took steps to have the respondent's name removed from their birth certificate on the basis of a DNA test result which had been fraudulently obtained by her.

In another unsuccessful application under the then Domestic Violence Act 1995, in *N v N*,[10] Judge Whitehead chose not to grant an application for protection order, determining that the ground of necessity was not made out. The applicant made an accusation of rape, at a time when she was suffering from a severe mental disorder, which His Honour considered she had not proven on the balance of probabilities. In his *viva voce* evidence at hearing, the respondent stated clearly that the alleged event had never occurred – but not before being given a warning as to self-incrimination (the matter being the subject of an open police investigation – documents of which had not been produced).

Importantly, the privilege does not apply in some situations and can be removed by other statutes.[11]

In an interesting dictum in the case of *R v R*,[12] Gendall J considered whether the rules of natural justice (in that case, the entitlement to know of the possibility of orders being made and to be heard in respect of same) unwaveringly trump the requirement that a child's welfare is paramount. He stated:

> [22] *...Litigation privilege may, in some situations, be overridden... parties may be compelled to answer questions, despite self-incrimination, as to the whereabouts of wards of the High Court... It will all depend upon the nature of the right which is being made subservient to the consideration of the welfare of the child. The more fundamental the right the more exceptional the case must be before it is abrogated.*
>
> [23] *The "right to justice" is endorsed in s 27 of [BORA] and speaks of every person having "the right to the observance of the principles of natural justice". They are not idle words. Natural justice can encompass many requirements but they are no more than fair play in action; essentially, procedural fairness. Application of ss 4 and 5 may, in some situations, result in s 23 of the Guardianship Act 1968 overriding some aspect of "fairness" where the child's welfare demands that a party suffer some procedural unfairness. But it will be a rare case...*

This issue came squarely before the Court in *T v Jones*.[13] There, the appellant faced charges that she abducted a six-year-old child. The case arose following the child's disappearance from the Hamilton public library and

his mother's subsequent arrest on a charge of kidnapping. The child's father, who had day to day care, issued habeas corpus proceedings against mother, other members of her family, and the appellant. In the High Court, Heath J made an order of habeas corpus against the said people. He required them to produce the child or, if they were unable to bring him before the Court at the time and place specified, directing them to file affidavits relating to their knowledge of his whereabouts and contact with him, and reasons for non-compliance with the order. The appellant appealed and William Young J made an order staying the order made against the appellant relating to the affidavit (subject to conditions). At a further hearing, Keane J found contempt was proven against the mother and she was committed to prison until she disclosed where the child was.

On appeal, the appellant raised the argument (among various others) that Heath J was incorrect in ordering that the appellant make an affidavit as to her knowledge of the abduction and its aftermath on the submission that to do so might incriminate her.

The Court of Appeal held that the appellant's entitlement, confirmed by BORA, to refrain from making any statement and not to be compelled to be a witness or to confess guilt, relates to the risk of prosecution or other penalty, and does not extend to the eliciting of information in a civil case directed simply at finding and protecting a child. It stated that there could be no rational basis for withholding, in the search for the child, information that the appellant could provide, given that she was protected from any breach of her right against self-incrimination.

This was because meticulous safeguards had been put in place, including that the affidavit be supplied in confidence to the registrar, to be laid before the judge and Counsel for respondent on the undertaking it not be copied or disclosed to anyone without leave, a prohibition against its use in any criminal proceeding against the appellant relating to the abduction, and an undertaking from the respondent that its contents not be used for the derivative purposes of any criminal prosecution other than for perjury or contempt of Court.

The possible complexities only expand when one considers other family law contexts outside a defended hearing, such as where a child or young person makes an admission that they committed a criminal offence during a family group conference, which is privileged and during which full and frank disclosure is encouraged.[14] Such other difficult scenarios are beyond the scope of this article, but must be borne in mind.

The practical takeaway for family lawyers, in the context of hearing, is that they should be aware of and up to date as to any parallel proceedings afoot in other Courts to ensure that their client's privilege against self-incrimination is observed – such as where a client is a respondent in a family violence proceeding, but also a defendant to a corresponding criminal charge. Family lawyers should also be on the lookout, more generally, for questions put to their client which could potentially result in criminal proceedings or other penalties if answered (whether there are existing contemporaneous proceedings at that time, or not). In such cases, family lawyers should ensure that a clear warning is issued or, if circumstances require it, seek leave to further advise their client. It should be remembered that an adverse inference should not be drawn from the activation of this privilege.

If it is not their client but rather the other party that seeks to exercise this privilege, a family lawyer will necessarily be left to consider whether the information can be obtained from another (unprivileged) source elsewhere. ■

Family lawyers should be on the lookout, more generally, for questions put to their client which could potentially result in criminal proceedings or other penalties

1. Sections 23(4) 25(d).
2. Often used interchangeably with the term "right to silence" but arguably quite different – see the article: *Silence and self-incrimination protections in the Children, Young Persons, and Their Families Act* (1995) 1 BFLJ 247.
3. Section 60.
4. [2017] NZFC 7502 [2018] NZFLR 554.
5. [2017] NZHC 42.
6. New Plymouth Family Court, Judge Murfitt, 19October 2009, FAM-2009-043-343.
7. Rotorua Family Court, Judge Geoghegan, 19 May 2005, FAM-2005-063-59.
8. Similarly, in *MKR v MJD* [2012] NZFC 9309, the applicant's former partner, who attended the hearing under summons, consulted his lawyer during the course of giving his evidence. Having received advice to elect to access his privilege against self-incrimination and not to answer questions unless he chose to do so, he answered some and declined to answer others.
9. Masterton Family Court, Judge Walsh, 1 August 2011, FAM-2011-035-63.
10. Nelson Family Court, Judge Whitehead, 5 July 2007, FAM-2007-042-382.
11. An example of a statute that expressly removes the ability to claim privilege is the Serious Fraud Office Act 1990.
12. 22 FRNZ 568.
13. 26 FRNZ 764.
14. See a full discussion about this in the article: *Silence and self-incrimination protections in the Children, Young Persons, and Their Families Act* (supra) – mindful of any relevant amendments to the Act (now the Oranga Tamariki Act 1989) since its writing.

New Family Violence Tort in Ontario

BY **ELLEN LELLMAN**

Ahluwalia v Ahluwalia

Heralded as a ground-breaking decision,[1] the case of *Ahluwalia v Ahluwalia* in Ontario, Canada has given rise to a new common law tort of family violence.[2] Justice Mandhane of the Ontario Superior Court of Justice, the Canadian province's equivalent of our High Court, recognised the tort when considering a self-represented mother's claim for damages in relation to the father's alleged abuse during their marriage, stating:[3]

On the most contentious issue, the Mother's claim for damages, I am prepared to award $150,000 in compensatory, aggregated, and punitive damages for the tort of family violence. I recognize that making such a significant damage award is well-outside the normal boundaries of family law.

The Judge acknowledged that in the typical marriage, where mutual support and economic interdependence exists, the statutory framework allows for the "fair, predictable, and efficient resolution of parties' financial issues post-separation".[4] However, she determined that this was not the case in *Ahluwalia*.

Facts

The parties met in India and after a short courtship were married in 1999 before immigrating to Canada. From the outset, although both parties were well educated, the marriage was a traditional one with duties and responsibilities of the parties defined along gender lines, with the mother undertaking caregiving and the father earning money outside the home. At the beginning of their time after immigrating to Canada, the parties also faced hardship with difficulties earning money, a miscarriage and poor living conditions. However in 2005, the couple bought their first home and became more involved in their local South Asian and Punjabi communities. Still, finances were tight. In 2013, the mother was diagnosed with Moderate Anxious Distress and Major Depressive Disorder. By 2015, the relationship had deteriorated to the point that the children were conveying messages between the parties.

The marriage was characterised by years of violence, coercion and control – the father was physically and emotionally abusive throughout, building up to the parties' separation in July 2016. As noted by the Judge, "it was not just "unhappy" or "dysfunctional"; it was violent".[5] The two children eventually stopped speaking to their father soon after in 2017, and in March 2021 the mother made a claim to the Court for "general, exemplary and punitive damages for the physical and mental abuse suffered".[6] The pleadings alleged a pattern of physical, emotional and financial abuse which were denied by the father, who stated they had "normal disagreements".[7]

The father was also charged with two criminal counts of assault and one of uttering threats to cause death in September 2021. Evidence in the civil claim before the Superior Court was received concerning three separate incidents of physical violence in 2000, 2008 and 2013, combined with coercive and controlling behaviour of the father and the mother "essentially pled the tort of family violence; she did not plead the specific torts of assault, battery, or ion (sic) of emotional distress".[8] There were clear social and economic barriers to the mother leaving the father.

Issues and Findings

Four complex family law issues were argued concerning property equalisation, child support, spousal support, and the claim for damages in relation to abuse during the marriage.[9] Noting there was little agreement between the parties, the Judge found that the father owed spousal and child support, and held that the matrimonial home and business were to be "equalised" and relationship property divided. The claim for damages, the most contentious issue, was then discussed in depth and the Judge ultimately found that the mother was entitled to compensatory damages in relation to the family violence she experienced during the marriage.[10]

The Judge also found that the father was psychologically abusive from the beginning of the marriage, belittling and insulting the mother about difficulties conceiving and her appearance and the Judge held that the father had made all financial decisions during the marriage instilling a pattern of financial control.[11]

The New Tort

Conventionally, torts arise where there is a breach of a recognised duty, for example in a situation where the conduct of one person harms another, and it is appropriate to claim for damages.[12] As all budding law students are taught, torts do not stand still. Torts evolve and develop as societal norms and expectations shift and change. Broad policy considerations guide the courts, across all common law jurisdictions, in deciding when, and how far, liability can extend. There will necessarily be questions of fairness and justice and other factors raised such as certainty and coherence within, and practicality of, the law. Addressing the development of torts broadly, Mandhane J stated that trial judges "must be cautious

about developing new foundations for liability" however scope to do so arises where "the interests are worthy of protection and the development is necessary to stay abreast of social change".[13]

The Judge raised the difficulty that existing torts do not fully capture the cumulative harm at the heart of family violence and the associated patterns of coercion and control which create fear and vulnerability for those abused.[14] While a tort of family violence may overlap with other existing torts, elements such as the recurrent and subtle nature of family violence go beyond torts like assault and battery and intentional infliction of emotional distress. Family violence, such as that seen by the Judge on the "rare and unusual facts before [her]",[15] may include more unique, complicated aspects of abuse not envisioned by torts currently available to claimants. The rare and unusual facts here being that the long marriage was characterised by 16 years of coercion and control: it was violent and the father often employed silent treatment for months at a time until the mother gave in to demanded sex.

The Divorce Act[16] in Canada prohibits compensation for "misconduct" or damages suffered through an award of spousal support. As a result, the family violence experienced by the mother in *Ahluwalia* at the hands of the father could not be compensated through an award of spousal support. The judgment noted that, as the Divorce Act creates a complete statutory scheme for resolving financial issues post-separation, the Court "must be careful not to arm family law litigants to overly complicate the litigation through speculative and spurious tort claims".[17] Nonetheless, the Judge sought an alternative path to compensating the mother for the abuse which she experienced.

This alternative in the form of a new tort was not initiated by the Judge but was a view that the mother maintained in her written submissions: "Throughout the trial, there was no indication that the Mother misunderstood the law or unintentionally pleaded the tort of family violence".[18] Submissions carefully maintained claims based on family violence and a pattern of control, through evidence of mental and physical abuse, threats and financial abuse. In obiter comments the Judge also noted that she could not "dismiss the Mother's novel claim simply because she was self-represented; at the same time, she must be held to the same standard as a party represented at trial".[19]

In outlining the shape of liability under the tort of family violence, Mandhane J looked to the Divorce Act's definition of "family violence".[20] Basing the civil standard for liability on that statutory definition, a plaintiff pleading the tort of family violence must establish, on the balance of probabilities:[21]

> Conduct by a family member towards the plaintiff, within the context of a family relationship, that:
> 1. is violent or threatening, or
> 2. constitutes a pattern of coercive and controlling behaviour, or
> 3. causes the plaintiff to fear for their own safety or that of another person.

This structure requires proving a pattern of conduct including more than one incident of physical or sexual or psychological or financial abuse, forcible confinement, threats, harassment, stalking, failure to provide the necessities of life, or killing or harming animals of property.[22] The threshold appears high with the Judge holding that "It will be insufficient to point to an unhappy or dysfunctional relationship as a basis for liability in tort".[23]

When bringing evidence, the focus should also be on specific conduct and examples of abuse.[24] It follows that a plaintiff should not rely on the presence of a pattern of conduct without pointing to specific incidents that make up that claim. As with any tort claim, pleadings based on the tort of family violence must be sufficiently detailed to promote fairness and allow the defendant to respond to the claim.

In *Ahluwalia*, Mandhane J therefore found that the mother was "entitled to a remedy in tort that properly accounts for the extreme breach of trust occasioned by the Father's violence, and that brings some degree of personal accountability to his conduct".[25]

Once liability is proven comes the assessment of damages by the Court. Justice Mandhane considered that the nature of the violence at hand, including the circumstances, extent of harm, duration

and specific harm, will be relevant to assessing damages.[26] The likely types of damages that may be awarded would be aggravated damages and punitive damages, given the breach of trust and social harms associated with family violence.[27] There is an overriding duty on judges to ensure that any compensation awarded is fair and proportionate to the harm.[28]

However, significant damages were awarded to the mother – $150,000 ($189,500 NZD).[29] The Judge stated that "While this damage award is high when compared to other cases involving "spousal assault," it reflects the overall pattern of coercion and control at play in family violence matters".[30] Further, the mother had adduced comprehensive evidence detailing the quantum of damages payable. In the future application of the tort, applicants would likely be expected to attempt to quantify the damage experienced. A trial judge could then assess the reasonable amount to be awarded based on the evidence before them.

The Judge made brief reference to betrayal of trust and breach of fiduciary duty as factors that may lead to an award of aggravated damages. The Judge did not, however, expand on when there would be a basis for a claim under these or when a claim in relation to breach of trust where there is violence, emotional or physical, would arise.

In summary, the tort award for family violence in *Ahluwalia* was designed to compensate for harms flowing directly to the mother from violence inflicted by the father. The nature of those harms range, and may include financial barriers, but this new remedy is not to be confused with spousal support, the purpose of which is to meet extant financial needs of a financially dependent spouse or partner and deals primarily with economic disadvantage. Recognising this new tort is consistent with the compensatory aims of tort law more broadly. Mandhane J held that "only an award in tort can properly compensate for the true harms and financial barriers associated with family violence", plugging a gap in the remedies available for the types of harms arising out of sustained violence.[31]

The Judge made brief reference to betrayal of trust and breach of fiduciary duty as factors that may lead to an award of aggravated damages

Wider Concerns When Dealing with Family Violence

When developing her reasoning in *Ahluwalia*, Mandhane J looked to research on family violence and wider trends as to how it is dealt with in the courts. She referred to the 2021 reforms of the Divorce Act, where the Parliament of Canada explicitly recognised the devastating impacts of family violence on children and families.[32] The Court was also directed to a recent case of the British Columbia Supreme Court dealing with the tort of spousal battery,[33] and the Judge recognised that damages had been previously awarded for the inter-spousal tort of assault.[34]

Beyond the new tort, family violence in Canada is typically dealt with by the Criminal Code or the Divorce Act. The

Criminal Code is federal law applying to all Canadians.[35] While the Criminal Code lacks the specific offence of family violence or of domestic violence, most crimes of that nature would be captured by offences related to physical and sexual violence, for example, assault (ss 265 to 268), forcible confinement (s 279) and sexual assault (ss 271 to 273). The sentencing principles in the Code also allow judges to take into account as an aggravating factor evidence that an offender abused an intimate partner or family member.[36] The Divorce Act is also a federal statute. The spousal support provided for in that statutory scheme is compensatory, rather than being driven by fault – that Act therefore does not address all potential issues arising following alleged family violence.

The recognition of family violence as a tort is also consistent with Canada's international human rights obligations, having ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981. Outside of Canada, the Judge highlighted that there is emerging case law recognising "battered women's syndrome", specifically referring to recognition of a tort framed in such a way in several states with the United States.[37]

It was also noted more broadly that providing a pathway for family law litigants to pursue damages for family violence is "a matter of access to justice" and the Judge reflected that "It is unrealistic to expect a survivor to file both family and civil claims to receive different forms of financial relief after the end of a violent relationship".[38] Should this streamlining of the necessary applications to address family violence in the Canadian courts lead to a reduction of the time taken for what are typically drawn out proceedings causing secondary trauma and revictimization, family violence victims would undoubtedly benefit.

Further, on a macro level, the tort is consistent with "the overarching imperative to remove the economic barriers facings survivors that try to leave violent relationships and access justice".[39] Taking a micro view, it is also consistent with normative standards of personal responsibility – while family violence remains a social and collective issue, it is the actions of individuals that found it. The decision of *Ahluwalia* sends a clear statement of wrongdoing to those individuals perpetrating long-term violence. The Judge additionally acknowledged the extreme power imbalances extant in relationships like that which existed between the parties in *Ahluwalia*, she criticised the negative inferences that continue to be made in the courts in regard to women who choose to stay in abusive relationships and she recognised the obvious financial barriers to women trying to leave.[40]

Conclusion

Ahluwalia was "one of those rare circumstances where the common law should recognise a new foundation for liability".[41] The recognition of a tort of family violence in Ontario providing an avenue for survivors to pursue accountability and financial independence is an important one in light of current research concerning family violence and it exemplifies an alternative approach to broader access to justice issues. Family violence is considered a significant social issue in Canada, as it is here in New Zealand, and the provision of a civil remedy mirrors recent criminalisation of this type of abuse. This noteworthy judgment recognises that as research on trauma and our understandings of abuse evolve, so too must our laws. ■

1. Heather Douglas "New Tort of Family Violence in Ontario" (9 March 2022) Slaw <New Tort of Family Violence in Ontario – Slaw http://www.slaw.ca/2022/03/09/new-tort-of-family-violence-in-ontario/>; Adam N Black "Judge awards damages for 'family violence' in landmark case" (March 15 2022) Financial Post <https://financialpost.com/personal-finance/family-finance/judge-awards-damages-for-family-violence-in-landmark-case>.
2. Ahluwalia v Ahluwalia 2022 ONSC 1303.
3. At [4].
4. Above n 3.
5. At [5].
6. At [27].
7. At [22].
8. Above n 6.
9. At [37].
10. At [112].
11. At [105].
12. At [49].
13. At [50].
14. At [54].
15. At [5].
16. Divorce Act RSC 1985 c. 3.
17. At [41].
18. At [35].
19. Above n 16, at [35].
20. At s 2.
21. At [52].
22. At [55].
23. Above n 22.
24. At [56].
25. At [5].
26. At [57].
27. Above n 26.
28. At [117].
29. At [112].
30. At [113].
31. At [46].
32. At [43]; SS v RS 2021 ONSC 2137; JK v RK 2021 ONSC 1136.
33. Schuetze v Pyper 2021 BCSC 2209.
34. At [32].
35. Criminal Code RSC 1985 c. C-46.
36. Section 718.2.
37. At [51]; Camille Carey Domestic Violence Torts: Righting a Civil Wrong (2014) 62 Kansas LR 695.
38. At [47].
39. At [67].
40. At [75].
41. Ahluwalia, at [58].

Excel spreadsheet declared a valid will

BY **KATE SULLIVAN**

When the deceased dies without a valid will, it can be difficult for the family of the deceased, particularly for those who expect to benefit from the deceased's estate but are not eligible to benefit from intestacy. Fortunately, the Wills Act 2007 empowers the High Court to declare that a document is a valid will if the Court is satisfied the document expresses the deceased's testamentary intentions. Over the years, common law courts have faced applications to declare a wide range of 'documents' valid, such as a will written on an ostrich shell[1] or an iPhone[2]. The New Zealand High Court recently considered for the first time whether an Excel spreadsheet could be a valid will.[3]

Background

The deceased, Mr Meyer, suffered from a condition which put him at high risk for COVID-19, so from March 2020 until he died in February 2022, he rarely left his house. He became unwell, so in September 2021, he prepared a draft will in the form of an Excel spreadsheet recording how he wanted his assets to be distributed. Due to his illness and the pandemic, Mr Meyer could not visit a lawyer to make and sign a formal will. After his death, his daughter applied to the High Court for an order declaring the Excel spreadsheet to be a valid will.

Validating a will

Section 14 of the Wills Act provides that the High Court can declare a document to be a valid will if the Court is satisfied that the document expresses the deceased's testamentary intentions. The person making the application to have the document validated has the burden of satisfying the Court that the document does reflect the deceased's testamentary intentions. The Court's enquiry should focus on the substance and intention of the document, rather than its form, to avoid thwarting the deceased's testamentary intentions.

The applicant, the deceased's daughter, gave evidence that her father had told her that the spreadsheet was his will and that it reflected his testamentary wishes. There was no evidence to suggest that the deceased had made another will, either before or after creating the Excel spreadsheet. There was also no evidence to suggest that the deceased's testamentary intentions had changed between creating the spreadsheet in September 2021 and his death in February 2022.

The High Court noted that the spreadsheet contained all the provisions normally found in a formal will. After considering the evidence, the Court was satisfied that the Excel spreadsheet reflected the deceased's testamentary intentions. The Court considered that the pandemic and the deceased's ill health had prevented him from converting the spreadsheet into a formal will which complied with the requirements of the Wills Act. On that basis, the Court declared the Excel spreadsheet to be a valid will.

Conclusion

An unsigned, unwitnessed Excel spreadsheet is far from the usual form of a valid will in New Zealand. However, the ease with which the Court declared this will valid may have been influenced by the low value of the estate, estimated to be less than $70,000, and the fact that the deceased's wife and four children had all provided their written consent to validating the Excel spreadsheet as the deceased's will. Although the Court was satisfied that the Excel spreadsheet clearly expressed the deceased's testamentary intentions, this may have been subject to closer scrutiny had the value of the estate been higher or if part or all of the deceased's family had opposed the application. Practitioners bringing section 14 applications for high value estates should ensure that the evidence clearly demonstrates the deceased's intentions, particularly if the document in question takes an unusual form. ■

1. *Hodson v Barnes* (1926) 43 TLR 71
2. *Re Yu* [2013] QSC 322
3. *Re Meyer* [2022] NZHC 2040.

Court of Appeal Decision Considering whether there is Fiduciary Duty to Adult Children following the Death of Parent

BY **CALINA TATARU**

In *D and E v A, B and C*[1] the Court of Appeal considered whether the High Court had erred in finding whether an abusive father breached his fiduciary duty to his adult children by transferring most of his assets to a trust prior to his death.

The deceased, father of three adult children, had transferred the bulk of his assets to a trust during his lifetime, resulting in a situation where the assets in the estate were minimal. The adult children's claims under the Family Protection Act were meaningless in the absence of assets to claim against. The children were successful in the High Court in a claim against the Trust.

The trustees of the Trust appealed against the High Court's decision that found that there was a breach of the fiduciary duty owed by the father to the children, which he breached by abusing them "egregiously. This duty was further breached by the father by establishing a trust for the benefit of another family and transferring his assets in that trust. The High Court decided the trustees held the father's assets as constructive trustees for the benefit of the father's estate.

The appeal proceeded on the basis of agreed facts that the father sexually abused his daughter and emotionally and physically abused the two sons (now in their late 50s). The children has no contact with their father after they left home, and did not take any criminal or civil action against the father during his lifetime.

It was accepted by the appellants that the father owed fiduciary duties to his children not to abuse them. The question under appeal was whether the father owed fiduciary duties to his adult children at the time he gifted the principal assets to the Trust and whether these claimed duties were breached.

The evidence showed that all three children had difficult lives, but the worst affected was the daughter who had suffered sexual abuse. In the High Court it was decided that the father did have fiduciary obligations that he owed his children when he transferred his assets to the trust, and the trustees were liable for knowing receipt of the property gifted by the father.

Held: Collins J in his the minority judgment traversed the basis for a fiduciary relationship between parent and children and found that in the exceptional circumstances of the case, there was an inherently fiduciary relationship between the father and the daughter that continued throughout the father's life. The fiduciary obligation would have been discharged had the father taken reasonable steps to provide some economic security for the daughter. In Collins J's decision the remedy he would have directed would have been a rescission of the transfer of the father's assets to the trust, so that they are available for a Family Protection Act claim.

The majority decision (Kos P and Gilbert J) acknowledged that the daughter suffered significant harm as a result of the father's abuse but found that equity could not supply a remedy to the tragic situation the daughter found herself in. Gilbert J's judgment proceeded on the basis that there was a fiduciary duty on the father not to physically or sexually assault his children. The breach of fiduciary duty causing the loss were the acts of physical and sexual abuse. A subsequent failure on the part of the father to provide compensation for that loss does not amount to a new breach of fiduciary duty.

The majority decision did not extend a fiduciary relationship between the father and his adult children. Kos P agreed that the relationship between the children and the father was fiduciary in nature for the time that they lived together but this fiduciary duty ceased when the father no longer lived with, or cared for, the children. The transfer of assets to defeat a future claim did not represent a further breach of fiduciary duty. Kos P held that the ordinary remedy applicable for a fiduciary breach of duty via sexual or other physical abuse must be by way of equitable compensation, but there was no basis to involve constructive trust principles. The personal equitable claim the children would have had against the father was extinguished.

Kos P took the approach that the duty not to sexually or physically abuse the children was extinguished when the children left home, and the residual personal claim for equitable compensation cannot be converted to, and preserved by, a continued proprietary claim to the father's property.

The trustees' appeal was successful.

The children have applied for leave to appeal to the Supreme Court. ■

1. *D and E Limited as trustees of the Z Trust v A, B & C* [2022] NZCA 430, 14 September 2022, Kos P, Gilbert & Collins JJ.

Court holiday dates

Christmas and New Year 2022/2023

Urgent Family Court applications

Family Courts will provide a national service for urgent applications over the Christmas and New Year holiday period. Urgent applications will all be dealt with via the national e-duty platform. Court staff and duty judges have been allocated to deal with applications on the following days shown to the right.

Mon	Tue	Wed	Thu	Fri
19 Dec 2022	20 Dec 2022	21 Dec 2022	22 Dec 2022	23 Dec 2022 **Cut-off** 12:00pm **Close** 5:00pm
Mon	**Tue**	**Wed**	**Thu**	**Fri**
26 Dec 2022	27 Dec 2022	28 Dec 2022 **Cut-off** 2:00pm	29 Dec 2022 **Cut-off** 2:00pm	30 Dec 2022 **Cut-off** 2:00pm
Mon	**Tue**	**Wed**	**Thu**	**Fri**
2 Jan 2023	3 Jan 2023	4 Jan 2023 Larger Courts reopen 9:00am **Cut-off** 2:00pm	5 Jan 2023 **Cut-off** 2:00pm	6 Jan 2023 **Cut-off** 2:00pm

☐ National e-duty service available ☐ Closed for observed statutory holiday

All urgent Family Court applications are required to be submitted to the registry **by 2:00pm (exception 12pm on 23 Dec)** on the days to the right in order for them to be processed. Any applications received after that time will be considered the following day. The process for urgent Family Court applications will go back to normal on Monday 9 January 2023.

Supreme Court

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Wednesday 4 January 2023
- **Emergency Contact:** Sue Leaupepe 027 288 5895

Court of Appeal

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Wednesday 4 January 2023
- **Emergency Contact:** Maryanne McKennie 027 227 7682

High Court

Auckland, Blenheim, Christchurch, Dunedin, Gisborne, Greymouth, Hamilton, Invercargill, Masterton, Napier, Nelson, New Plymouth, Palmerston North, Rotorua, Tauranga, Timaru, Wellington, Whanganui, Whangarei (rule 3.2 High Court Rules 2016)

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Wednesday 4 January 2023

Emergency Contacts

John Richardson | 027 474 3995
Auckland, Hamilton, Rotorua, Tauranga, Whangārei
Jane Penney | 027 509 3918
Gisborne, New Plymouth, Napier, Whanganui, Palmerston North, Masterton, Wellington, Nelson, Blenheim
Sharon Graham | 027 553 4338
Greymouth, Christchurch, Timaru, Dunedin, Invercargill

District Court

Auckland, Blenheim, Christchurch, Dunedin, Gisborne, Greymouth, Hamilton, Hastings, Hutt Valley, Invercargill, Levin, Manukau, Masterton, Napier, Nelson, New Plymouth, North Shore, Palmerston North, Porirua, Queenstown, Rotorua, Tauranga, Timaru, Waitakere, Wellington, Whanganui, Whangarei:

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Wednesday 4 January 2023

Alexandra, Ashburton, Dannevirke, Hawera, Huntly, Kaikohe, Kaitaia, Morrinsville, Papakura, Pukekohe, Taumarunui, Taupo, Thames, Tokoroa, Wairoa, Whakatane:

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Monday 9 January 2023 (unless gazetted otherwise)

Gore, Taihape, Westport:

- **Close:** 5pm, Friday 23 December 2022
- **Open:** 9am, Monday 16 January 2023 (unless gazetted otherwise)

The following courts are Hearing Courts. They will not be open over the Christmas and New Year's period, and will resume hearings as rostered in the New Year: Chatham Islands, Dargaville, Kaikoura, Marton, Oamaru, Ohakune, Opotiki, Ruatoria, Te Awamutu, Te Kuiti, Waihi, Waipukurau. ■

CPD *Calendar*

NZLS CLE Ltd
Continuing Legal Education
New Zealand Law Society

PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
FAMILY				
SECTION 15 PRA – RECENT CASES & AWARDS *2 CPD hours*	*Vivienne Crawshaw KC* *Elizabeth Heaney*	Section 15 of the Property (Relationships) Act 1976 allows for one party to be compensated if the income and living standards of the other party are likely to be significantly higher due to the division of functions in the relationship. This seminar will consider the key recent cases and awards pertaining to economic disparity following the Supreme Court's decision of Scott v Williams in 2017. It will take a practical approach that will help ensure that you are able to provide robust advice to your clients whatever party you are advising.	Auckland Live Web Stream	24 Nov 24 Nov
SEXUAL VIOLENCE LEGISLATION FORUM *6 CPD hours*	*Chair: His Honour Judge Mike Crosbie*	The Sexual Violence Legislation Act 2021 is coming into effect in stages and practitioners need to be fully up to date with the specific changes and their likely effects in practice. This FREE full-day forum for lawyers, sponsored by the Ministry of Justice, will provide expert analysis of the new provisions along with discussion of how they will work.	Wellington Live Web Stream	30 Nov 30 Nov
CONSTRUCTIVE TRUSTS *1 CPD hour*	*Mike Lennard*	A constructive trust is an equitable remedy that prevents the person holding the property from unjustly benefiting from that property. This webinar will look at the features and types of constructive trusts; the factors that must be established to determine a constructive trust, as well as the potential remedies and outcomes when a constructive trust exists.	Webinar	29 Nov
CPD DAY 2023 *7 + 3 CPD hours*	*Various*	Now in its Ninth year and designed for the busy practitioner a one-day programme offering 7 + 3 hours of CPD. You will benefit by receiving 7 hours of practical advice with a bonus 3 hours Online CPD. The programme includes a range of practice areas with a regional focus.	Christchurch Auckland Wellington A Live Web Stream A Wellington B Live Web Stream B	21 Feb 22 Feb 23 Feb 23 Feb 24 Feb 24 Feb
INTERFACE BETWEEN TRUSTS & THE PRA *3.5 CPD hours*	*Sharee Cavanaugh* *Kimberly Lawrence* *Colette Mackenzie*	This forum will consider the interface between the Trusts Act 2019 and the Property (Relationships) Act 1976. It will consider the key issues and developments in this area and take a practical approach that will help ensure that you are able to provide your clients with effective advice.	Wellington Live Web Stream	30 Mar 30 Mar

SAVE THE DATE

NZLS CLE Family Law Conference

Te Pae, Christchurch, 1-2 November 2023

Registrations Open August 2023