The Family Advocate

Spring 2023
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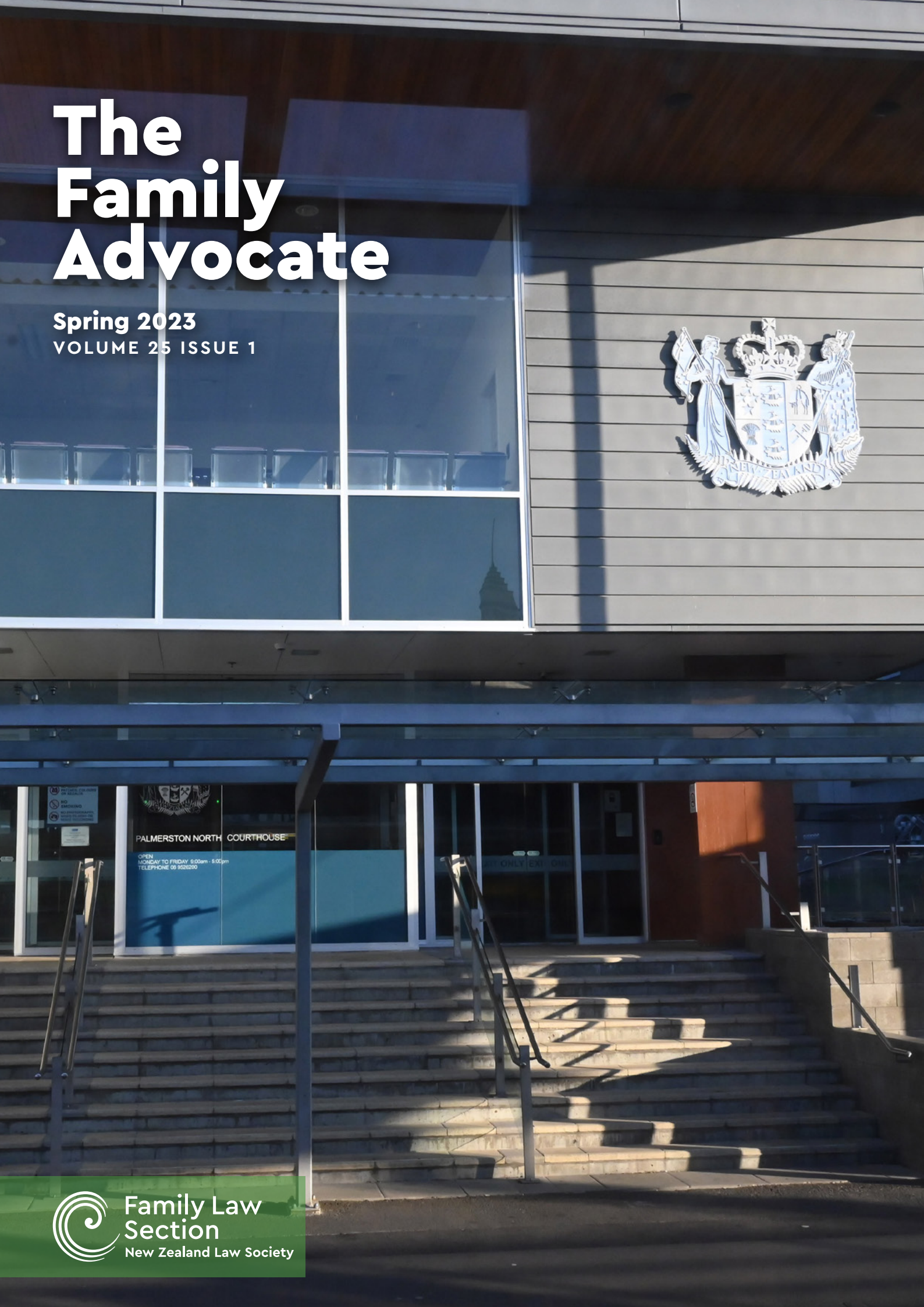

Family Law Section
New Zealand Law Society

SPRING 2023
VOLUME 25 ISSUE 1 ISSN 2324-5085

▲ Palmerston North Court
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 **31 October 2023.**

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FROM THE CHAIR

BY **LAUREN PEGG**

I HOPE THIS AUTUMN EDITION FINDS YOU warm and dry and that you have had a chance to take a mid-year break.

The wellbeing of the profession is a real and serious issue for our members. Recently the New Zealand Law Society brought this to the attention of the Heads of Bench. We were provided with the opportunity to comment and forwarded a letter to the NZLS setting out the concerns of family lawyers; the workload and the increasing demands and pressures and the growing shortage of lawyers with 5 to 10 years' experience. The Chief High Court Justice Susan Thomas and Chief District Court Judge Heemi Taumaunu have addressed the issue in a letter to all judges. You will have seen the letter in LawPoints on 27 July. Since then, Law Society President Frazer Barton has spoken further in the media, on radio and television. This issue is being taken seriously and we intend to continue the discussion and to work collaborativley with the various stakeholders to find solutions. If you have any matters you would like to raise in terms of wellbeing please contact your local FLS representative.

Part of wellbeing is lawyers being able to take a decent break over the Christmas|New Year period. We are currently liaising with the Law Society, the Heads of Bench and schedulers at the ministry to ensure that again this holiday season, matters will not be scheduled for the first two weeks in January 2024. We will advise members in an email bulletin about this in the near future.

On 16 August the Family Court (Supporting Children in Court) legislation came into effect (an article about this featured in *Advocate* Volume 23 Issue 1). These changes seek to ensure the voices of children involved in the family justice system are heard and their views taken into account. The Bill amends the Care of Children Act 2004 and the Family Dispute Reolution Act 2013. Some of the practical aspects of this are still being worked out and as we know more we will keep you informed.

Registrations have opened for the Family Law Conference to be held in Christchuch on 1 to 2 November, with a pre-conference workshop on the Oranga Tamariki Act on 31 October, a mihi whakatau followed by the FLS sponsored drinks and canapes. The theme of this year's conference is Te Hononga – Connection. Conference chair, Siobhan McNulty explains that "*this theme is about us connecting with each other after recent challenging and testing times with the pandemic, natural disasters, the ever-increasing demands of practice and the very real risks to our personal safety when carrying out our mahi.*" Do take the opportunity to attend and connect with your colleagues. The programme looks set to be both stimulating and the social events, entertaining.

Over the last couple of months the executive has been involved in work on various practice notes, consulting with the Ministry of Justice on a process for the regular review of all court-appointed counsel renumeration, pariticpating in a ministry working group considering safety in all of our courts, providing a confidential response to proposed amendments to the Family Court Rules in respect of Family Court Associaties and providing a response to the minstry in respect of updated information for its website.

The FLS continues to provide excellent educational webinars and we have another two planned for the rest of this year. Details of those will follow very soon.

We are delighted to advise that we have now filled all the vacancies on the executive. The new co-opted Te Hunga Rōia Māori o Aotearoa (Māori Law Society) representatives to the executive are Amy Chesnutt and Alisha Castle. Amy and Alisha will share the responsibilities of the one seat.

In 2011, the executive agreed to co-opt a member to reflect the diversity of the FLS membership at the executive table. Paul Muller was the first co-opted member for this role. Following Paul being elected to the FLS executive in April this year, the executive agreed to co-opt Nazmeen Rasheed from Auckland to the executive.

A casual vacancy arose on the FLS executive due to Judge Caroline Hickman standing down from the executive and Fenella Devlin from Palmerston North has been appointed to fill the casual vacancy. We congratulate Amy, Alisha, Nazmeen and Fenella as welcome additions to the executive.

In addition, the executive has appointed a number of new regional representatives: Bryony Shackell (Central Otago), Catharina Chung (Auckland Central), Brooke Glasgow (South Auckland), Chris Seibt (Central Otago) and Amanda Courtney (Northland). We congratulate all of our new regional representatives on their appointments and also thank those who are standing down for their contribution to FLS .

Biographies and photos of our new executive members and regional representatives are included in this edition.

We always love to hear from you. Please get in contact with your local representative if there is anything you would like to bring to our attention. ■

Ngā mihi nui, Lauren.

FROM THE EDITOR

BY **EMILY STANNARD**

TĒNĀ KOUTOU KATOA, NAU MAI KI TE TĀNGA kōanga o *Te Advocate*.

Thank you, as always, to everyone who contributed to this edition. There were a wide range of really quality articles and I was blown away by the generosity of those who gave up their time to write for the Advocate. In particular, Len Andersen KC who spoke with us about his career, how the law has changed over time, and his most memorable case.

The Supreme Court decision of *Sutton v Bell*[1] has been helpfully discussed by Samantha Wilson. The case sets out how s 44 of the Property (Relationships) Act 1976 can apply to dispositions before the beginning of a de facto relationship, and that *Regal Castings Ltd v Lightbody*[2] applies when considering whether a disposition has been made "in order to defeat" a partner's claim or rights under the Act. This development highlights the importance of section 21 agreements for providing clients with clarity as more and more case law emerges around trusts.

Another way to provide clients with clarity can be using the collaborative law method. Selina-Jane Trigg discusses how practitioners can work towards having a collaborative mindset. One way she recommends doing this is ensuring that there is room in our practice to be more collaborative. Undertaking professional supervision can also assist with this. Tania Anstiss discusses the barriers to and benefits of professional supervision.

On 16 August 2023, the Family Court (Supporting Children in Court) Legislation Act 2021 came into force. One of the amendments adds additional requirements to s 7B of the Care of Children Act 2004 (COCA). Will Story sets out the obligations in s 7B which says that before commencing any COCA proceeding "a lawyer must take any steps that, in the opinion of the lawyer, assist in enabling the issues in dispute to be resolved as safely, fairly, inexpensively, simply, and speedily as is consistent with justice". Other changes to COCA include:

- a new s 5(g) a child must be given reasonable opportunities to participate in any decision affecting them;
- a new s 5A(1A) requiring the court to take into account the principles of the Family Violence Act 2018;
- a new s 6(1AAA) setting out the purpose of s 6 is to implement article 12 of the UNCROC;
- a new s 7(2) requiring the court, where possible, to appoint a lawyer for child suitable to that particular child by reason of their personality, cultural background, training, and experience;
- a new s 7AA requiring the lawyer for child to explain the proceeding to the child in a way the child will understand.

It will be interesting to see in particular how the new s 5(g) of COCA impacts how children are involved in proceedings. Will's article is also a helpful reminder to encourage clients to use FDR where appropriate.

It will be interesting to see in particular how the new s 5(g) of COCA impacts how children are involved in proceedings

Section 7B could also be a useful section in making a strike out application.

Kesia Denhardt has provided an update on other new pieces of legislation; The Family Court (Family Court Associates) Legislation Act 2023, which (unsurprisingly) provides for Family Court Associates to be appointed, and the Child Support (Pass On) Acts Amendment Act 2023, which means that child support payments do not offset sole parent benefits. She also addresses the surrogacy legislation.

Te Wiki o te reo Māori is approaching. We have an article with some kupu (words) for court and the office. We are also hosting a cultural webinar on 7 Mahuru (September). There are two books to be won for those who register. I can remember the first time I tried to use te reo in the work place (which, really was my first time using it since kindy and early primary school). I felt so awkward and almost like I would get in trouble. I have mispronounced countless words, and I get it wrong a lot. Continuing my journey while in practice has been really difficult and I don't use it as much as I should. But never once has anyone been annoyed or discouraging of my use of it. Some things I need to learn more about is tikanga and why cultural competency is important. Mānia Hope and Johan Niemand will be discussing this at the webinar.

There has been much to celebrate this edition with Judges Hickman, Sharkey and Williams Blyth being sworn in. The FLS executive has some new members, Alisha Castle, Amy Chestnutt, Fenella Devlin and Nazmeen Rasheed. I am really looking forward to working with them. ■

1. *Sutton v Bell* [2023] NZSC 65.
2. *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

New FLS executive members

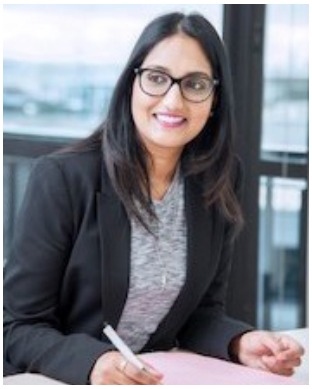
Fenella Devlin – Manawatu

I HAVE BEEN PRACTISING IN THE CENTRAL region of the North Island since 1991, primarily in the Palmerston North and Whanganui regions. My experience has been across the family, criminal and civil jurisdictions in both District and Family Courts. I have been appointed as lawyer for child and lawyer to assist since the mid-1990s.

I am practising on my own account and have developed my interest in mediation. I conduct regular mediations in the central region for the Family Dispute Resolution Mediation Centre.

I have previously been a regional representative for Whanganui and I am looking forward to serving on the Family Law Section executive.

Nazmeen Rasheed – Auckland



TĒNĀ KOUTOU KATOA

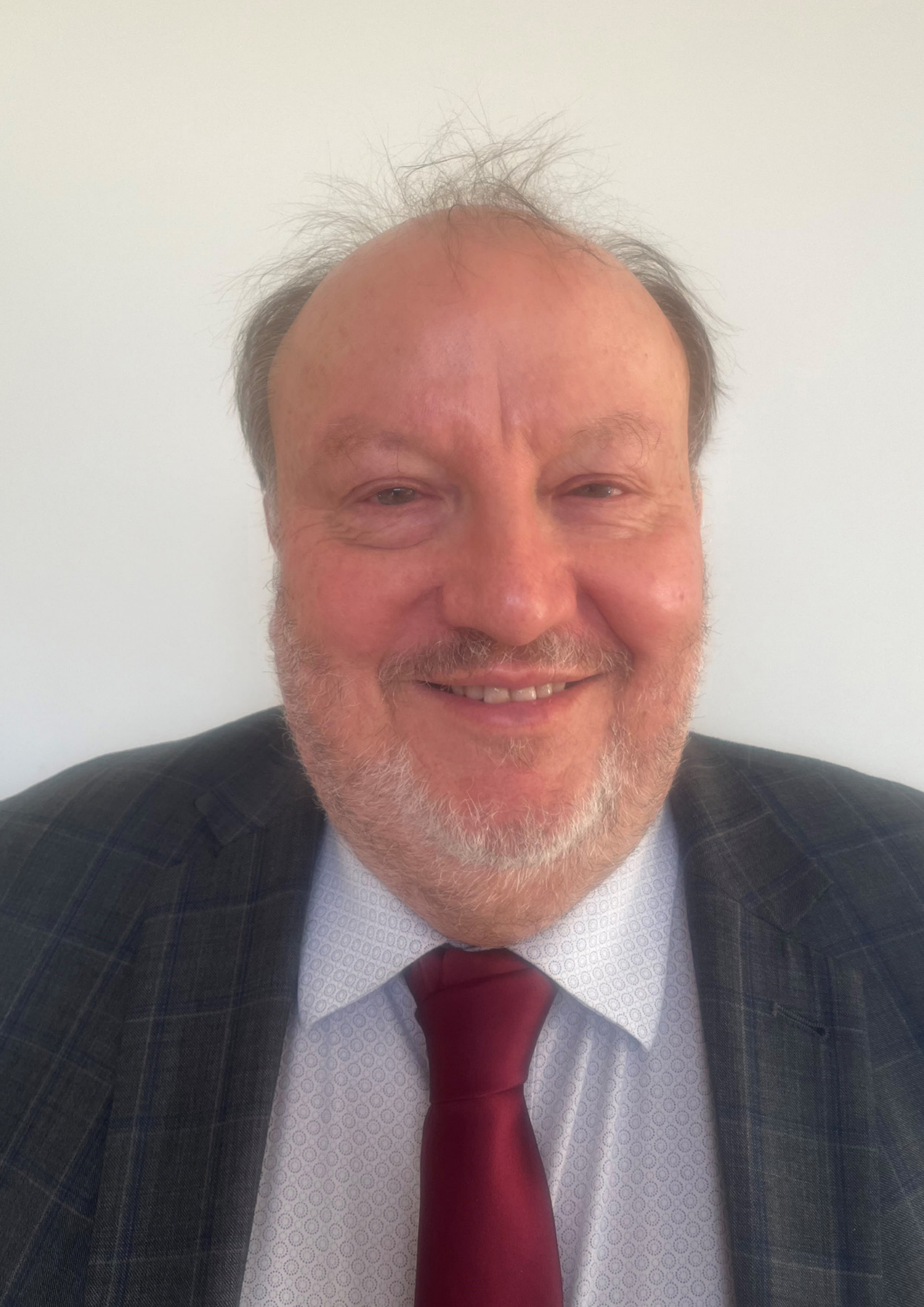
I grew up in Auckland and was admitted to the bar in 2007. I have practised as a family lawyer for 15 years. Since 2019, I am a barrister sole at Halcyon Chambers in Central Auckland.

I am Indo-Fijian and fluently speak in Hindi. My areas of practice are largely in family violence, care of children and relationship property. I have a particular interest in complex Care of Children Act cases where there is a resist-refuse dynamic. I am regularly appointed as lawyer for child and lawyer to assist across all courts in Auckland. I am familiar with issues faced by minority groups where there are language and cultural barriers as well as socio-economic disadvantage.

I understand the dynamics of working with whānau and people from all walks of life. I continue to undertake legal aid work and understand the difficulties arising for lawyers and clients in respect of legal aid grants and access to justice.

I have been a member of the FLS Advisory Panel as well as an FLS co-regional representative for Auckland Central for a number of years.

I believe there is a need for diverse representation of lawyers on the executive and am proud to be co-opted into this role. I hope to bring to the executive fresh ideas, energy and perspective. ■



Len Andersen KC

Where did you grow up?

I grew up in Napier. I was born in Norsewood in Central Hawke's Bay. I moved to Taradale (then a separate town) when I was 6.

Why did you want to be a lawyer?

I wanted to be a lawyer from a young age. I'm not sure why. I was steadfast about it from the time I was 8 or 9. My father took me to a careers advisor while still at primary school... I told him I wanted to be a lawyer, and he suggested I should consider something within my abilities. The comment did not deter me but made my father furious and I was never taken to another careers advisor. I don't remember any of my 6 siblings (all younger than me) going to one either.

Where did you study?

I went to Napier Boys' High School and from there to university in Dunedin.

The reason I went to Dunedin is that my mother, who was a teacher and deputy principal of Napier Girls' High School, was an Otago graduate. I also had grandparents living in Mosgiel.

When I finished my law degree I had spent a year as teaching fellow at Otago . I didn't want to be an academic and was impatient to practice law.

I applied for a job in Whakatāne. The partner who met me at the airport was in shorts and had a sun tan and I knew I would enjoy life there. I stayed there for 15 years.

What sort of law did you practice in?

I had a general practice in Whakatāne of about 1/3 family, 1/3 criminal and 1/3 other litigation including civil. It was a provincial firm with 4 partners with employed solicitors. One of the good things about working in a provincial firm like that is the variety of work. I have continued to do a wide range of work as a barrister in Dunedin.

Any memorable cases?

Gillies v Keogh[1] was the most well-known case I argued. The feeling within the profession at the time was the Courts were looking to help remedy the injustices resulting from de facto couples not being included in the Matrimonial Property Act and I was arguing against that trend by seeking to have a woman in a de facto relationship not lose a share of her house. Bronwyn Gillies had said "You can live in my house, but it is not going to be yours. It is mine". I persuaded the court that her de facto partner should not get a share because she made it clear that that was the basis on which he was living in her house. It was a significant decision examining the basis for de facto property claims. I knew Ms Gillies' former husband. He was a unionist and sat on the Arbitration Court. He bailed me up in Rotorua Court library one day and said, "I've been defamed by the Court of Appeal". He took me to the NZLS reports in the library and referred to the passage in the reported decision in *Gillies v Keogh* where it was noted that Ms Gillies had not got her share of relationship property in his settlement with Ms Gillies and protested that was not correct. I think he was more amused to be referred to a reported decision than angry about it.

Another memorable case for different reasons was when I acted for a woman who turned out to be an fraudster. She had obtained custody of her children by alleging they had been sexually abused by their father (later found by DNA analysis to be incorrect). I had this incredible battle in Nelson with Julian Maze. He was acting for the children and had succeeded in establishing without doubt that my client was a fantasist and a fraudster. That was not the end of the matter as the children desperately wanted to be with their mother. The father played little part in the proceedings and it seemed he could not comprehend why the allegations had been made against him or that the mother of his children was so dishonest. The main opposition I had was from Julian and we fought for a week in front of Judge Inglis QC. At the end of the trial Judge Inglis QC ordered the children be immediately removed from the mother and delivered to the father. It was the most extraordinary case and I became good friends with Julian and Jo Maze (later Judge Maze) as a result of the battle which I deservedly lost. With current DNA techniques the fabrication of sexual abuse would have been established as the techniques at the time only established (eventually) that the relevant semen in the child's underpants my client had provided did not contain the father's DNA but where it came from. The client was an extraordinary manipulative and dishonest woman who claimed to be the illegitimate daughter of a leading businessman to obtain credit from businesses and other organisations. Subsequent to my acting for her, she joined a fundamentalist church and the congregation helped her and her husband by providing them with a house. She later got convicted on fraud charges and was sent to prison.

What was it like when you first practised compared to now?

The practice of law has changed significantly. The biggest change is the growth of women practitioners. This has resulted in a noticeable change of culture in the courts, much of which is attributable to the leadership of Dame Sian Elias' leadership as Chief Justice and the significant number of female appointments as judges.

Another big change is the increase in written submissions and memoranda. This reflects both the ease of word processing and the ready availability of unreported court decisions. The days you could just appear and argue your case without filing any submissions are in the past.

The biggest change in the Family Court was the introduction of mediation. It soon proved extraordinarily successful in resolving matters. It was a big change from the rather brutal approach of the Family Court before that.

When the Family Court was established there were no dedicated Family Court rooms and it was only gradually that such court rooms with separate entrances to the criminal court were built. In an effort to demonstrate things had changed and there was marked difference between the criminal and family courts, the First Principal Family Court Judge, Sir Peter Trapski, arranged for pot plants to be put in the courtroom and the judge sat (without a gown) at the registrar's desk at the front of the judge's bench in the criminal court to make the court more friendly. It backfired a bit because some parties thought that the judges weren't real judges, and judges went back to sitting on the bench and wearing gowns.

A significant change when the Family

Court was established was the recognition of the children's interests by appointment of lawyers for the child. I was the first lawyer for child appointed by Judge Trapski who had previously been our local judge. It was an undefined role and quite different to anything that had previously been required. It has subsequently developed into an industry and a considerable part of many Family Court lawyers receive a significant income from the court as payment for Lawyer for Child and/or Lawyer to Assist.

The establishment of the Family Court was at a time when legal aid was readily available and of real assistance to separated people (mainly women at the time) because it was economic for average provincial firms to have partners and staff doing work at legal aid rates. The fees were set at a reasonable market level with a 15% discount and the discount was the profession's contribution. It overcame the economic disadvantage that women had previously faced. This contributed to establishment and the growth of the family court bar which did not exist as a significant entity when the Family Court was established.

The growth of family bar also reflected the move away from conveyancing as the main source of income for law firms. In the late 1970's there was a conveyancing scale which regulated charges for conveyancing transactions. It was generous and provided far greater renumeration (even allowing for inflation) than what would now be charged for standard conveyancing transactions and (allowing for inflation) would equate now to approximately what real estate agents currently charge for a sale. Firms would regard services offered to family and criminal clients as a professional obligation rather than a money making exercise. Things changed with the abolition of the conveyancing scale and funding by legal aid meaning that family law could be a career instead of what young lawyers did before they moved in to conveyancing and commercial work.

Another big change has been the growth of the independent bar. The reasons are partly economic and partly lifestyle choices. It is economic because practising as a barrister does not have the same costs as running a solicitor's practice with a trust account and there is the ability to share costs by being in a barrister's chambers. Working as a barrister has suited family lawyers, particularly since the change that allows direct instructions. It has advantages over working as a solicitor without a trust account when acting on relationship property matters because an instructing solicitor is able to handle any money transactions while a solicitor cannot handle money as agent for a solicitor without a trust account.

Were you in a firm the whole time you were in Whakatāne?

I joined the partnership after three years as an employee. I remained as partner for 12 years until I left the firm to practice as a barrister in Dunedin.

Why did you want to become a barrister?

I enjoyed being in the partnership in Whakatāne but always intended to practice as a barrister. As a barrister, you lose the benefit of others contributing to the common income (including paid sabbaticals) but gain being solely responsible for your practice and not having to worry about staff or other issues that are associated with partnerships.

I decided to move from Whakatāne when my children got close to High School age. I was tossing up whether to go to Auckland and work for a law firm or to go to Dunedin. I went to Dunedin because Royden Somerville KC agreed to set up a new set of chambers which included me and there seemed to be work available. I had spent three months at the law faculty in 1987 as a practitioner in residence while on sabbatical. That made me realise I enjoyed teaching and I have taught a course in advocacy since I arrived in Dunedin.

What have been some of the best parts of your career?

I have enjoyed court work and the variety involved in working in different parts of law.

The best parts are not just the work but the people you work with and the friends you make. I like the fact that the issue in any form of litigation is the matter before the court and not personal to the lawyers.

I have enjoyed my roles with the Law Society, the Criminal Bar Association, and the New Zealand Bar Association, mainly because of the friends I have made.

The biggest project I worked on was obtaining resource consents to deepen the shipping channel for Port Otago Limited to allow larger ships to visit. I was fortunate to be involved from the conception of the project onwards.

What have been some of the most challenging parts of your career?

Covid was the biggest challenge. As president of the Criminal Bar Association, I attended meetings by Zoom at least once a week with Judges, heads of other legal associations and others to decide how the courts were operating during the lockdowns. It was rewarding because there was a real sense of co-operation and I was impressed by the efforts made by Judges and Ministry of Justice staff to minimise the risk to lawyers working during the lockdown.

What do you do in your spare time or to help manage the stress of practice?

I play bridge which can become an obsession in itself. I follow rugby including the Otago teams and the Highlanders. I enjoy reading but have a large number of books in the "to read" bookshelf. When I was young reading comics was frowned on as being a discouragement to more serious reading. My mother disagreed and had the view that any reading was good. I also watch movies and tv. My favourite series is Ted Lasso on Apple TV.

Is there anything else you want to add?

The practice of law changes constantly and you just have to be prepared with new issues and things that arise.

Whakatāne in the 1980's was an interesting place to work in and it was a place that gave a good start to lawyers who have moved elsewhere including Judges Tony Fitzgerald, Stephen Coyle and Sarah Lindsay, and notable practitioners including Patricia Jones, Chris Moore, Bill Chapman, Rachael Adams, the late Harry Edwards, and Siobhan McNulty.

Changes in technology mean we are now much more tied to computers and spend less time in court and talking to other people. Because of the increased specialisation of the family bar, and the closed nature of the Family Court, young lawyers do not get much opportunity to see other lawyers in action which is a shame and makes it more difficult for proper standards of advocacy to be maintained in the Family Court. There can be a difference in the standard of courtroom craft practised by young lawyers between those who receive proper training from their employers and those who are left to fend for themselves. ■

1. *Gillies v Keogh* [1989] 2 NZLR 327

Family Law Section executive

Te Hunga Rōia Māori o Aotearoa co-options

Amy Chesnutt

Tēnā koutou katoa. Ko Amy Chesnutt tōku ingoa. Ko Ngāti Raukawa tōku iwi.

I was admitted to the Bar in 2007 and after two years working in Waitangi Tribunal claims, I moved to Manukau to join the family law team at Inder Lynch Lawyers.

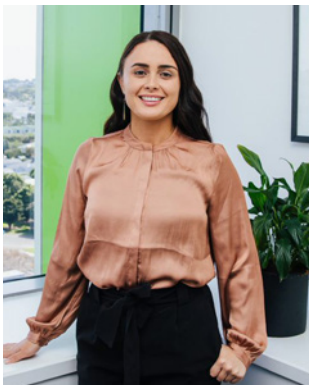
I relocated to Queensland in 2012 and practised exclusively in family law, before returning home in late 2020 with my young family. Since October 2020, I have worked at Dixon & Co Lawyers in Ellerslie, where I became partner in April 2022. I practise in Māori legal issues and family law, primarily in parenting, family violence, and relationship property matters.

As a wāhine Māori raised in the melting pot of South Auckland, access to justice is important to me, as is giving back to my community. I am a registered legal aid provider for family law, including relationship property. Working in the Waitangi Tribunal has heavily influenced my practice in family law, and I am particularly passionate about issues as they affect whānau and hapori Māori.

I am an active member of Te Kōmiti Ture-ā-Whānau, the family law committee of Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) and am excited to be the kōmiti representative with my hoamahi, Alisha Castle, on the FLS executive committee.

Outside of work, I am a trustee on my Marae Reservation Trust and tauira of Te Pōkaitahi Reo at Te Whare Wānanga o Awanuiārangi. I am also developing my knowledge of fa'a Samoa in honour of my husband (and children) and have completed the Aganu'u Fa'asamoa 101 programme.

Alisha Castle



Ngā mihi mahana ki a koutou katoa. Ko Alisha Castle tōku ingoa, he uri tēnei nō Ngāpuhi me Ngāti Paoa nōki.

I grew up in Ruakākā, Northland and was admitted to the bar in 2014 after completing my degree at the University of Auckland. I previously worked at Tamatekapua Law before joining Dixon & Co Lawyers where I now practise as a Senior Associate. I am an active member on Te Kōmiti Ture-ā-Whānau, the family law committee of Te Hunga Rōia Māori o Aotearoa (the Māori Law Society). I am proud to represent the committee on the FLS executive alongside my tūakana Amy Chesnutt.

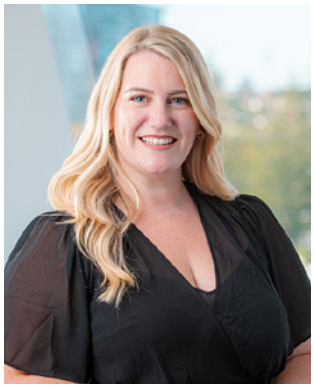
I work primarily in the Waitangi Tribunal and the Family Court in the areas of care of children, family violence and relationship property. I have been appointed as intermediate counsel assisting the Royal Commission of Inquiry into Abuse in Care since January 2020 and appeared in the Māori and State and Faith-based institutional response public hearings.

I've been fortunate to have been mentored by a number of wāhine toa during my study and practice who have inspired me to be a strong advocate for the rights of a culturally diverse set of clients, whānau, hapū and iwi. I am passionate about assisting clients with navigating legal spaces in a way that makes them feel supported and safe.

I am due to complete a Master of Laws (Applied Law) specialising in family law in 2023 and I continue to prioritise my development in te reo me ngā tikanga Māori. Outside of work I enjoy being a māmā to my young daughter and spending time with my friends and whānau in Te Tai Tokerau. ■

FLS regional representatives appointed

Brooke Glasgow – South Auckland



I AM A SPECIALIST FAMILY LAWYER WITH just under 12 years PQE, and an associate at Denham Bramwell in Manukau. I am from South Auckland and went to school here, so am very much immersed in the community. I have a very keen interest in the issues our families in South Auckland face. I have always undertaken a high level of legal aid work for parenting and family violence matters and intend to continue this in future. My career began in Papakura at David Rice and Associates, and I then practised child protection law in the UK, working for local authorities. I returned to NZ in 2018 and have worked at Denham Bramwell since then.

I have also undertaken a lot of relationship property work (although most of this is settled out of court). Another part of my role is supervising junior lawyers and I have direct supervision of two within my firm. As a general family lawyer, I do consider I can bring a lot to the role, particularly as I am aware of the issues that South Auckland practitioners face. Outside of work I am a very social person, and very family focused. I spend a lot of time with my niece and nephew, and love to travel (although COVID has hindered that).

Brooke will work alongside the two FLS South Auckland co-regional representatives Charles Boon and Lena Wong.

Amanda Courtney – Northland

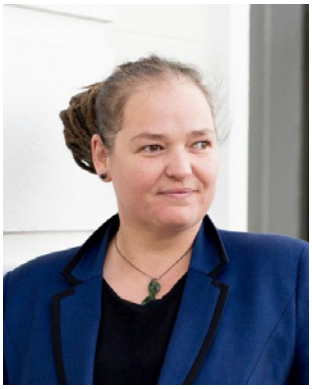
I HAVE BEEN PRACTISING FAMILY LAW FOR over thirty years predominantly in Te Tai Tokerau and Wellington during my career. I am a youth advocate and lawyer for child and I have over 23 years' experience in these roles. I am also a senior criminal and parole lawyer. I am a district inspector appointed subject to the Mental Health and Substance Abuse and Addiction Act. I have been a district inspector for the Wellington region and have been in the role in Northland for over four years.

I look forward to being a voice and advocate for practitioners in my region. My practice regions of Mid-North and Far-North have the additional challenges of large distances to travel to our courts, poor roading and inadequate infrastructure to include cell phone and other service coverage. Accessing justice in our region is an ongoing challenge as our clients are marginalised and suffer extreme poverty. We are also needing to attract more lawyers to ensure representation.

I hope my experience working in different centres will add value to the section. Overall, the use of technology for administrative court matters, are welcomed as the cost-of-living situation and the petrol increases often disable clients from in-person attendances.

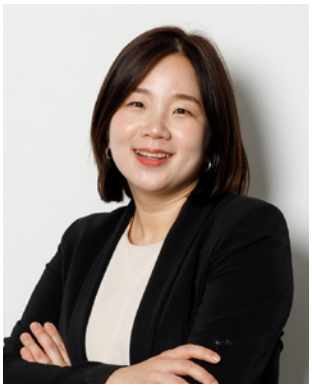
Amanda will work alongside the two FLS Northland co-regional representatives David Adams and Fiona Newton.

Bryony Shackell – Central Otago



I am a director at Mactodd Lawyers, with offices in Queenstown and Cromwell. Originally from Mosgiel, I practised in Tairāwhiti for several years before returning to the South in 2018. I enjoy working across all areas of family and criminal law, including court-appointed roles as lawyer for child and youth advocate. I am a firm believer in access to justice, social responsibility, diversity and sustainability. In my spare time, and in all seasons, I prefer to be camping.

Catharina Chung – Central Auckland



I have been practising as a family lawyer since 2011 with a wide range of experience in the field. I began my career in a general practice setting as a family lawyer, and later joined a medium-sized firm in Auckland Central specialising in family law and general litigation, which included defending claims made against family lawyers.

I have broad experience in all areas of family law including relationship property, trusts, estate claims, care of children, family violence, spousal maintenance and PPPR matters. Since 2022, I have been working at Tompkins Wake Lawyers in Auckland Central where I am now a senior associate in the family law team.

I have a deep passion for all areas of family law, with specific interests in relationship property, trusts, estates and PPPR matters. It is a great privilege as a family lawyer to be involved in diverse aspects of clients' lives. I'm actively engaged in furthering my education as a family lawyer and fostering collegiality within the profession. Recently, I had the opportunity to present a seminar for Legalwise, and I serve as a committee member of the New Zealand Asian Women Lawyers. Outside work, my three-year-old son Theo keeps me very busy.

Catharina will work alongside the two FLS Auckland Central co-regional representatives Louise Reed and Sharon Chandra.

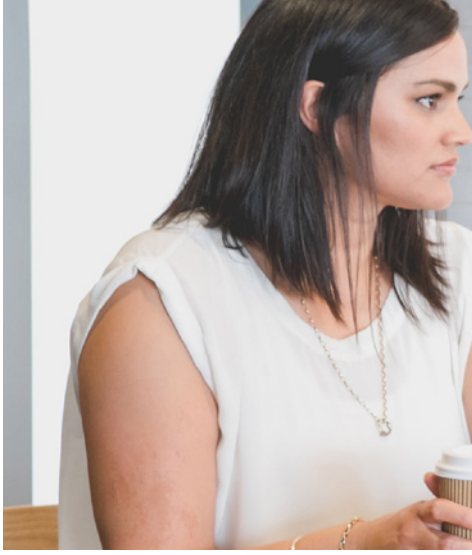
Chris Seibt

I am a solicitor at Oranga Tamariki-Ministry for Children based in Dunedin and am in my third year of practice since being admitted in 2020. My area of expertise is in the care and protection of children and young people under the Oranga Tamariki Act 1989. I have a dual role as I provide in-house legal advice and appear on behalf of the Chief Executive in the litigation of applications for care or protections orders/issues. This work does touch and concern collateral child and family law legislation.

My legal interests beyond child and family law are in matters of public law and the development of legislation incorporating Te Tiriti o Waitangi. Beyond the law my heart is very set on anything futsal, football and American football related as I am a committed Liverpool and Miami Dolphins supporter. I do my best to get involved in these sports in my spare time amidst spending my time with my family in Invercargill and South Canterbury. ■

FLS Cultural Webinar – Preparation for Te Wiki o te reo Māori

The FLS will be holding a webinar on 7 September 2023 to help members prepare for Te Wiki o te reo Māori (Māori Language Week). It will cover pronunciation, an overview of why tikanga is important and relevant to our practice, a mock court scene with introductions in te reo and a Q & A session. Participants in the webinar will also be in the draw to win a copy of Toby Morris' Te Tiriti o Waitangi book. We encourage all members to attend this fun and informative webinar.



Te Reo Māori in Court and at the office

BY **EMILY STANNARD**

This article was previously published in Advocate for Māori Language Week 2021 and 2022. We have included it again to provide some tips for using te reo around the office and in court as Māori Language Week approaches again.

AS TE WIKI O REO MĀORI (MĀORI LANGUAGE week) approaches, the FLS executive is encouraging its members to step up to the challenge to increase their use of te reo Māori. This article gives a very brief guide to pronunciation, some vocabulary and a few phrases. I am not an expert by any means, and this article is intended to be a general guide only. Most of the following pronunciation tips and phrases are taken from: *Kia kākano rua te ture, a te reo Māori handbook for the law* by Alana Thomas and Corrin Merrick, and The Maori Dictionary Online, Te Aka. All errors are mine.

Pronunciation: Long and short vowel sounds

Long vowel sounds are shown by macrons over the vowel, or by a double vowel. The following table gives some examples of the sounds:[1]

		Short	Long
A	As in	Up	Bar
E	As in	Egg	Bed
I	As in	Eat	Peep
O	As in	Ordinary	Your
U	As in	To	Boot

A common example is tangata (person) has all short vowel sounds, while tāngata (people) has a long vowel sound with the first "a".

Pronunciation: diphthongs

There are several diphthongs or glides in te reo Māori. Some diphthongs and their approximate pronunciation are set out in the following table. These are my estimate pronunciation comparisons only. The best way to learn these is by listening to fluent te reo Māori speakers.

Ae	As in	Eye
Ai	As in	Tie
Ao	As in	Owl
Au	As in	Window
Ei	As in	Bay
Oi	As in	Oy
Oe	As in	Weigh
Ou	As in	Toe

Other vowel combinations are the distinct sounds of the two singular vowels together. One example of this is "ua" the "u" and "a" keep their distinct sounds.[2] For example, the word "rua" has two syllables whereas the word "rau" has one syllable.[3]

Pronunciation – consonants and digraphs

Most consonants are pronounced the largely same as English. Two exceptions are "T" which is softer, and closer to a "D" sound, and "R" which is rolled, if it is difficult to roll an "R", aim for the "D" sound in "puddle".[4]

There are two digraphs "Wh" as in the "F" in "Feather" and "Ng" as in "singer".[5]

Pronounciation – Dialects

Different regions have different dialects. This article is by no means a comprehensive guide, but, in Ngāi Tahu, the "ng" sound is pronounced and spelled with "k". In Whanganui, the "Wh" sound is pronounced "W". In the East Coast of the North Island (Te Ika-a-Māui) the "Ng" is pronounced "N".

Pronouns

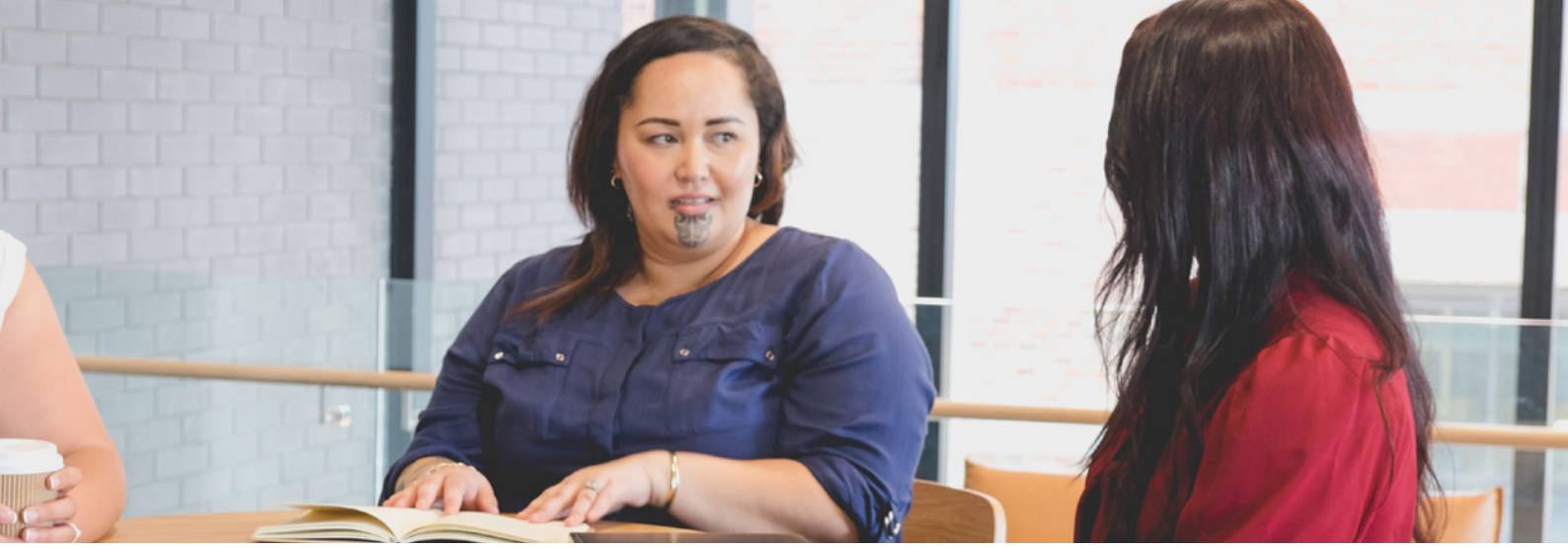
Te reo Māori has different pronouns to English. A list of some is below:[6]

Ahau, au	I
Koe	you (singular)
Ia	she / he / it
Tāua	we (you and I)
Tātou	we (three or more, includes the listener)
Māua	we (two people, excluding the listener)
Mātou	us (three or more, excluding the listener)
Kōrua	you (two)
Koutou	you (three or more)
Rāua	they (two)
Rātou	them (three or more)

Important Kupu (Words)

Below are some kupu Māori (Māori words) which a lawyer might come across in his or her day-to-day work. There are many useful lists for specific situations in *Kia kākano rua te ture.*

- Affidavit – Kōrero taurangi
- Air conditioning – whāhauhau
- Aunt – Whāea Kēkē
- Barrister – Rōia Tūtahi
- Bookshelf – Paenga pukapuka
- Child – Tamaiti
- Children – Tamariki
- Client – Kiritaki
- Coffee – Kawhe
- Colleague – Hoamahi
- Computer – Rorohiko
- Dictaphone – Pūere āhukareo
- Dictation – Āhukareo
- Family Court – Te Kōti ā-Whānau/ Kōti Whānau
- Father – Matua / Pāpā
- File – Kōnae
- Grandchild/ grandchildren – Mokopuna
- Grandfather – Koroua (koro)
- Grandmother – Kuia tūpuna wahine
- Judge – Kaiwhakawā



- Lawyer – Rōia / Poutoko ture
- Library – Whare pukapuka
- Lift – Ararewa
- Meeting room – Rūma hui
- Mother – Whāea / Māmā
- Office – Tari
- Parents – Mātua
- Photocopier – Mīhini whakaahua
- Printer- Pūeretā
- Receptionist – Kiripaepae
- Registrar – Kairēhita
- Secretary – Hēkeretari
- Student – Tauira
- Submissions – Tāpaetanga
- Support person – Kaiāwhina
- Toilet – Wharepaku
- Uncle – Matua Kēkē
- USB Stick – Rākau pūmahara
- Whiteboard – Papa mā
- Wifi – Ahukore
- Worker – Kaimahi

Greetings and sign offs

Some more formal greetings, appropriate for court, or letters are below:

Tēnā koe	hello/ greetings to one person (formal)
Tēnā kōrua	hello / greetings to two people (formal)
Tēnā koutou	hello / greetings to three or more people (formal)
Tēnā Tātou	hello / greetings to us all (including the speaker) (formal)

For less formal greetings "kia ora" can be used in place of "tēnā" followed by the same pronouns above.

Some written sign offs that are appropriate for more formal emails and letters are:

Ngā mihi	kind regards / thank you
Nāku iti noa, nā	yours sincerely
Nāku nā	yours faithfully

More informal sign offs that can be written or verbal include:

Noho ora mai	take care
Mā te wā	see you later/ in due time
Ka kite	see you later
E noho rā	see you later, good-bye (said to someone who is staying)

Out of office

One way to promote the use of te reo Māori even if you're away that week, is to use the following template in your out of office auto-response.[7]

Greetings, I am away from the office and will be returning on [date].	Tēnā koe. Kei wāhi kē atu i te tari au i tēnei wā. Ka hoki ahau ki te mahi hei te [date]
While I am away, [name] is taking care of my clients.	Ka tamō ana au, kei te tiakina aku kiritaki e [name]
If your matter is urgent, please call [phone number]	Mēnā he take, kōhukihuki tāu, tēnā waea atu ki [phone number]

Introductions in court and at FGCs

A way to promote te reo Māori is to use the following template to introduce ourselves in Court. Most of the words should be familiar from earlier on in this article. Below are several phrases that could be useful in court, as with English, there are several correct ways to structure sentences, and the list below is just one way.[8]

Greetings, your Honour	Tēnā, e te Kaiwhakawā
Counsel's name is	Ko [name] tōku ingoa
I am the lawyer for [name]	Ko au te rōia mō [name]
I am the caregiver's lawyer	Ko au te rōia mō te kaitiaki
I am the lawyer for the children / child	Ko au te rōia mō ngā tamariki / te tamaiti
I am the lawyer for Oranga Tamariki	He rōia ahau nō Oranga Tamariki
As the court pleases	Nōu te mana, e te kōti

I hope this article has been of some assistance as we head into te reo Māori week. Kia kaha tātou! ■

1. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 2.
2. Peter Keegan, "Māori Phonology", (9 March 2021) Māori Langue Information, http://www.maorilanguage.info/mao_phon_desc1.html, accessed 7 August 2021.
3. "Rua" means "two", "rau" means "thousand".
4. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 3.
5. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 4.
6. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 4 – 5.
7. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 148.
8. Alana Thomas and Corrin Merrick, *Kia kākano rua te ture, a te reo Māori handbook for the law* (LexisNexis, Wellington, 2019) at 24 – 25, 149.

Virtual contact after parental separation study

BY **DR MEGAN GOLLOP**, CHILDREN'S ISSUES CENTRE, FACULTY OF LAW, UNIVERSITY OF OTAGO

In recent years there has been an exponential increase in information and communication technologies (ICT) – technology and devices (such as computers, smartphones, software, applications) that allow information to be transmitted, received and exchanged in digital form. Such technologies facilitate communication and information exchange and allow people to interact and maintain social connections electronically.

In the context of parent-child contact after parental separation, this has meant that in addition to traditional ways of indirect communication such as texts, letters, phone calls and emails, contact can now involve a widening variety of media including video conferencing software such as Zoom, Skype or Facetime; social media platforms such as Facebook, Instagram, Snapchat, and WhatsApp to exchange text, images, video or voice data; or online games that parents can play with their children. The term 'virtual contact' refers to post-separation indirect contact between a non-resident or contact parent and their child(ren) using such electronic, digital or online modes of communication. While virtual contact primarily relates to children having contact with their non-resident/contact parent, it can also occur between children and either of their parents while in the care of the other.

Despite legal commentary about virtual contact, changes to international legislation and an increase in its use by separated families, particularly in the relocation context, very little empirical research has been undertaken on this topic, internationally or within Aotearoa New Zealand. Furthermore, much of the research that does exist is somewhat dated, narrowly focused, small scale, or pre-dates the Covid pandemic when the use of digital technologies to communicate surged. New research, particularly from a local perspective, is needed. I have been fortunate to receive funding from the Michael and Suzanne Borrin Foundation for the first phase of a proposed three-phase project investigating virtual contact from multiple perspectives to understand the benefits, challenges and risks and the barriers to its use.

As part of Phase One, an anonymous nationwide survey will be open during September 2023 for family lawyers

Phase One is focused on legal and academic perspectives and involves:

1. A literature review;
2. A case law analysis;
3. Key stakeholder consultations; and
4. A nationwide online survey of family justice professionals.

The next proposed phase will seek the perspectives of parents/caregivers and children to understand their experiences of virtual contact after parental separation. The final proposed phase would involve the production of evidence-based resources and best practice guidelines about how parent-child relationships can be successfully and safely facilitated and maintained after parental separation through the use of electronic/digital modes of communication.

Online Survey For Family Justice Professionals

As part of Phase One, an anonymous nationwide online survey will be open during September 2023, for family lawyers (and other family justice professionals). I am interested in your views on the benefits, risks and challenges of virtual parent-child contact for separated families. The survey will collect information about your experiences of, and perspectives on, virtual contact. The Family Law Section has kindly agreed to send out information about the study along with a link to the survey when it goes live that will take you to the study website (www.vcaps.co.nz) where you can complete the survey. I welcome your participation.

Contact the Researcher

You are most welcome to email *vcaps.study@otago.ac.nz* to register your interest in participating and you will be notified directly when the online survey for family justice professionals goes live. Otherwise, you can just await the publicity about the survey. ■

For more information contact the Principal Investigator:

Dr Megan Gollop
Children's Issues Centre | Manawa Rangahau Tamariki
Faculty of Law | Te Kaupeka Tātai Ture
University of Otago | Te Whare Wānanga o Otāgo
Tel 03–479 4918 or 0800 472 776
Email *megan.gollop@otago.ac.nz* or *vcaps.study@otago.ac.nz*

Family law in focus

A shortcut to three recent developments

BY **KESIA DENHARDT**

There has been a lot of change, either proposed or effected, in the family law space in recent times, making it increasingly difficult to keep your finger on the pulse. A brief summary of three key developments follows.

A problem shared, is a problem...25 percent reduced?

The Family Court (Family Court Associates) Legislation Bill, introduced to Parliament on 5 July 2022, was well received. It gained royal assent on 6 June 2023.

It is the mission of the Family Court (Family Court Associates) Legislation Act 2023 to alleviate some of the pressure on Family Court judges, thereby enabling substantive matters to advance more swiftly and reducing the backlog in our system. It also aims to hamper vexatious activity.

Former Justice Minister, Kiritapu Allan, commented: "*Going through the Family Court is already a traumatic and distressing experience for many. Experiencing court delays on top of this compounds that stress. The Government is continuously [trying] to look for ways to reduce delays and this new legislation will address that...An accessible Family Court that can operate without undue delay is not only key to a fully functioning family justice system but key to ensuring there is better access to justice in New Zealand.*"[1]

Principally, by amendment to the Family Court Act 1980, it establishes the new role of a judicial officer, termed a Family Court associate. Those appointed will have held a New Zealand practising certificate for at least seven years and be considered "suitable", by reason of their training, experience and personality, to occupy the role.[2]

Schedule 2 of the Act sets out an exhaustive list of powers which Family Court associates share with Family Court judges, which include making decisions in respect of interlocutory matters, making consent orders, appointing lawyers for various purposes (including lawyers for children and to assist the court), obtaining specialist reports and convening settlement conferences. It also confirms that Family Court associates have the powers conferred on a Family Court registrar by or under any enactment.

Other provisions provide a process for the transfer of proceedings before a Family Court associate to a Family Court judge where its complexity makes it desirable to do so.[3] It is also made clear that, in the exercise of their powers, Family Court associates have the same immunities as Family Court judges.[4]

The role has come about following the 2019 report, Te Korowai Ture ā-Whānau. Allan said that the Government is undertaking a "*phased approach to the report's recommendations*."[5]

It is expected to free up a Family Court judge's workload by up to 25 percent. That is huge.

The Act also makes amendments to 12 other statutes, including the Care of Children Act 2004, the Family Violence Act 2018, the Family Proceedings Act 1980 and the Property (Relationships) Act 1976.

A mandatory review, conducted by the Ministry of Justice, is to commence in five years' time to assess whether the appointment of Family Court associates has in fact reduced delays in the Family Court (and whether any modifications to this role are necessary or desirable).[6]

Pass-On legislation passed

Child support payments, paid by liable parents and collected by the Inland Revenue Department (IRD), are utilised to offset the cost of sole parent benefits (i.e. the IRD keeps the amount equal to a person's benefit and pays them the excess).[7] This is based on a policy made all the way back in 1936.

However, the Child Support (Pass On) Acts Amendment Act 2023 makes this long-known practice a thing of the past. Instead, these payments will now be passed on directly (in their entirety) to receiving carers who are sole parent beneficiaries.

This takes effect from 1 July 2023, with the first payments being passed on to parents from 22 August 2023.

According to Deputy Prime Minister, Carmel Sepuloni, it is estimated that this move will benefit more than 41,000 sole parents by a median of $20 a week.[8]

It is surmised that if parents know that the child support they pay will get to their own children, it will encourage more parents to pay.[9]

Other changes brought about by this Act include that sole parents on a benefit will no longer have to apply for child support through the IRD (i.e. it is for them to decide whether they get these payments through the IRD, or not) and that the Ministry of Social Development will automatically regard such payments as income when considering their eligibility for a benefit or other assistance.

Surrogacy laws reborn?

It is no secret that the existing practice of surrogacy in New Zealand has a catalogue of challenges. Those navigating the laws relating to surrogacy have become increasingly disenchanted with our system and have long sought urgent reform.

The Law Commission delivered a report

CONTINUED FROM PAGE 15

recommending change in 2005, though nothing came of this. The release of its further review on 27 May 2022, and the Improving Surrogacy Arrangements Bill, a member's bill introduced on 23 September 2021, have awakened and reinvigorated this call for action.

A welcome announcement was made, on 30 May 2023,[10] that the bill has been escalated to a Government bill and will now be reconsidered alongside the (63) recommendations made by the Law Commission.

The bill and recommendations both have many common objectives, including removing the need for intending parents to adopt their child born by surrogacy, improving access for people born by surrogacy to information about their birth origins and whakapapa, and clarifying the types of payments a surrogate can receive for costs relating to a surrogacy arrangement.

Tamati Coffey, the member of Parliament who sponsored the bill, has spoken of the need for a more "*equitable and mana-enhancing*" process.[11]

The bill presently remains at Select Committee stage and a further report has been sought by 4 August 2023. However, given the vast legal and ethical complexities shackled to surrogacy, an extension may be required. For now, the future of our surrogacy laws remains to be seen. ■

1. In a release on 31 May 2023 – beehive.co.nz
2. Section 4 of the Act; section 7A of the Family Courts Act 1980
3. Ibid; new section 7D
4. Ibid; new section 7H
5. Also in its release on 31 May 2023 – beehive.co.nz
6. Section 4 of the Act; new section 7K of the Family Courts Act 1980
7. E.g. if a receiving carer gets a benefit payment of $250, and also receives a child support payment of $350, the IRD retains $250 and pays them $100
8. Stated in a release on 6 June 2023 – beehive.govt.nz
9. As stated Attorney-General and Minister, David Parker, also on 6 June 2023
10. In a release on even date – beehive.govt.nz
11. Ibid

Expert evidence in Hague Convention proceedings

Roberts v Cresswell[1]

BY **SAMANTHA WILSON**

In proceedings under the Convention on the Civil Aspects of International Child Abduction (the Convention), s 106(1)(c) of the Care of Children Act 2004 (the Act) provides that a court may refuse to make an order under s 105(2) for the return of a child to the state of habitual residence if the court is satisfied that there is a grave risk that the child's return would expose the child to physical or psychological harm, or would otherwise place the child in an intolerable situation.

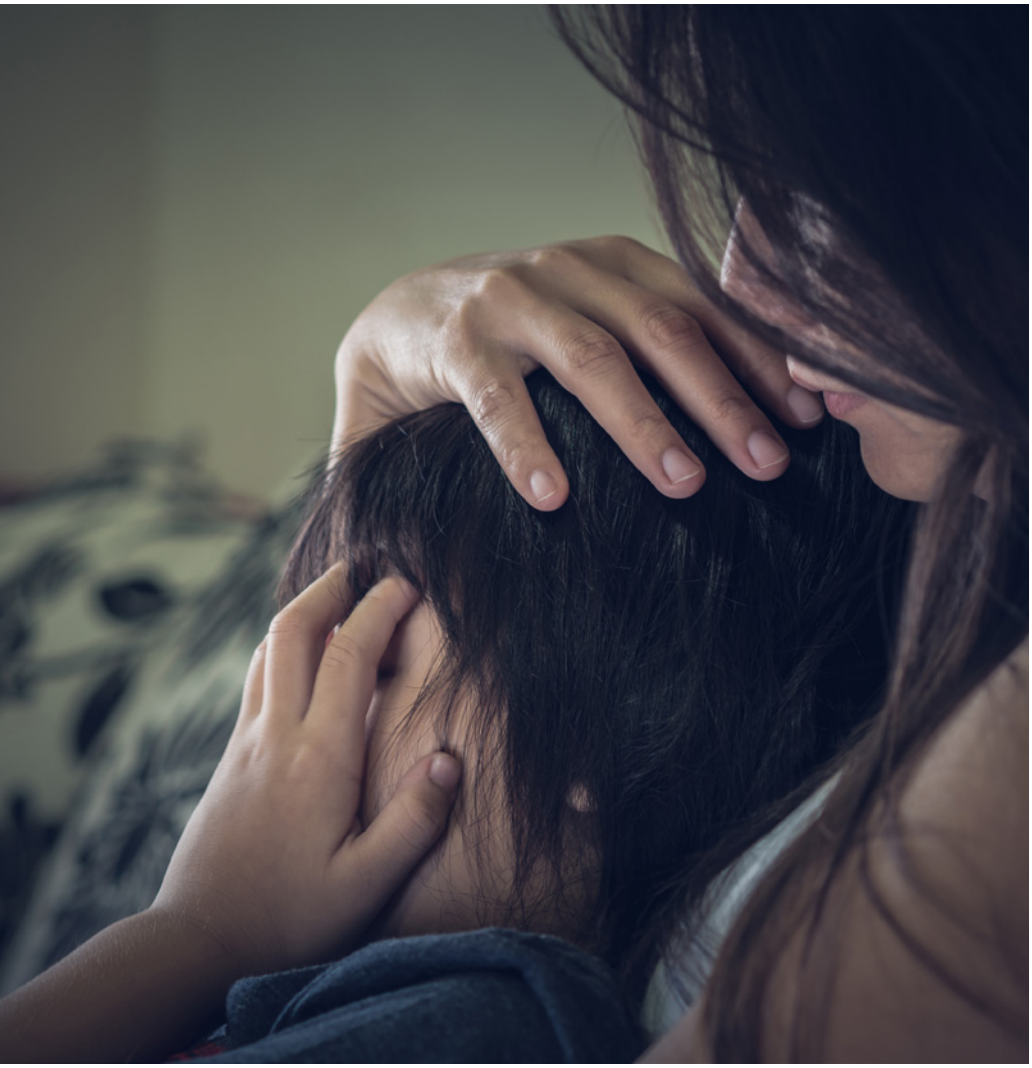
On 27 February 2023, the Court of Appeal delivered its decision in *Roberts v Cresswell*, which concerned an application under s 105 of the Act for the return of two children to France and required the Court to consider whether the exception in s 106(1)(c) applied. The decision is comprehensive and should be read in full by anyone interested in this area. This article provides a summary only and does not traverse the factual detail of the case. Rather, it focusses on the Court's guidance as to the use of expert evidence in proceedings under the Convention and the Act, and the way in which New Zealand courts deciding applications under s 105 may be assisted by cooperation between lawyers (and courts) of relevant Contracting States.

Background

The mother was from New Zealand and the father was French. They settled together in France and had two daughters, who were 7 and 5 at the time of the Court of Appeal hearing. By 2020 the relationship between the parties had broken down, although they were still living under the same roof. In October 2020 the mother came to New Zealand with the children for a holiday. The father agreed to the trip being extended to April 2021, but the mother and children failed to return to France and remained in New Zealand.

The father sought the return of the children to France under the Hague Convention. The mother opposed the application and argued that the children would be at grave risk if returned to France because:

(a) they would be removed from their primary carer, the mother (at that point the effect of interim orders of the Family Court in Perpignan (the French Court) was to award the father primary care of the children).
(b) they would be adversely affected by a decline in their mother's mental well-being. The mother filed expert evidence from a clinical psychiatrist, Dr Elizabeth Macdonald, that the mother suffered from post-traumatic stress disorder (PTSD) because of family violence perpetrated



by the father. Those allegations were denied by the father.

(c) if placed in the father's care in accordance with the interim orders of the French court at the time, he would be unavailable to care for them for extended periods of time due to his unique business commitments.

Family Court and High Court

On 21 December 2021 Judge Hambleton made an order under s 105(2) of the Act for the return of the children to France.[2] She was not satisfied that the risk of a decline in the mother's wellbeing was such that there was a grave risk that the children's return would expose them to psychological harm or place them in an intolerable situation. Nor did she consider the interim French Court orders gave rise to a grave risk of psychological harm or an intolerable situation for the children.

The mother successfully appealed to the High Court.[3] Justice Doogue found that there was grave risk that a return of the children to France would place them in an intolerable situation. First, because of the effect of interim French Court orders and the children's separation from their mother. Second, because the Judge accepted that the mother suffered from PTSD because of physical and psychological abuse by the father. The Judge found there was a grave risk of her PTSD being triggered if she returned to France, and the mother's parenting being seriously impaired, which would be intolerable for the children.

The Court of Appeal

The Court of Appeal granted the father leave to appeal on 12 December 2022.[4] A hearing was allocated for 14 February 2023. The Court gave leave for updating evidence to be filed by the father and his French lawyer, as well as expert evidence from a clinical psychologist, Dr Blackwell, critiquing the expert evidence of Dr Macdonald. The mother was granted leave to file evidence in response. The Court received an updated psychological report on the children under s 133 of the Act and lawyer for the children was reappointed for the appeal.

The appeal was allowed. The Court did not consider the first or third grounds under s 106(1)(c) were made out. That was essentially because, by this point, the father had obtained modified interim orders from the French Court to provide for shared care between the parents in the event the mother returned to France. The first and third grounds had therefore "fallen away".[5]

On the second ground, the Court followed the approach outlined in *LRR v COL*[6] and accepted that the mother's assertions relating to family violence were of such a nature, detail and substance that they could not be discounted.[7] It was not, however, satisfied that the risks met the "grave" threshold.

The Court held that Dr McDonald's opinion that the mother suffered from PTSD could not be relied on by the Court.[8] Although the Court accepted that it could not confidently discount the possibility that the mother suffered from PTSD, or that a return to France would involve psychosocial stressors that would trigger a recurrence of PTSD, it rejected the submission on behalf of the mother that that risk should be taken at its highest and assumed to exist. The Court held that that would be "an abdication of the Court's responsibility to consider whether it is satisfied that return would give rise to a grave risk of an intolerable situation."[9] Whilst the Court acknowledged that returning to France would undoubtedly be very difficult and stressful for the mother, it concluded on the evidence that there was no grave risk that her parenting would be impaired to such an extent that the children were placed in an intolerable situation.[10]

The Court also rejected the new "grave risk" argued by the mother on appeal, that an order for the children's return to France would be psychologically harmful or

would place them in an intolerable situation because they had been in New Zealand since October 2020 and were settled here. The Court of Appeal found that this argument was misconceived and that there was no reason to believe the children would not readapt to life in France.[11]

Subsequent events

The mother's application for leave to appeal to the Supreme Court was dismissed on 25 May 2023.

The parties were unable to agree arrangements for the children's return to France. In June 2023 the mother informed the father that she had decided not to return to France with the children. The father advised he would travel to New Zealand to collect the children. Further orders implementing the children's return were sought from the Family Court by the father, and a warrant for the children's uplift and return to the father was ultimately issued on 3 July 2023.

The mother filed an appeal against the issue of the warrant to the High Court the same day, along with a without notice application for a stay of execution of the warrant. An interim stay was granted by the High Court given the extreme urgency of the situation and without consideration of the merits of the application. The following day, the father applied to rescind the stay, and a hearing took place before Dunningham J on 18 July 2023. The Court issued a results decision on 19 July 2023 rescinding the stay, thus allowing the Family Court orders to take effect. In the reasons decision that followed on 26 July 2023, the Court held that the High Court did not have jurisdiction to make the stay. Moreover, the stay had been wrongly made because the appeal against the warrant had virtually no chance of success. The Court considered it was an attempt to fundamentally frustrate the effect of the s 105 order when circumstances existed which made it appropriate to issue a warrant to enforce. Any further delay in the implementation of the return order would be contrary to the children's best interests.[12]

Expert evidence in proceedings under the Convention

In considering the father's challenge to the reliability of the mother's expert evidence, the Court of Appeal made a number of important observations about the use of expert evidence in this context.

The Court reiterated that expert evidence must satisfy the test of substantial helpfulness in s 25 of the Evidence Act 2006. Where the expert's opinion is based on facts that are outside the general body of knowledge that makes up the expertise of the expert, s 25(3) provides that a court can rely on that opinion only if the fact is or will be proved or judicially noticed in the proceedings.[13] The Court emphasised that it is not the function, nor within the expertise, of an expert witness, including a psychiatrist, to make factual findings or to express opinions about the credibility of a witness of fact.[14]

The Court rejected the suggestion that evidence that did not meet the Evidence Act threshold for admissibility might nonetheless be received by a court by virtue of s 12A of the Family Court Act 1980. The Court held that, although s 12A sets a lower threshold for receipt of evidence in proceedings of this kind, it was "difficult to envisage circumstances in which a court could place any real weight on expert opinion evidence that does not meet the "substantial help" threshold in s 25 of the Evidence Act".[15] The Court also held that the speed with which Convention applications need to be determined, and the rarity of cross-examination in the context of such applications, requires particular care in the preparation of expert reports. An expert report cannot be used as a substitute for evidence of fact. Any underlying facts relied on must be established by admissible evidence.[16]

The Court held that where a formal diagnosis of a specific mental illness is advanced by an expert, the criteria for that diagnosis should be explicitly set out, the matters leading the expert to conclude that those criteria are met should be expressly identified and any areas of doubt or uncertainty should be expressly identified. The Court is dependent on this information being set out in the expert's report, so that it can understand and assess the reliability of that evidence. Without this information, the court cannot safely rely on the expert's conclusions.[17]

The Court also emphasised that balance and impartiality are "an essential feature of a report by an expert who understands that their primary role is to assist the court, and not to act as an advocate for a party". It gave cautionary warning to lawyers and experts that a report that is "absolute in its terms and does not expressly set out necessary qualifications about the information available, and the confidence with which the expert's opinion can be expressed, is likely to carry *less* weight than an appropriately nuanced report".[18] Whereas the Court found that the initial report filed by the mother's expert lacked balance and impartiality, it was substantially assisted by the more balanced approach adopted in the second report, in particular her views on the likely consequences of a return to France for the mother's parenting.[19]

The Court confirmed that these are matters to be addressed by a lawyer who commissions an expert report and should be considered before any such report is filed. It emphasised that it is the responsibility of the lawyer, not the clinician, to ensure that the necessary criteria for admissibility of the report and use of it by the court are addressed.[20]

Cooperation between Contracting States

The Court observed that there had been considerable speculation in the courts below about what the French Court might do as regards the interim care arrangements in France. The Court was grateful to the French Court for the speed at which it proceeded to consider the father's application to vary the orders, to enable the New Zealand court to have the benefit of the modified French Court orders. It observed, however, that modified orders from the French Court could, and should, have been sought at an

earlier stage of the New Zealand proceedings, by either the mother or father, or potentially through judicial communication between the New Zealand Court and the French Family Court.[21] In this case, the modified orders of the French Court had a material outcome on the proceedings, and decision is a useful reminder of the importance of cooperation between lawyers (and courts) of relevant Contracting States in proceedings under the Convention and the Act. ■

1. *Expert evidence in Hague Convention proceedings: Roberts v Cresswell* [2023] NZCA 36.
2. *Roberts v Cresswell* [2021] NZFC 12991.
3. *Cresswell v Roberts* [2022] NZHC 1265.
4. *Roberts v Cresswell* [2022] NZCA 625 [Leave judgment].
5. *Roberts v Cresswell* [2023] NZCA 36 at [164]-[170].
6. *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610.
7. *Roberts v Cresswell* [2023] NZCA 36, at [194].
8. Ibid, at [139]-[154], in particular [153].
9. Ibid, at [197].
10. Ibid, at [195]-[204], [212]-[213].
11. Ibid, at [210]-[211].
12. *Cresswell v Roberts* [2023] NZHC 1970.
13. *Roberts v Cresswell* [2023] NZCA 36 at [139].
14. Ibid, at [140].
15. Ibid, at [143].
16. Ibid, at [144]-[146].
17. Ibid, at [148]-[150].
18. Ibid, at [151].
19. Ibid, at [151], [154].
20. Ibid, at [152]-[153].
21. Ibid, at [164]-[166].

Roberts v Cresswell – comments from an FDR perspective

BY **RICHARD PIDGEON**

Roberts v Cresswell is a guardianship dispute writ large on an international scale, but many of the issues are common to the types of matters which come up in FDR – where to live, the framing of care and contact orders, and which schools to attend. It is notable that where family violence is alleged, undertaking FDR is not a prerequisite to making an application to the Family Court. In most other situations it is; and the Family Dispute Resolution Centre (**FDRC**) is equipped to deal with the range of parenting and guardianship issues.

The FDRC commonly deals with guardianship issues argued under s 46R of the Act: What is the best interests of the child? With that in mind, the FDRC offers family dispute resolution services as an alternative route to public litigation through the courts. We have experienced professionals who can assist the parties to reach an agreement through mediation.

You can find out more about the FDRC's services at *www.fdrc.co.nz* ■

Richard Pidgeon is a Knowledge Manager in the ADR Centre's Knowledge Management team. He studied law at Auckland University where he obtained an LLB and Master of Commercial Law and received a PhD in Law from AUT in 2022. Before joining the ADR Centre he practised in the Family Court for a time (together with general civil litigation) in a career as a solicitor from 1998 and later as a barrister.

Farewell Judge O'Dwyer

BY **LAURA BARRY**, **FRAN LINTS** AND **AMY GULBRANSEN**
(FLS REPRESENTATIVES FOR THE HUTT VALLEY AND WELLINGTON)

The Family Law Section hosted a farewell dinner for Her Honour Judge O'Dwyer on 21 April 2023, at Foxglove, to commemorate her years on the family bench and her extraordinary career. The evening was well attended by the wider Wellington region family bar and members of the Judiciary, with the entire Wellington bench (Judge Binns, Judge Black, Judge Montague, Judge McLeod and Judge Dellabarca) attending as well as Judge Russell (Nelson), Judge Callinicos (Napier), Judge Morrison (Waitakere) and Judge Ullrich (retired) attending.

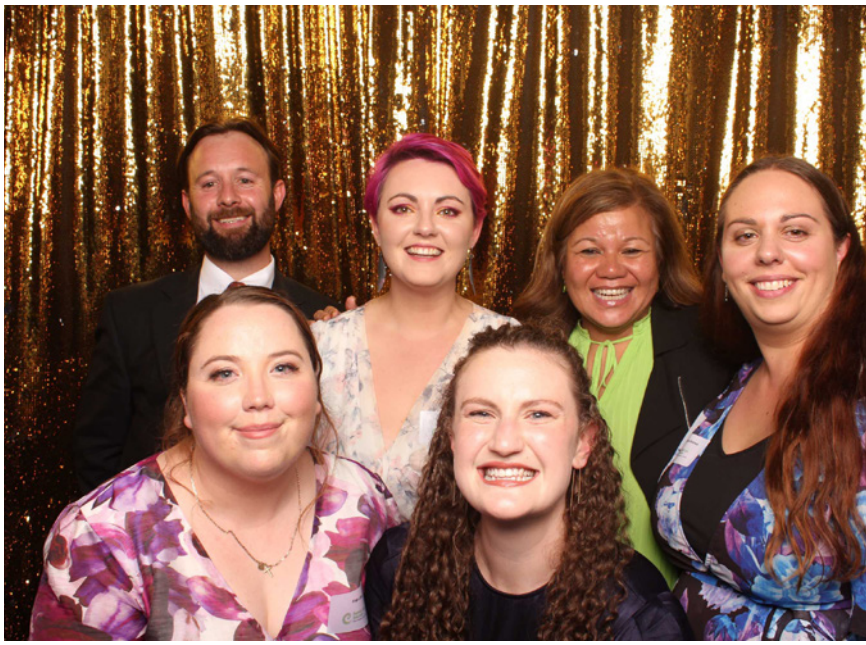
The evening kicked off with a speech from Annette Gray (Buchanan Gray) which traversed Her Honour's considerable achievements, and career both at the bar and on the bench, including her arrival in Dunedin and the implementation of defended hearings. Annette also spoke of Judge O'Dwyer's work with respect to family violence and the initiative for streamlined adoption applications to help families with overseas-based surrogates after the New Zealand borders closed in the COVID era. Judge O'Dwyer's significant international contributions were also noted, including her hosting the International Association of Women Judges Conference in 2021 and her work helping to evacuate women Judges in Afghanistan following the Taliban takeover.

Following this, the FLS gifted Her Honour with a Korowai which was blessed and presented by Matiu Jennings (Taranaki Whānui ki Te Upoko o Te Ika and Te Atiawa) and Lisa Reedy-Jennings (Ngāti Porou) mana whenua. The korowai "Te Manu Homiromiro" represents the Mana that Judge O'Dwyer has carried with her in her journey first as a lawyer and then as a Judge. The name of the Korowai was derived from the "Homiromiro" which is a small bird known for having the heart of a warrior despite its small stature, and sharp eyes which nothing would get past.

His Honour Judge Black then spoke on behalf of the bench, recounting his days appearing in front of Her Honour when he practiced in Balclutha, and the collegiality he has enjoyed as her colleague on the bench. He told those in attendance how Judge O'Dwyer had always taken the time to assist him with complex cases, and that she would be greatly missed by her colleagues on the bench.

Judge Black was followed by a speech from the guest of honour herself, Judge O'Dwyer. In preparing for the evening, the FLS had asked Her Honour to reflect about her career and her time on the family bench, and she had some words of wisdom for us all which we would like to share with you here. Her Honour has most enjoyed the satisfaction that comes from helping families put their lives back on track after bitter breakups and reach solutions that provide a pathway for healthy relationships, especially where children are involved. She will miss the lunchtime quiz, the common room camaraderie, and the passion and commitment of all of the family lawyers who appeared in front of her. There were too many memorable cases to mention, but two or three which came to mind had an international dimension as follows:

1. A Property Relationships Act case where the wife was in Poland, the husband in London, the lawyers and some property was in NZ, and the hearings were held



by AVL over a number of days despite several time zones;

2. An unusual adoption case that involved working with the lawyers, OT and Immigration NZ to reunite a young Eritrean refugee with her family in New Zealand; and
3. An extremely difficult relocation case involving a diplomat with seemingly no winners where the views and wishes of an 11 year old boy were the critical factor.

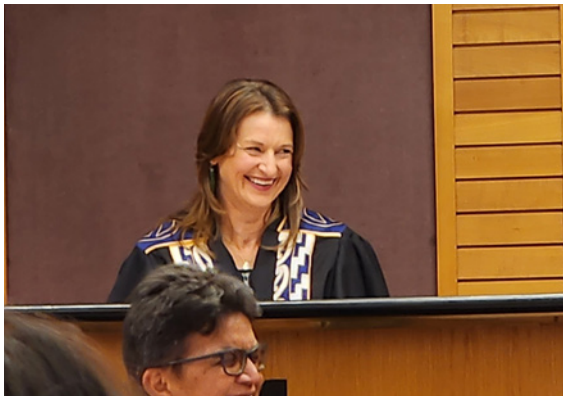
More recently Her Honour found great reward in considering humbling and heart-warming international surrogacy cases, and contributing to the development of better Court processes for surrogacy generally.

Her takeaway advice for us is to be on top of the law, define and don't lose sight of the key issues, and be clear about the strengths and weaknesses of your client's case. Always be kind to yourself – representing clients in the Family Court is very hard work so it's important to have balance in life.

The formalities were concluded with a waiata – Purea Nei – led by Judge Binns and Ataga'i Esera in what was a fitting way to end a lovely evening.

Thank you to everyone who attended and made the evening such a special one for Her Honour Judge O'Dwyer. We look forward to hosting our next social event soon. ■

Swearing in of her Honour Judge Hickman



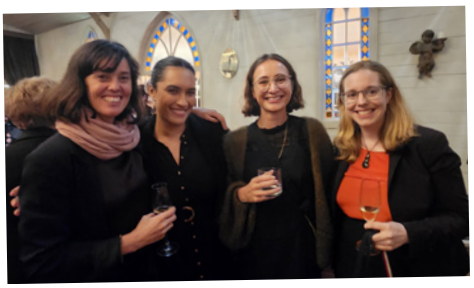
On 8 June 2023, her Honour Judge Hickman was sworn in at the Napier District Court. So well beloved was the new judge that two courtrooms were filled to overflowing.

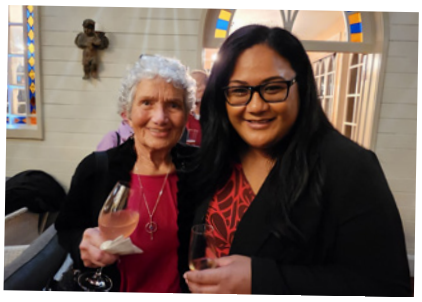
There was a mihi whakatau where her Honour was welcomed by mana whenua. Sarah-Lee Hape was the kaikaranga for mana whenua while Stormie Waapu was kaikaranga for the manuhiri. The whaikōrero were Jerry Hapuku (mana whenua) and Dustine Sandler (manuhiri) and the waiata were Pinepine te Kura and Purea Nei.

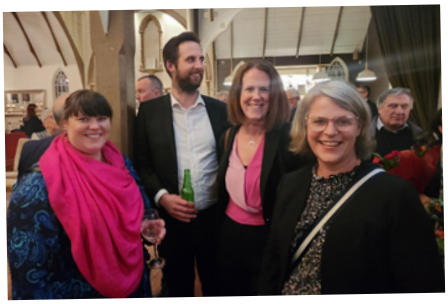
At the swearing ceremony, Principal Family Court Judge Moran and Judge MacKenzie sat on the bench with Judge Hickman and many other judges were also in attendance. Sara-Lee Hape did the opening and closing karakia. Principal Family Court Judge Moran spoke of Judge Hickman's career and in particular her significant work for the FLS, and her concern for her clients and colleagues.

FLS President Lauren Pegg was the first to address the court, followed by barrister Maria Hamilton and Ingrid Squire, partner at Gifford Devine. All three shared stories of her honour's immense work ethic with Ingrid Squire commenting that the new judge must have 30 hour days, intellect, compassion, and fashion sense. Her Honour acknowledged her family and how they shaped her career and of fond memories in practice and with other members of the bar.

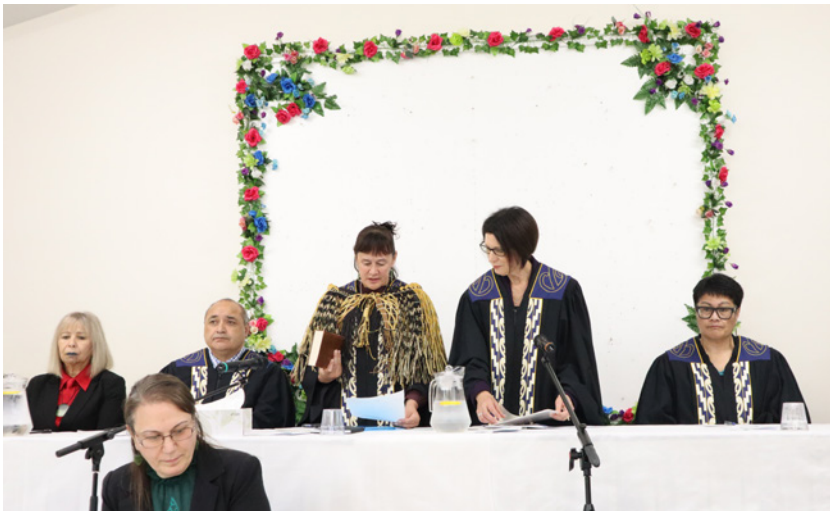
There was a function at the Old Church afterwards where we were able to celebrate and congratulate the new judge on her achievement and wish her well. Thank you to her Honour for her immense work she has done to help the profession through the FLS, her fearless advocacy for her clients and for the support she has provided other practitioners. ■







Swearing in of Judge Williams Blyth



BY **JOHAN NIEMAND**

On Saturday, 10 June 2023, the Coromandel was swarmed by judges, lawyers, friends and whānau who travelled from far and wide to attend and celebrate the swearing in of Judge Tania Williams Blyth at the marae in Manaia. Despite some fairly iffy weather in the days leading up to it, any fears about a gloomy day were quickly dispelled by the clear skies treating all those who attended to a glorious sunny day amidst the beautiful surrounding that the region had on offer. It was, of course, also a fantastic opportunity for a catchup with friends and colleagues in a more informal setting.

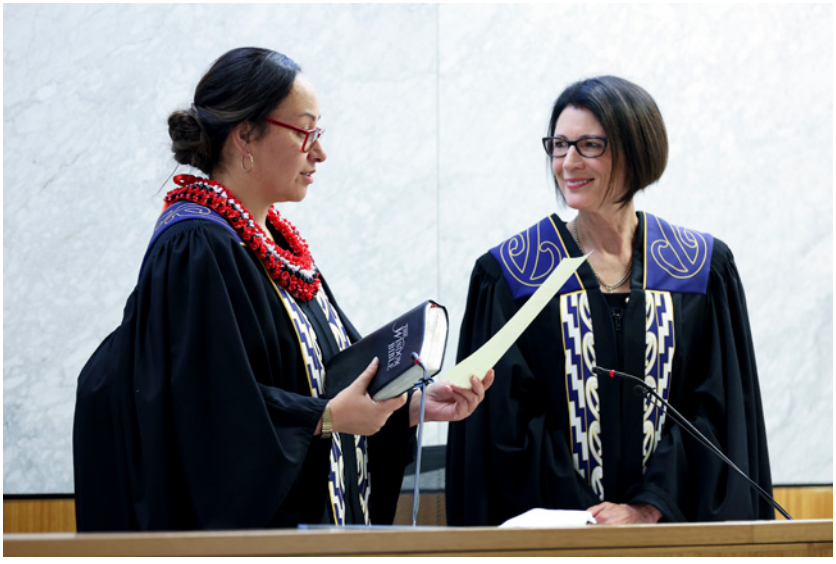
Following the formal welcoming ceremonies and a brief interval (which allowed for more socialising!), the special sitting of the Hamilton District Court commenced, presided over by her Honour Principal Family Court Judge Moran. After Judge Williams Blyth was formally sworn in, there were addresses from Corrin Merrick and Rahui Papa with words of congratulations and encouragement to her Honour for the mahi ahead. This was followed by a reply from Judge Williams Blyth and what is rumoured to be the most succinct speech ever delivered by a newly sworn Judge at their swearing in, and which was well received. Whilst waiata were of course prevalent throughout the day, perhaps the highlight of the waiata was the one immediately following Judge Williams Blyth's address – "Ngā Iwi e" led by Justice Joe Williams and with the odd change in lyrics thrown in to customise the waiata for the occasion.

Festivities eventually adjourned into Coromandel Town where, I am reliably informed, those continued well into the late hours of the night.

Judge Williams Blyth will be based in Whangārei. We wish her Honour all the best for the journey ahead. ■

Swearing in of Judge Sharkey

Her Honour Judge Sharkey was sworn in as a judge on 4 August 2023. Queen Nanasipau'u of Tonga was in attendance alongside Principal Family Court Judge Moran and other members of the judiciary. The new judge spoke of her Tongan heritage and also of the support she had from her family in obtaining her LLB and LLM. Crown Solicitor Natalie Walker spoke of how the new judge developed a passion for family law cases. The event was well attended by the profession, the judiciary and the new judge's family and friends. The new judge will sit in Manukau. ■



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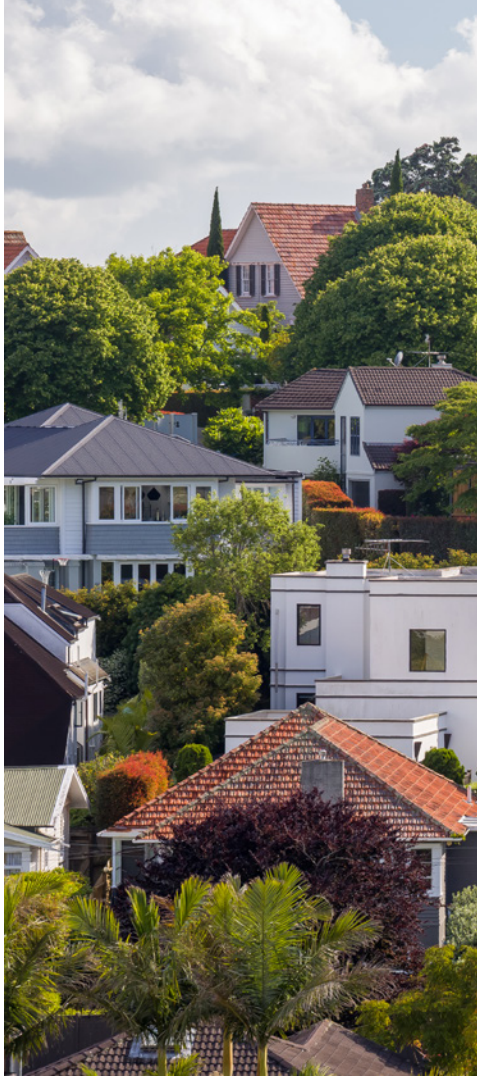


Supreme Court guidance on s 44 of the PRA

Sutton v Bell

Section 44 of the Property (Relationships) Act 1976 (the Act) enables a court to set aside dispositions of property made in order to defeat a person's claim or rights under the Act. The Supreme Court's decision in *Sutton v Bell*,[1] confirms two important aspects of s 44 cases. First, s 44 can apply to a disposition made prior to the commencement of a de facto relationship. Second, the approach in *Regal Castings Ltd v Lightbody*[2] applies to determining whether a disposition has been made "in order to defeat" a partner's claim or rights under the Act. The Court confirmed that knowledge of the effect of the disposition is sufficient; it is not necessary to show a conscious desire by a disposing party (party A) to defeat the other party's (party B) interest.

Background

Mr Sutton and Ms Bell met in July 2003 and commenced a sexual relationship shortly afterwards. At the time, Mr Sutton had just finalised the division of property following the end of his marriage earlier that year, pursuant to which he acquired his former wife's share in the former family home in Pt Chevalier, Auckland (Pt Chevalier).

Ms Bell moved into Pt Chevalier in February or March 2004 and rented out her apartment. The couple slept together in Mr Sutton's bedroom. Ms Bell used the spare bedroom as a working office. Around the time she moved in, Ms Bell emailed Mr Sutton about the potential consequences of the Act on the sharing of the family home and suggested he take steps to ensure Pt Chevalier remained his separate property.

The parties' relationship continued over the course of 2004. In September 2004, Mr Sutton won a free legal consultation in a raffle at the Auckland Home Show. He attended the consultation later that month, following which he settled a trust on 9 November 2004. Pt Chevalier was sold to the trust on 29 November 2004. A memorandum of wishes and full gifting programme forgiving the trust's debt was executed at the same time.

The parties had two children: a boy born in 2005 and a girl born in 2009. During the relationship Ms Bell sold her apartment and contributed funds to renovations at Pt Chevalier. The parties separated on 1 September 2012. Ms Bell remained in the family home with the children until April 2017, when an interim parenting order was made granting Mr Sutton day-to-day care and Ms Bell contact. A final parenting order was made in Mr Sutton's favour on 4 December 2017 and Ms Bell vacated Pt Chevalier on 9 January 2018. Ms Bell brought proceedings under the Act in July 2017, arguing that the transfer of Pt Chevalier to the trust was a disposition of property by Mr Sutton in order to defeat her rights under the Act. She argued that the disposition should be set aside and claimed a half interest in the property. There was no other relationship property of any significance.

Decisions in the courts below

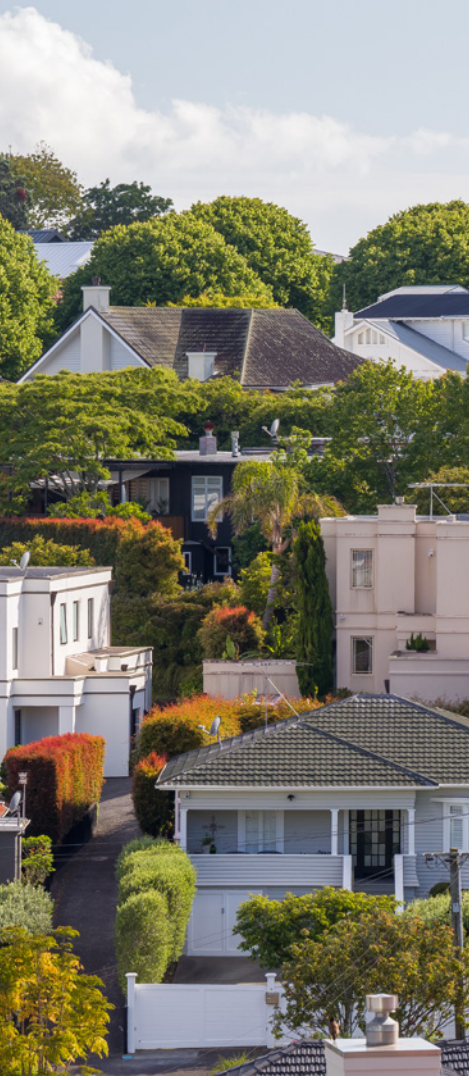
In the Family Court, Her Honour Judge Clarkson determined that the de facto relationship began in February/March 2004.[3] In a subsequent judgment, His Honour Judge Druce proceeded on the basis that the parties were in a de facto relationship at the time the disposition of Pt Chevalier occurred and upheld Ms Bell's claim under s 44.[4]

The High Court, having granted the appellants leave to adduce new evidence,[5] found that the parties' de facto relationship did not commence until some time between December 2004 and January 2005, that is, after the transfer of Pt Chevalier to the trust.[6] Notwithstanding this, the High Court found that the transfer of Pt Chevalier to the trustees was a disposition to which s 44 applied and therefore dismissed the appeal. The High Court concluded that the disposition was made by Mr Sutton with the knowledge that it would affect Ms Bell's future rights and in anticipation of the couple's deepening commitment to one another. The requisite intent under s 44 was therefore satisfied.

The appellants appealed to the Court of Appeal. The Court of Appeal held that a claim under s 44 could be made where the property was disposed of before the start of the relevant relationship provided a de facto relationship was "in contemplation". Like the High Court, the Court of Appeal was satisfied on the evidence that Mr Sutton did, in fact, know of the consequences of the disposition; that was sufficient to establish intent. The appeal was dismissed.[7]

The Supreme Court

The Supreme Court did not consider there was any reason to restrict s 44(1)



to dispositions made after the commencement of a marriage, civil union or de facto relationship. The Court observed that there is nothing in the words of s 44(1) itself that requires such an interpretation. Nor does a claimant have to have had an existing right or claim under the Act at the time of disposition. Rather, it is sufficient that there is an anticipation that a claim or rights will come into existence. Importantly, the Court agreed with the Court of Appeal that there would be considerable potential to "hollow out" s 21 of the Act if s 44 were interpreted to allow for a soon-to-be partner to unilaterally dispose of property and thereby take it outside the scope of the Act.[8]

The Court then turned to consider the point at which s 44 applies to a disposition made before the commencement of a de facto relationship. The Court acknowledged the practical problems arising from taking either too broad or narrow an approach to determining when s 44 is engaged before a de facto relationship has begun. The Court formulated the test as follows:[9]

> For a disposition of property to have been made in order to defeat the claim or rights of party B, there must be sufficient certainty that party B will have a claim or rights to justify the application of s 44(1) to the disposition. So, if the disposition is made in circumstances where the parties are in a romantic relationship and/or are living together but do not have a clear and present intention to become parties to a de facto relationship, then we do not consider that it would be right to infer an intention to defeat a claim or rights that may, or may not, arise in the future, depending on how the relationship between the parties develops.

The Court considered this test as appropriately confining the scope of s 44, while avoiding "the undesirable possibility of dispositions being made just before the commencement of a qualifying relationship in circumstances where it can be inferred that the necessary intent to defeat the claim or rights of party B exists".[10] The Court was satisfied that Mr Sutton and Ms Bell had a clear and present intention to commence a de facto relationship when the disposition of Pt Chevalier was made.

As to whether the disposition was made "in order to defeat", the Court confirmed that the approach set out in *Regal Castings* applies to s 44 cases. *Regal Castings* concerned the application of s 60 of the (now repealed) Property Law Act 1952, which dealt with dispositions made with intent to defraud creditors. In short, it confirmed that an intention to defraud can be inferred from the disposing party's knowledge of the effect of the disposition on the other party's rights.[11] In confirming that test should apply to s 44, the Court drew attention to three important aspects of this test. First, it is not necessary to establish a dishonest intent in addition to an intent to defeat party B's claim or rights (including future rights) under the Act. Second, where party A "must have known" the disposition would have the effect of defeating party B's claim or rights, then that is a legal and sufficient basis from which to infer an intent to defeat. Third, "motive" and "purpose" are to be distinguished from "intent". Section 44 does not require party A to have a conscious purpose of defeating rights or causing loss. It will be sufficient that they intended a course of conduct that produced that effect.[12]

The Court agreed with the courts below that Mr Sutton transferred Point Chevalier to the trustees in the knowledge that this would defeat Ms Bell's future claim under the Act, and therefore with intent to defeat that claim. The fact that Ms Bell knew of, or initially supported the disposition, did not undermine a finding of an intent to defeat a claim for the purposes of s 44. The Court considered it would be inappropriate in a relationship property context to find that party B's knowledge that a disposition is occurring prevents the disposition from engaging s 44. The Court observed that the situation would have been different if Ms Bell had entered into a contracting out agreement that complied with s 21F (including the requirements for parties to be given legal advice).[13]

Relief

The appellants argued that, even if s 44(1) was satisfied, the Family Court was wrong to order the vesting of Pt Chevalier in the parties as tenants in common in equal shares. They argued that: the Court should make no order, relying on ss 44(2) and 44(4); or that the court should defer the order for vesting until the younger child turns 18 (in 2027), relying on ss 26 and 26A of the Act; and/or that the Court should "ringfence" the parties' initial financial contributions to the property.

The Court saw the lower courts' conclusion that the trustees had not received the property in good faith as "unassailable". It did not consider that a case for further postponing vesting was made out and observed that the parties had been apart for more than 10 years. Moreover, without her half share of property, Ms Bell could not obtain secure accommodation and it was in the children's best interests that she was able to do this. The Court held that considering the effect of an order under s 44 on the interests of the children in their capacity as beneficiaries of the trust conflated the

CONTINUED FROM PAGE 25

needs of the children with their interest as beneficiaries. The appeal was therefore dismissed.[14]

Conclusion

Section 44 has become a valuable means of drawing property back into the relationship property pool for division under the Act, particularly for de facto partners to whom relief under s 182 of the Family Proceedings Act 1980 remains unavailable. The Supreme Court decision confirms the availability of s 44 as a useful tool to accomplish this, including in respect of dispositions made before a de facto relationship has begun.

The decision also highlights the importance of the Act's contracting out regime. Although the Court stated that it "cannot be" that a disposition made by one party in the early days of a relationship is vulnerable to attack under s 44,[15] whether s 44(1) is engaged will be highly fact-dependant, and identifying the point at which the parties have a "clear and present intention" to become parties to a de facto relationship may be difficult to assess. For those wishing to ameliorate uncertainty arising out of a proposed transfer of assets, the contracting out regime provides the legitimate pathway to avoiding the statutory regime, whilst incorporating crucial safeguards to protect a vulnerable or financially weaker partner or spouse. ■

1. *Sutton v Bell* [2023] NZSC 65.
2. *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
3. *Cannon v Cox* [2018] NZFC 5556.
4. *Cannon v Cox* [2019] NZFC 5363, [2019] NZFLR 556.
5. *Sutton v Bell* [2020] NZHC 327, [2020] NZFLR 27.
6. *Sutton v Bell* [2020] NZHC 1557.
7. *Sutton v Bell* [2021] NZCA 645, [2022] 3 NZLR 152.
8. *Sutton v Bell* [2023] NZSC 65 at [44]-[51].
9. Ibid, at [69].
10. Ibid, at [71].
11. *Regal Castings*, above n 2, at [52]-[54] per Blanchard and Wilson JJ.
12. *Sutton v Bell* [2023] NZSC 65 at [93]-[95].
13. Ibid, at [96]-[97].
14. Ibid, at [107]-[116].
15. Ibid, at [62].

Collaborative process

Creating an effective climate for resolution through our client relationships

BY **SELINA-JANE TRIGG**

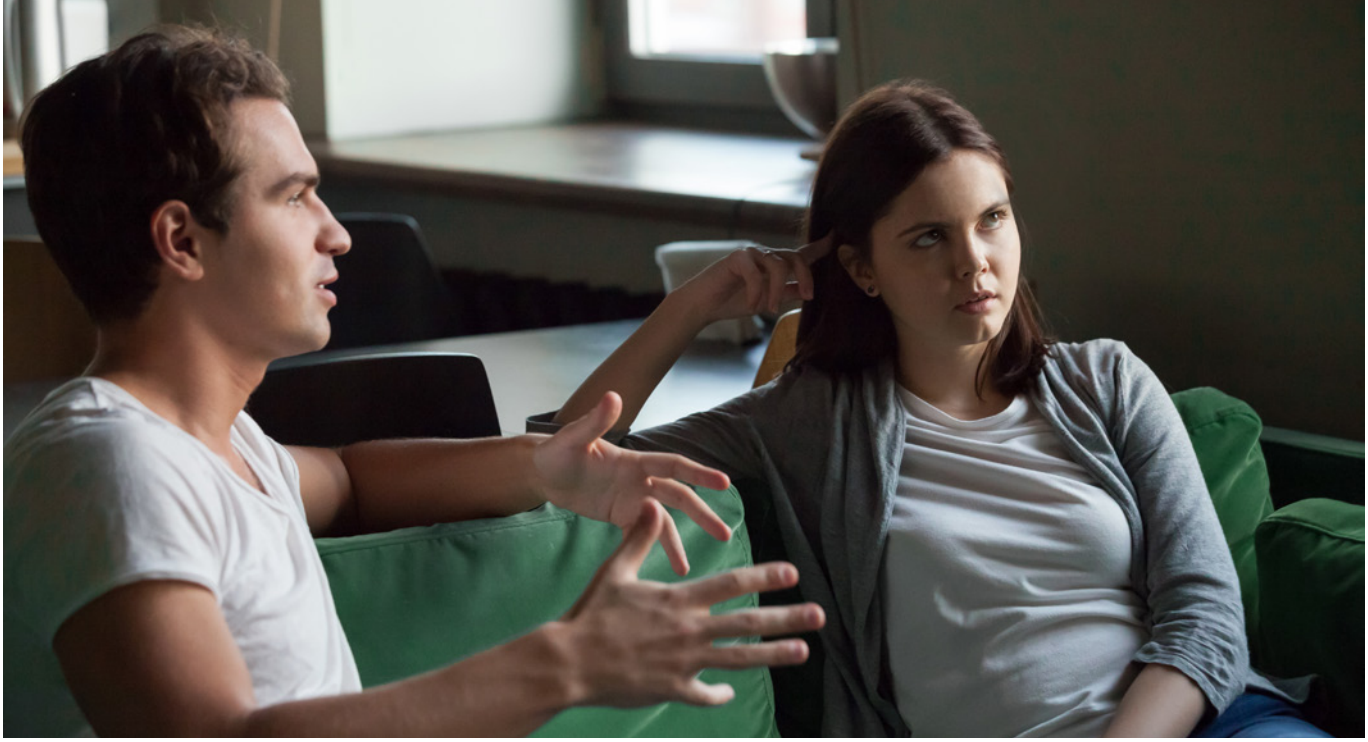
The Collaborative law process is increasingly being used to assist clients to reach resolution of their legal, financial and parenting issues. Commonly used when a couple separate, it also has applications for negotiating Contracting Out Agreements and resolving disputes involving employment, trusts and estates. Collaborative professionals report that clients are seeking out the process, regarding it as a common sense and respectful way to resolve their family law issues without a positional, adversarial approach that they assess would be detrimental to the ongoing relationships they may share and to their own values around how they conduct themselves throughout change and conflict in their family life.

With Collaborative process cases regularly taking place, our experience around how to create an optimal environment for resolution is ever increasing. In this article, I will share some practical considerations for how Collaborative lawyers may create an optimal climate for resolution through their professional relationship with their clients. Using Collaborative practice framing, this article spotlights some of the factors we must consider when answering this question: how may we work with our client to create a safe and robust "Collaborative container" in which the parties are able to effectively participate in the challenging work of problem solving?

The techniques we learn as Collaborative Professionals enrich all our client relationships and resolution skills hence are transferable to all our cases. Therefore, don't stop reading just because you aren't yet a trained Collaborative lawyer!

A theoretical framework

Clinical social worker, Kate Scharff, and psychologist, Dr Lisa Herrick,[1] [2] expand on the concept of the Collaborative container by positing it is comprised of a "Macrocontainer" and various "Microcontainers". Both types of containers are equally important and interdependent. The Macrocontainer encompasses the Collaborative protocols and techniques used with parties, the "process". The Microcontainer refers to the supportive, dyadic relationships between clients and members of the professional team and between the professionals themselves. Generally, the more complex the case and the more heightened the conflict within it, the more microcontainers (or professional relationships) that will be required. Simply put "... *these two levels of containment, the Macro and the Micro, provide a*



safe psychological space in which we and our clients can manage the challenges we face".[3]

This article will largely focus on the microcontainer of the relationship between lawyer and client. I suggest there is a tendency among lawyers to think creating successful resolution lies in the way we show up and perform in court, negotiations, Collaborative meetings, and mediation. Much of our training and development as lawyers emphasises the importance of the "technical, hard" skills we bring to advocacy and negotiation moments over the value of the "emotional, soft" skills we use to build our microcontainers or relationships with our clients. Yet the climate for creating a successful resolution in our negotiations and advocacy is built in the very early stages of our client relationship. As Scharff and Herrick point out, widely accepted psychological theory is that for positive change to take place, a "helping relationship" must exist that encompasses a safe and responsive holding environment, containment, empathy and attunement.[4]

Is your sponge dry enough?

Collaborative lawyers, Nancy Cameron KC and the late Kevin Scudder, have spoken of building your Collaborative caseload by ensuring you have "*a dry enough sponge*".[5] When you think of a sodden sponge trying to take on more water, it simply cannot. The same is true of us creating a client relationship that primes the client for resolution. Responsive and effective service to our clients is challenged if we are attempting to provide it from a place of our bandwidth being akin to a sodden sponge!

Why is this important to an effective resolution climate? In the Collaborative process (or any dispute resolution process), the client is being asked to do the hard work of problem solving. They are being challenged to stretch to consider new concepts, to accommodate in ways they are not inclined towards and to imagine a future they may not have sought out. If our clients are to build and maintain faith in the resolution process (the macrocontainer) it is important they have a strong sense of being supported by reliable and predictable relationships within which they can think, feel and work.[6]

Creating this climate of predictability and reliability is done in our lawyer-client relationships through seemingly small and obvious but, amid our busy lives, easily overlooked actions – invoicing regularly and in line with expectations that have been set in advance, being punctual, setting and holding to boundaries in our relationship, calling when we say we will, talking to the client in a timely way when problems arise, being proactive in initiating client contact (the "courtesy call"), holding ourselves and others to account, advance roadmarking for the client what lies ahead, undertaking preparations in an organised and unpressured manner, getting documents out to them in the timeframe we undertake to. How well can we show up to the client relationship and the resolution process in a responsive and reliable way when our "bandwidth sponge" isn't dry enough?

Maintaining Curiosity

Collaborative professionals and mediators understand the importance of thoroughly screening clients to help them choose the dispute resolution process that is appropriate for them and their family. Successful screening involves being deeply curious about the client to develop a strong understanding of their concerns, cares and interests. Maintaining our curiosity about the client, both for initial screening and beyond, effectively creates the understanding and relationship foundations required for effective resolution.

Research about the impact of being on the receiving end of curiosity indicates that transformative shifts for the client can occur.[7] Opportunities for self-disclosure are associated with the reward and social bonding centres of our brains while a lack of self-disclosure opportunities and resulting feelings of being misunderstood are associated with negative affect and social pain. When we are on the receiving end of being wondered about and feeling understood, this leads to feelings of satisfaction, security and relief which are the opposite of the anxiety, fear and stress that our clients often present with. These "feel good" emotions evoked within the client by feeling understood by the professional act as a buffer against the negative effects of conflict. The satisfaction, security and relief from feeling understood evokes positive feelings, supports clear thinking and helps us connect with others, all great conditions precedent for reaching resolution.

Being deeply curious with our clients about what matters to them allows us, when problem solving, to capitalise on the positive effects of this within them. Importantly, taking the time to exercise genuine curiosity means you are likely to screen more successfully as to the client's

ability to participate well in Collaborative Process and whether another process would be better suited to them, thus setting the client and their family up for a successful and safe resolution process.

Another relationship microcontainer within the process that we must attend to is that between ourselves and the other party. Collaborative meetings give us the opportunity to better understand the problem and motivating interests at hand by attentively noticing and exercising curiosity about the other party's behaviours, nonverbal communication cues, and concerns to better understand the problem. As "the other lawyer", we must be mindful to practice humble enquiry and our curiosity in a manner that is not perceived by them or others as "cross examination" which would be counter to the relationships and process. Being skilled in using our verifying and expanding questions and paraphrasing the interests (rather than the conflict narrative or position), particularly in moments of defensive or resistant behaviour by the other party, enables us to engage the positive effects on the other party of curiosity and self disclosure.

Preparing the clients in an aligned way

Effective participation in Collaborative negotiation and dispute resolution relies heavily on the preparation we do ourselves and with our clients prior to meetings. When we think about the importance of predictability and reliability as conditions for the client feeling they have a safe environment in which to think and problem solve, it is not surprising that a considerable amount of a Collaborative professional's training and continuing development centres around preparing the client. Effective preparation work mitigates against surprises and builds confidence in the client. It sees the client doing important preliminary thinking about their interests (as opposed to just legal positions), preparing and receiving conflict coaching around the statement they will share at the first Collaborative meeting, having input into the agenda and understanding the behaviours and guidelines everyone is committing to.

Imagine, however, what it does for the conflict resolution environment if one party comes to the meeting less prepared by their lawyer than the other. The difference in preparation will be apparent to everyone, not least of which the parties. For the well-prepared party, it may evoke misapprehensions about the commitment which the other party is making to the process. It may evoke responses of sympathy, frustration or anger. For the under-prepared party, feelings of defensiveness, frustration, failure and anger can arise along with a decline in trust in their relationship with their lawyer. For both parties and the professionals, this spells a rupture in the macro and microcontainers.

In their first team briefing, I suggest the professional team can mitigate against this occurring. The meeting provides an opportunity for the team to discuss in detail the preparation work each professional will be doing with the clients, clarifying and addressing assumptions held about what this preparation entails, and to share the preparatory materials or workbooks that the clients will be sent. It also provides an opportunity to receive the advice of any mental health and financial professionals in the team about how to undertake the preparation work most effectively and efficiently given the clients' presentations.

Keep Yourself in Check!

Much of the coaching and transformation for clients around conflict behaviours, occurs through mindful modelling of constructive conflict behaviours and communication by the professionals during their 1:1 client relationship building and Collaborative meetings.

When we behave in ways that aren't conducive to resolution, the process and relationship containers rupture. Our client's trust in us and in the process is jeopardised if they perceive we have acted in a disinterested, dismissive, adversarial or aggressive manner or out of alignment with the conduct commitments made in the Participation Agreement. The professionals' trust and relationship with one another is also challenged if the behaviour occurs in a team setting. If the behaviour is egregious enough, trust in the resolution process may be lost altogether causing disengagement in the process.

This should not be surprising to anyone. It should be regarded a statement of the obvious. However, successfully creating a conducive resolution climate involves Collaborative lawyers being able to shift from long entrenched training and approaches to problems that are steeped in rights based, positional bargaining. While we may embrace new ways of approaching problem solving and conflict resolution in our training, human nature means that when faced with moments of difficulty we can default to our "comfort zone" which, for lawyers, usually involves defaulting to litigious, positional and rigid behaviours. We can slide into "telling", rather than exploring with, the client or parties which can be met with resistance.

Continuing in our education, mentoring and professional supervision or coaching are all ways to ensure we notice when this is happening (I often first notice it happening through observing physical, embodied changes) and keep such tendencies in check. Attending professional team debriefs with openness and with a goal of continued improvement is also an invaluable way to engage in honest discussions and reflections about our work with our client, the parties and each other.

Capitalise on the Expertise of Others

Like all professionals, lawyers have a role and lane to stay within. We cannot be all things to our clients. Collaborative Practice gives us the opportunity to work as part of a multidisciplinary team, tailored to the parties' needs. Within that team, we can engage the expertise of others to support our creation of strong and robust client relationships and responsive process. Just some of the ways this can happen are:

- Mental health professionals can advise the professional team on the impacts of the emotional landscape and the family system on the process and the family and how the emotional issues are affecting our client's behaviour or engagement in resolution. Importantly, they can support us to work in an optimal way with our client in light of this.
- Coaches can work with our clients on much of the preparation needed to enable them to participate with us and the process most constructively and efficiently.
- Child development specialists can step into the process to advise the team and the clients about their children's views and important child focused information to consider when the clients and professionals engage in Collaborative decision making.

- Collaborative financial professionals can advise lawyers not just on "the numbers" but also help us understand our client's financial personality, risk appetite and financial literacy gaps which informs our understanding of our client's behaviours and what may trigger defensiveness or resistance in them.

Often difficult messages or information that needs to be received by our client are more palatable to them when delivered by a neutral professional on the team, rather than from one of the lawyers. In this way, the information can be delivered without the risk that could occur to the client-lawyer relationship if the client receives the information from their advocate. Similarly, the neutrals on our teams serve an important role in assisting us to attend to ruptures within the macro and microcontainers in a timely and proactive way, lend opportunities for us to reflect on how we are showing up to our clients and responding to challenges in the client relationship and to how we attend to our relationships with one another as a professional team.

Many of us are not blessed to be able to work with a full multidisciplinary team. However, as lawyers committed to empowering our clients to effectively resolve conflict we can take accountability for accessing knowledge from these fields as part of our professional development. As of recently, all members of Collaborative Resolution NZ are automatically members of the International Academy of Collaborative Professionals which opens to us learning opportunities from mental health and financial colleagues around the world. There is also available material from psychologists for Collaborative lawyers that specifically guides us in developing our consultation and client relationship skills. The Scharff & Herrick books referred to in this article are good examples of two such publications.

Conclusion

This article has shared just a few of the many ways lawyers can attend to their client relationships to ensure a stronger and more effective resolution process. I have not explored the important role in building our client relationships of empathy, attunement, reflective listening and reframing which feature in training. Instead, I have focused on considerations that my colleagues and I were not as attuned to early on in our Collaborative journeys but which I observed arose in problematic ways in cases.

As I wrote this article, US psychologist and Collaborative professional, Dr Deborah Gilman shared the following thoughts online which capture the significance of the client relationship upon creating successful resolution and outcomes: *"So much of the time we may feel like we are not getting through to our most challenging clients. We need to remind ourselves that success with a client is rooted in the quality of the relationship. We cultivate growth with diligent nurturing and care, compassion, and genuine desire to understand their needs. With every conversation we are planting seeds, encouraging clients to become curious about their thoughts, feelings and behaviours, making it safe for them to re-evaluate existing beliefs in a compassionate, non-shaming way".*

As professionals dedicated to seeing conflict within families resolved in the least harmful way, the ongoing challenge is for us to commit not only to growing our technical skills but also to developing and rethinking how the importance of how we approach our client relationships in order to give ourselves, our clients and their families the best opportunity to reach a satisfying and enduring agreement. ■

We need to remind ourselves that success with a client is rooted in the quality of the relationship

1. Scharff, K. & Herrick,L. "Navigating Emotional Currents in Collaborative Divorce" (2010) American Bar Association Publishing
2. Scharff K. & Herrick. L, "Mastering Crucial Moments in Separation and Divorce – A Multidisciplinary Guide to Excellence in Practice & Outcome" (2016) American Bar Association Publishing.
3. Note 1, p 32.
4. Note 2, p 13.
5. Cameron, N. & Scudder, K. "7 Keys to Success: What No One Told You about Growing your Collaborative Practice", International Academy of Collaborative Professionals webinar, 23 May 2019.
6. Scharff, K. & Herrick, L. "Navigating Emotional Currents of Collaborative Divorce: An Introduction to Central Concepts", International Academy of Collaborative Professionals webinar recording, 1 May 2023.
7. For a good summary of this research, see Price, M. "Change through Curiosity in the Insight Approach to Conflict", Revista de Mediacion (2018) 11.

Professional Supervision – What's in it for you?

BY **TANIA ANSTISS**

Professional supervision is a practice growing in recognition and significance, particularly within allied health fields. Increasingly, the legal profession – in particular, the family law sector – is seeking to utilise the services of professional supervisors for lawyers in acknowledgment of the challenging nature of their work.

Stress, burnout and mental health challenges are prominent issues for many in the legal profession, with 75% of lawyers responding to the 2020 Employment Information Survey stating their mental health had suffered due to their work. Yet, giving these issues the necessary attention often falls by the wayside in the swell of busy professional lives. While many lawyers access helpful mentoring through informal networks and gain valuable collegial support from peers, arguably the role and value of professional supervision is not well understood or utilised.

Researchers in professional supervision have highlighted the unique role it plays as a key resource to help manage professional and personal responses. When professionals are involved with complex and emotionally charged situations, such as those often faced by family lawyers, the role of supervision is particularly important. The New Zealand *Lawyer for Child Best Practice Guidelines (2018)*, state that supervision provides an opportunity for "self-reflective review of practice, to discuss professional issues and to receive feedback on all elements of practice, with the objective of ensuring quality of service, improving practice and managing stress".

My experience as a professional supervisor of lawyers suggests there may be barriers which discourage some lawyers from seeking professional supervision. These include the generally hierarchical nature of the legal profession combined with a work culture which discourages open vulnerability, a lack of explicit support within organisations to take time for supervision within the pressures of the work day, poor recognition historically for the value of professional supervision, legal training which is focused on skill development over relational issues, and concerns that professional supervision may not be confidential in the context of professional oversight of work.

These barriers can be addressed in many cases by highlighting the nature of good quality professional supervision, it's role in adding value to legal practice and by raising awareness about the type of issues which can be addressed through supervision. For example, in my practice of supervision of family lawyers the following themes commonly arise:

- High levels of mental health difficulties, stress, trauma and inequity in society leading to pressures on the Family Court system to solve increasingly complex family challenges
- Lawyers' regular exposure to traumatised individuals in complex emotional and psychosocial situations, leading to vicarious trauma and compassion fatigue
- Advocating for the developmental needs of children as Lawyer for the Child
- Balancing the need to clarify roles and professional boundaries while maintaining empathy and a caring relationship with clients
- Increased recognition of the need to address personal stress, burnout and mental health challenges
- A desire for evolving methods of practice, such as moving away from solely adversarial approaches to mediation and dispute resolution
- A desire for improved work/life balance
- Career change decision-making
- Wanting to make the most of supervision within the context of feeling mandated rather than choosing

Whether you are considering arranging your first professional supervision session or are a seasoned participant, there are several key steps you can take to maximise what you get out of professional supervision:

- Find a supervisor who is a good fit for you, who you feel comfortable with and can trust
- Consider what you hope to achieve from supervision, for example, reduce stress, reconsider career steps, improve an interpersonal situation, address work/life balance, or any of the other common themes outlined above
- Review your progress over time with your supervisor, consider changing your supervisor if you feel there is a mismatch

As a general guide, you should expect the following in a supervision session:

- A safe, confidential space where you have constructive conversations with someone you trust
- Time to share what's 'on top' and how have you been working on any identified goals from your last supervision session
- Discussions led by what is important to you, including collaborative problem solving, exploration of ideas, and reflection
- Opportunities to be challenged and to continue developing as a professional
- Goal setting and agreeing on a focus for you until your next supervision

For more information about professional supervision for family lawyers in New Zealand, contact Tania Anstiss on *Tania.anstiss@gmail.com* or 021432974. ■

Tania Anstiss is a Professional Supervisor, Registered Clinical Psychologist, and President of the New Zealand Psychological Society.

Lawyers take note

The new duty on Family Lawyers from 16 August 2023

BY **WILL STORY**

FROM 16 AUGUST 2023, FAMILY LAWyers will need to be familiar with their new legislative obligation. The introduction of the Family Court (Supporting Children in Court) Legislation Act 2021 (the Act) has been a while in the making, but it is a game changer.

Of significance is the new duty imposed on family lawyers by the addition to section 7B of the Care of Children Act 2004. Section 7B currently sets out a number of duties upon lawyers when providing legal advice to a person about arrangements for the guardianship or care of child, or both. While lawyers must currently consider the mechanisms for assisting resolution of family disputes, the new duty upon lawyers goes much further to ensure that "*before commencing a proceeding under this Act, a lawyer must take any steps that, in the opinion of the lawyer, assist in enabling the issues in dispute to be resolved as safely, fairly, inexpensively, simply and speedily as is consistent with justice*."[1] So what does this really mean for family lawyers? And how did it come about?

In 2018, the independent panel reviewing the reforms to the family justice system in 2014 concluded in their report *Te Korowai Ture ā Whānau* that "*the evidence is compelling that it's in the best interests of children and young people to make arrangements about their care and other decisions about their lives with the least conflict and without having to go to court, which is inherently adversarial.*"[2] Based on this, the panel recommended that the Care of Children Act 2004 be amended to introduce an obligation on lawyers to facilitate the just resolution of disputes as quickly, inexpensively, and efficiently as possible, and with the least acrimony in order to minimise harm to children and families.[3]

There were other recommendations made by the panel in the same context (promoting early resolution) which included making Family Dispute Resolution (FDR) free – to remove another barrier, and to give the Court more teeth when it came to directing parties to attend FDR.[4]

When the Bill made it to Parliament, one of its main aims was summarised as to "*require lawyers to facilitate the efficient resolution of disputes in order to minimise harm to children, families, and whānau*".[5]

Five years following *Te Korowai,* the panel's recommendation is about to take effect and lawyers will now be under a statutory obligation to advise their clients to engage in what can be summarised as the least interventionist and least adversarial process of resolving the dispute possible. In practical terms, this means that from now on, not only are parties obliged by statute to attend FDR, but their lawyers are also under a statutory obligation to consider it. It is expected (and I suspect anticipated by the independent panel and Parliament) that the uptake of FDR will increase markedly.

Based on the law from 16 August 2023, as I see it the current ratio of Court proceedings to FDR cases is simply not sustainable. The intention of the legislation is that Court proceedings ought to *follow* attempts at early resolution. After all, Court proceedings are often expensive, become complex, and are slow to resolve. Over five years, the number of families waiting more than three years for a resolution from the Family Court has tripled to 1165.[6] They can also be destructive on relationships, which is not a consideration underlying section 7B but nonetheless another valid rationale for avoiding Court. If implemented well, the Act should see the current ratio of Court proceedings to FDR cases turned on its head.

Of course, for cases involving serious family violence or other immediate risk to the safety of individuals, section 7B rightly so retains discretion for lawyers to advise clients to commence Court proceedings (where

appropriate). But for standard track matters, early resolution and FDR must be the first stop.

What does this mean for those cases which end up on the without notice track, which really shouldn't be there? In their commentary to the Bill, the Justice Committee observed that the bill did not specify how compliance or non-compliance with section 7B would be assessed or enforced.[7] The Committee went on to note that *"statutory responsibility for the regulation of lawyers, including lawyer for child, sits with the New Zealand Law Society (NZLS), as prescribed in section 65 of the Lawyers and Conveyancers Act 2006. Any systemic issues that might arise in relation to compliance would be identified and addressed by the NZLS."*[8]

This represents a clear signal from Parliament that non-compliance with section 7B will be taken seriously, and lawyers will be accountable for their decision making in this regard. However, if it is to be truly successful, early resolution as best manifested by the FDR model must be supported by all family justice system players. This begins with Court staff, Kaiārahi and other justice system providers together with lawyers and perhaps most importantly, Judges. The number of Judge referrals to FDR remains very low overall; however, section 7B in theory will give Judges more latitude when it comes to examining the course of action taken by parties, directing parties to attempt or revisit FDR, and when making awards as to costs.

While this article has focussed on section 7B, there are a number of other changes effected by the Act surrounding child participation in Court proceedings and FDR.

In the Court space, the main change surrounds appointment of lawyers for children, providing that the appointee's suitability (including personality, cultural background, training, and experience) must be taken into account when determining the best fit for each child in every case.[9]

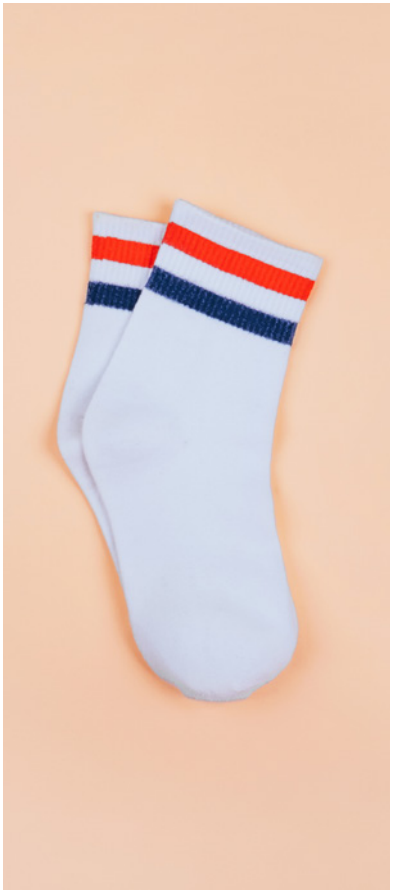
In the case of FDR, the Ministry of Justice is in the process of developing a Quality Practice Framework for Voice of Child Specialists. At this point in time, it is too premature to comment on how this will look in practice – and exactly how this will change how children participate in FDR. What is clear is that FDR is shaping up to be a more child-inclusive process, and that has got to be a change for the better.

Reflecting on the spirit of the Act, as family justice professionals we must all rise to the challenge of helping parties move their focus from their own adult issues to the touchstone underlying Care of Children Act matters – the welfare and best interests of the child in his or her circumstances must in all cases be the paramount consideration.

In an increasingly self-centred world and one full of conflict, this challenge is not for the faint-hearted. It is, however, one which we all need to embrace if we are to achieve better social outcomes. ■

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.

1. Section 9, Family Court (Supporting Children in Court) Legislation Act 2021.
2. Te Korowai Ture ā Whānau, page 10.
3. Ibid, page 13.
4. Ibid.
5. Family Court (Supporting Children in Court) Legislation Bill Commentary, as reported from the Justice Committee, page 2.
6. Parliamentary question 17791 (2023), Chris Penk to the Minister for Courts, published 14 June 2023.
7. Family Court (Supporting Children in Court) Legislation Bill Commentary, as reported from the Justice Committee, page 3.
8. Ibid.
9. Section 7, Family Court (Supporting Children in Court) Legislation Act 2021.



Odd Sock

BY **JOHN ADAMS**

Under a sofa bed
at our Amsterdam AirBnB,
one separated sock
lay limp, miserably.

Had he* been abandoned?
Had they agreed to part?
We lifted him (lonely), we laundered,
to comfort his hapless heart.

It does seem rather pathetic –
fallaciously pathetic too –
to bestow such care on a single sock:
we can only hop (sic) he'll pull through.

*Gender inferred from blue stripe.

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Casenotes

These cases may contain publication restrictions. Any report of these proceedings must comply with ss 11B to 11D of the Family Court Act 1980.

CARE OF CHILDREN

Ross v Richards

Ross v Richards [2023] NZHC 797, High Court, Auckland, van Bohemen J, 18/4/2023

Civil procedure – Appeals

Family law – Care of children – Parenting – Orders – Variation

Family law – Care of children – Parenting – Wishes of child

Unsuccessful appeal by JR against parenting orders granted in the Family Court (FC); CR and JR from South Africa (SA) and H was born there; family moved to New Zealand (NZ) in 2018 for CR's work; CR made redundant in 2021 and intended to move back to SA and separate from JR; JR obtained without notice order preventing H leaving NZ; CR applied for and granted interim parenting order but denied an order to allow H to leave NZ; CR gained further NZ employment and sought exclusive guardianship of H and release of her passport to make immigration applications; JR evasive about immigration status in FC; FC found JR did not seem to have invested time in planning for care of H; FC granted parenting order for day to day care of H to CR with alternative weekends for JR during school term and alternative weeks during holidays; before hearing H requested orders be varied so she could spend more time with JR but no agreement could be reached with him; appeal challenged jurisdiction of court, alleged breaches of Care of Children Act 2004 and New Zealand Bill of Rights Act 1990, partiality, predetermination, prejudice, improper interview with H and failure to get psychological evaluation of H.
Held, JR's criticism of FC Judge's decision had no substance; FC Judge's observations of JR were based on evidence and impartial, even supportive of JR's continued relationship with H; FC Judge's consideration of family's immigration status directly relevant to H's best interests; FC's paramount consideration was H's welfare and best interests and had regard to H's views; clear that CR could provide more stable and financially secure home for H despite improvements in JR's situation since FC decision; interview of H standard and ordering psychological report would have delayed FC proceedings by months; courts discretion whether to get psychological report; no error in parenting orders made; JR had opportunity to consent to variation proposed by H which would have increased his time spent with her; appeal dismissed.

Shirley v Richmond

Shirley v Richmond [2023] NZHC 913, High Court, Napier, Isac J, 24/4/2023

Family law – Care of children – Parenting – Orders – Interim

Family law – Care of children – Parenting – Overseas travel

Family law – Care of children – Parenting – Specialist reports

Family law – Care of children – Parenting – Welfare and best interests of the child

Successful appeal by S against Family Court (FC) decision making parenting orders in respect of S and R's 15 and a half year old son, M; S and R struggled to parent collaboratively since separation; FC made final parenting orders in favour of R; FC found delay in M rekindling his relationship with his father was not in his best interest; S challenged one aspect of parenting order; S argued FC erred when it determined a psychological report was unnecessary; S argued M had a strong adverse reaction to FC's decision and had since refused to have contact with his father; S challenged FC's order preventing M's removal from NZ until his 18th birthday; S did not challenge FC's finding R did not assault M as earlier alleged; M's complex needs made him 'intellectually and emotional vulnerable'; R argued further delay was not in M's best interests.
Held, despite R's understandable frustrations and upset about his lack of contact with M, a psychological report was essential and its absence made a material difference to the parenting orders made; additional evidence not available to FC supported that position; evidence showed real risk of harm both to M's mental well-being and well-being of R, should contact be compelled under warrant; FC erred in concluding psychological report was not essential before making final parenting orders; it was in M's best interests to have a relationship with his father and S had a legal obligation to facilitate and support R having a role in M's life; delay would not have an unacceptable effect on M as matters stood; psychological report ordered; existing parenting orders set aside; interim order preventing M's removal from NZ until further order of Court; appeal allowed.

FAMILY VIOLENCE

N v Police

N v Police [2023] NZCA 103, Court of Appeal, Gilbert J, Ellis J, Davison J, 6/4/2023

Criminal law – Offences – Family violence (formerly Domestic violence) – Breach of order

Criminal procedure – Appeals – Leave to appeal – Court of Appeal

Family law – Family violence – Protection order – Final

Unsuccessful application by N for leave to bring second appeal against conviction and sentence for breaching a protection order; N previously married to complainant; they had two children together, 7 and 9 years old at the time of the offending; on 12 December 2019 a without-notice protection order was made against N; protected people were complainant and two children; on 4 March 2020 a final protection order was made against N; order included standard non-contact condition; final order provided specific exceptions; N could text message the complainant to discuss care of children or contact; in September 2021 N discovered complainant was proposing to move house; N sent text messages to complainant regarding children but also various other topics; complainant did not reply; District Court (DC) found N guilty of one of two charges; text N sent that referenced children did not breach protection order; it was within scope of permitted exception; however a text that read "[complainant] r u ready 4 divorce or nt? Y or n" was not permitted and for that N was found guilty of a breach; N was ordered to pay fine ($150) and court costs ($130); High Court (HC) later dismissed N's appeal against conviction and sentence; N argued his renewed appeal proposed matter of general importance; N questioned whether a court, in deciding context of a criminal prosecution on how a group of words should be interpreted 'was entitled to disregard the statute law in NZ that touches on that subject'; subject being divorce and how it related to children; N argued miscarriage of justice would occur if leave was not granted; N suggested HC erred in failing to consider context in which text was sent; Crown submitted N's appeal did not engage matter of general or public importance, but rather turned on a question of fact.

Held, proposed appeal did not raise issue of general or public importance; N's text did not mention the contact with or care of his children; reference to divorce did not necessarily or implicitly refer to or engage issues regarding the care of children or N's contact with the children; application for leave to appeal dismissed.

ORANGA TAMARIKI

MC v Family Court at Manukau

MC v Family Court at Manukau [2023] NZSC 54, Supreme Court of New Zealand, O'Regan J, France J, Kós J, 15/5/2023

Civil procedure – Appeals – Leave to appeal – Supreme Court

Civil procedure – Costs – Security for costs – Waiver

Civil procedure – Proceedings – Striking out

Civil procedure – Time – Extension

Oranga Tamariki – Striking out

Unsuccessful application by MC for (a) an extension of time to apply for leave to appeal and (b) leave to appeal against a High Court (HC) decision that had struck out her claims in tort; MC's children had been placed in the care of Oranga Tamariki (OT) and she had been unsuccessful in challenging that decision; her claims in tort against FCM and OT had been struck out as an abuse of process; her appeal against that decision had been deemed abandoned because she had not paid security for costs.

Held, there were no exceptional circumstances justifying a direct appeal from the HC; was no point granting an extension of time because criteria for granting leave to appeal were not met; application declined.

RELATIONSHIP PROPERTY

Jones v Jones

Jones v Jones [2023] NZHC 1408, High Court, Nelson, Isac J, 7/6/2023

Family law – Relationship property – Division – Death of spouse or partner

Trusts – Trustees – Duties and liabilities – Act in beneficiaries' best interests

Wills, probate and administration – Executors and administrators – Removal

Wills, probate and administration – Family protection – Further provision – Claim by spouse

Successful application by LJ to remove executors from estate of Basil Jones (deceased); deceased survived by his wife, LJ, and two adult children, CJ and JJ, from previous marriage; deceased executed will shortly before death broadly dividing estate equally between the three parties and appointing them all executors; LJ brought claims to deceased estate under Property (Relationships) Act 1976 and Family Protection Act 1955; due to conflicts with LJ's claims on estate she accepted her removal as executor; large part of estate was company owned by deceased; CJ moved majority of shares in company to herself and made herself sole company director; LJ argued CJ and JJ should also be removed and an independent executor appointed; LJ submitted in support no meaningful progress made in administration of estate coupled with hostility by CJ to LJ and CJ's conduct and conflict due to shareholding and holding company director position.

Held, Court had broad discretion to remove an administrator; main concern whether trust was being executed for the benefit of the beneficiaries; question was what was expedient to interests of beneficiaries; expedience was lower threshold than necessity; hostility between beneficiaries could assume relevance if risk to beneficiaries interests; LJ had clear conflict and should be removed but all three executors failed to gather in and secure estate's assets; CJ had two years to change the share ownership and appoint other executors as directors; CJ and JJ had not taken steps to progress LJ's relationship property claim; JJ residing overseas reduced his ability to be an effective executor; LJ's claim needed to be resolved before estate could be determined and independent executor would be in best interests of beneficiaries as opposed to CJ and JJ alone; executors removed and independent executor to be appointed; application granted.

Mead v Paul

Mead v Paul [2023] NZSC 70, Supreme Court of New Zealand, Glazebrook J, O'Regan J, France J, Williams J, Kós J, 20/6/2023

Civil procedure – Appeals – Determination

Family law – De facto relationships

Family law – Relationship property – Division

Statutory interpretation – Terms and expressions

Unsuccessful appeal by M against Court of Appeal (CA) judgment reversing High Court (HC) determination that Property (Relationships) Act 1976 (PRA) did not apply to relationship between herself, LP and BP; LP and BP married in 1993; in 2002 they formed polyamorous relationship with M and moved with her to property for which M was legal titleholder and for which she had paid deposit; for next 15 years parties lived together at the property, committed to shared life while relationship continued; LP, BP and M had understanding that, although free to love others, main relationship was between them and shared same room and bed; LP separated from BP and M in November 2017; BP and M separated in early 2018; M remained in property; in February 2019 LP applied to FC seeking orders determining parties' respective shares in relationship property; BP sought declaration that there were three contemporaneous qualifying relationships; M appeared under protest to jurisdiction on basis that, as LP's application founded on relationship between three people, it was not 'qualifying relationship' under PRA and equity alone could erode her legal title; on appeal by way of case stated HC held PRA did not apply to parties and FC lacked jurisdiction to entertain LP and BP's claims; CA held FC had jurisdiction under PRA to determine claims to property between two persons who were married, in civil union, de facto relationship, or in polyamorous relationship; CA held FC jurisdiction extended to determining claims among three people in polyamorous relationship, where each party was either married to, in a civil union with, or in a de facto relationship, each of the other partners in the polyamorous relationship; issues on appeal whether triangular relationship (a) could itself be qualifying de facto relationship and (b) could be subdivided into two or more qualifying relationships.

Held, (O'Regan, Williams and Kós JJ) triangular relationship was incapable of falling under definition of 'de facto relationship' in PRA; by enacting ss 52A and 52B of the PRA Parliament made it clear qualifying relationship need not be exclusive; reach of PRA to be construed from relevant statutory language and with Parliament's policy choice in mind; legislative scheme required mutual commitment to living together in intimate domestic relationship where risk and reward so intertwined it would be unjust for one partner to fall back on equitable principles to obtain advantageous proprietary entitlement; if relationship between M and BP satisfied test in s 2D(2) of the PRA before LP left, odd and unfair to suggest relationship only began at that point for PRA purposes; no material distinction between contemporaneous 'vee' arrangement between one party and two others and triangular relationships under PRA; presumption of equal sharing could still be displaced in appropriate circumstances; unexplored complexities in operation of PRA did not imply excluding intention on Parliament's part; triangular relationship could be subdivided into two or more qualifying relationships; (Glazebrook and Ellen France JJ, dissent) HC correctly concluded FC had no jurisdiction to consider parties' claims, given (a) artificiality of treating parties' relationship as sub-divisible to qualify under PRA and (b) practical ramifications of applying PRA, premised on coupledom, to parties' polyamorous relationship should be left to Parliament to decide whether to extend PRA and how to address practical issues arising from extension; while family arrangements may involve multiple relationships and whether any of these relationships were qualifying relationships under PRA was matter of fact, this ignored the way in which parties conducted their lives and how they saw their relationship; only basis on which there could be one or more qualifying relationship was by ignoring third person in relationship; relatively simple case belied complexity of future issues; majority assumed outcomes would be more generous under PRA than equity; Parliament better placed to address question of extension of PRA to polyamorous relationships; appeal dismissed.

Werder v Singh

Werder v Singh [2023] NZHC 853, High Court, Associate Judge Lester, 21/4/2023

Civil procedure – Costs – Security for costs – Application

Evidence – Discovery – Production and inspection – Grounds for resisting production

Family law – Family proceedings

Family law – Relationship property – Division

Partially successful application by W for further discovery; successful application by G for security for costs; unsuccessful application by S for security for costs; parties were former flatmates and S and G were married between 1996 and 2013; W and S co-owned property in Calgary Street, Auckland and parties had limited joint venture involving two other Auckland properties; W claimed parties had another long-running joint venture acquiring further Auckland residential properties, beginning in 1997; W relied on signed document from 1997 and two other handwritten documents, from 2000 and 2003, to support existence of joint venture; W transferred half-share in Calgary Street to S for $1.00 and waived right to independent advice; W claimed equity in Calgary Street was springboard for joint venture to acquire further properties; after S and G's separation in 2013, properties W alleged were in joint venture divided equally between them in FC proceedings; S and G created third and fourth defendant trusts to hold properties received through division; G claimed to be unknown and uninformed bystander to virtually everything that occurred; W sought to trace alleged joint venture properties to trusts; W sought further discovery and to address issues of privilege and document redaction by defendants; S and G applied for security for costs.

Held, key security for costs issue whether just in all circumstances; S's affidavit did not address documents' merits in any

detail; evidence indicated W's cash contributions limited but he did work on the properties, which was consistent with 2000 and 2003 handwritten documents recording W's share as 25 per cent reducing to 21 per cent; while W sought to argue he was forced to sign 2000 document by undue influence, it helped his case; no evidence re equity parties held in Calgary Street property at time of transfer; W's claim against S had reasonable chance of success, but claim against G weaker as she was not involved with 2000 and 2003 documents; W's note to solicitor handling transfer of Calgary Street property to G's trust indicated financial arrangements re transfer; greatest risk to G was Court finding S used property involved in joint venture between him and W to settle G's relationship property claim; W's difficulty was claim covering events spanning nearly quarter century with informal arrangements; order of security would not prevent claim proceeding; W ordered to pay $40,000 security in G's favour; S had not established W's claim weak as to liability; G to discover necessary documents to determine value of relationship property assets/funds used to acquire further property; redactions removed where they related to expenses re maintenance/realisation of claimed joint venture properties; direction that G and S co-operate in making their relationship property judgment available with information identifying persons under 18 years redacted; information to be assessed for relevance to current proceedings; discovery orders accordingly; S's application declined; G's application granted; W's application granted in part.

WL v AJ

A v L [2023] NZHC 703, High Court, Napier, Mallon J, 31/3/2023

Equity – Fiduciary relationships– Breach

Family law – Relationship property – Agreements – Contracting out – Adequacy of independent legal advice

Family law – Relationship property – Division – Equal sharing – Presumption

Family law – Relationship property – Separate property

Unsuccessful claims by WL for constructive trust, knowing receipt and breach of fiduciary duty; partially successful claim by AJ for half equity in property purchased by WL and for occupation rent under s 18B Property (Relationships) Act 1976 (PRA); WL and AJ lived together as couple for about 17 years, including separation periods and had three children; WL purchased property early in relationship; during early separation period, parties signed agreement prepared by WL's sister, without independent legal advice; agreement purported to exclude property as relationship property; post-separation, AJ claimed half equity in property and other relationship property, occupational rent for period WL lived in property following separation and declaration contracting out agreement void or should be voided as seriously unjust; WL sought order giving effect to agreement so property was separate property and for remaining relationship property to be equally divided; if Court invalidated agreement WL sought 80 per cent division in his favour and order no adjustments to be made for occupational rent; WL brought abandoned High Court proceedings alleging AJ used relationship property funds to contribute to her brother RJ's house deposit and consequently claiming an interest in RJ's house via constructive trust. **Held**, WL and AJ's evidence re circumstances of signing agreement differed; AJ considered best option for herself and oldest child living at property; WL logically concerned in context that AJ could have, or sought, claim on property; AJ's experience with unequal outcome of parents' separation and concerns regarding mortgage, likely influence in suggesting contracting out agreement to assuage WL's concerns; AJ's concerns keeping the peace and having secure place to live, not likely effect of agreement; typed agreement produced at hearing contained terms of agreement parties originally signed; as parties separated when agreement entered into, better viewed as post separation settlement agreement under s 21A of the PRA; evidence suggested relationship longer than three years at time of separation agreement required to comply with s 21F of the PRA as parties in de facto relationship; alternatively viewed as contracting out agreement in contemplation of reconciliation, agreement must also comply with s 21F of the PRA; although AJ received brief phone legal advice neither party had independent legal advice as required by s 21F(3) of the PRA; independent legal adviser likely to have told AJ signing agreement not in her interests; circumstances of AJ's knowledge of parents' separation insufficient to show she would have signed with legal advice, or had clear idea of agreement's effect on her legal rights; AJ was vulnerable, with a young baby and no qualification, when signing the agreement; no clause in agreement provided for review if relationship resumed; agreement became unreasonable as relationship proceeded as it did not recognise AJ's equal contribution to relationship; disparity of outcome at separation and lack of other major assets in property pool relevant; agreement void or alternatively voidable for serious injustice; weight of agreement as exceptional factor diminished by WL's failure to ensure it was legally binding; parties' contributions to relationship substantially equal; WL's payments of loans, rates and insurance over occupation period balanced rent claim; WL to have opportunity to settle claim before sale; AJ's claim accepted in part; WL's claims rejected.

TRUSTS

Cooper v Cooper

Cooper v Cooper [2023] NZHC 1403. High Court, Auckland, Associate Judge Sussock, 7/6/2023

Property – Real – Encumbrances – Caveats – Removal – Lapse

Property – Real – Interests in land – Beneficial interests

Trusts – Classification – Constructive trusts – Institutional constructive trusts

Successful application by TEC for order that caveat against title of Pukekohe property not lapse; registered proprietors of property were George Benny Cooper Trust (GBC Trust) and Tekuraingatau Cooper Family Trust (TKC Trust) in half

shares; GBC and TKC were married and parents to 10 children, including TEC's husband MC who was quadriplegic and relied on daily care of family members and care agencies; GBC and TKC purchased property in 2005 and built two homes, one for MC and TEC and one for themselves; following MC's and GBC's deaths, TKC and TEC continued to live at property; TEC lodged caveat describing interest as 'cestui qui trust of which the registered proprietors … are trustees'; respondents claimed that, in July 2022, TKC appointed her son Ephraim Cooper to GBC Trust to replace GBC and TEC and another son, Richard Cooper as trustees of TKC Trust; respondents purported to remove TEC as beneficiary of GBC and TKC Trusts; TEC lodged caveat; respondents lodged application that TEC's caveat lapse, but considered caveat had lapsed by the time TEC lodged application for caveat not to lapse; Land Information NZ (LINZ) allowed caveat to remain on title until Court determined timing issue.

Held, TEC relied on 'reasonable expectations' constructive trust for her interest in property; in context of application that caveat not lapse, TEC needed to establish it was reasonably arguable that (a) TEC contributed in more than minor way to acquisition, preservation or enhancement of property, directly or indirectly, (b) TEC had expectation of interest in property, (c) TEC's expectation was reasonable and (d) respondents should reasonably expect to yield that interest to her; TKC did not directly challenge TEC's evidence about the discussions between GBC, TKC, MC and herself before purchase of property, or that TEC signed documents when parties entered into mortgage; TKC admitted in evidence that at one time it was intended that TEC would inherit 30 per cent of the property; TEC, as only person in paid employment at time of purchase, clearly made contributions from her earnings to property that manifestly exceeded benefits; common intention for TEC to have interest in property consistent with extent of contributions made when property was purchased, fact that TEC remembered signing documents at the time, invalid 2010 will signed by GBC and TKC expressly providing for situation where both GBC and MC had died and email sent by TEC to GBC and TKC's solicitors before GBC's death; recent correspondence from TEC offering to help out with rent in addition to TEC receiving her 30 per cent share suggested TEC otherwise expected to yield share; interest stated with sufficient certainty as respondents understood nature of interest claimed and basis of claim; notice to be considered as given in time given LINZ sent notice of lapse to PO box; time for filing of fee waiver form extended; application granted.

K v K

K v K [2023] NZHC 1020**,** High Court, New Plymouth, Gwyn J**,**2/5/2023

Civil procedure – Costs – Assessment

Civil procedure – Costs – Increased

Family law – Family proceedings

Trusts – Variation – Authority – Court

Successful application by Mrs K for increased costs following various Family Court (FC) and High Court (HC) proceedings; culminated with her successful application for order varying deed of Trust enabling division of assets between parties; specified adjustments made in Mrs K's favour; Mr K removed as trustee of Trust; all Trust property vested in Mrs K and independent trustee; ancillary orders directed sale of Trust property; Mrs K argued for 50 percent uplift on 2B costs; Mrs K submitted increase justified because Mr K significantly prolonged proceedings and inflated associated costs by failing to comply with Court directions; Mr K was able to stall proceedings without any detriment to himself; Mr K had control of majority of parties' and Trust's assets; he remained living in family home and was fully employed in family business; Mrs K forced to move in with her mother and find alternative employment; costs were not sought for time period in which Mrs K received legal aid; Mrs K's actual costs were $59,505.70 (including GST and disbursements).

Held, Mr K failed or had been unwilling to act on previous Court directions, or on his own proposals; Mr K failed to properly fulfil his obligations as trustee; at the time of hearing Court was not persuaded Mr K would fully engage with his responsibilities as trustee; grounds for increased costs against Mr K; Mr K contributed to time and expense involved in proceedings; he continued to enjoy benefit of parties' assets when Mrs K was in dire financial situation; Mrs K entitled to 2B costs for FC and HC proceedings with 50 per cent uplift; application granted.

Lendich v Codilla

Lendich v Codilla [2023] NZCA 222, Court of Appeal, Katz J, Whata J, Davison J, 9/6/2023

Civil procedure – Appeals – Determination

Property – Real – Encumbrances – Caveats – Removal – Lapse

Trusts – Classification – Resulting trusts – Apparent gifts

Unsuccessful appeal by L against Associate Judge's decision declining application order that caveat over property in Whenuapai, West Auckland not lapse; over forty years previously, Lendich Heavy Equipment Limited (LHEL), in which L was governing director and he and his wife were shareholders, transferred property to long-term employee and personal friend Mr Posa (P) for $1; parties had no written sale and purchase agreement; L employed P, a fellow member of Croatian community, from late 1960s to his retirement in early 2000s, apart from P's six-month return to Croatia in 1980s; L claimed original intention in offering property to P was to allow P as trusted caretaker to keep after-hours watch over heavy machinery and vehicles LHEL kept at nearby depot, as they had intended with an earlier property, with construction of cottage for P included; C was executor of P's deceased estate; L claimed interest in property under resulting trust, claiming he effected transfer to allow P to live there for the rest of his life and use it as security, not to make him beneficial owner and allow him to sell or bequeath it; L and Lendich Construction Limited (LCL) commenced separate proceedings against C seeking declaration C held property in

resulting trust for L or LCL; C's application for summary judgment stayed pending hearing of appeal.

Held, L had right of appeal by way of rehearing; essence of resulting trust was that person providing or contributing to purchase price of property conveyed into another person's name retained beneficial interest to extent of contributions if no indication of intention to confer beneficial interest on legal transferee; evidence indicated agreed consideration of $1 paid and L acknowledged it; if parties' intention was to honour agreement made concerning previous property memorandum of transfer and stated consideration of $1 did not provide full picture; L clearly intended to transfer beneficial interest to P given close personal relationship, decision to provide a subdivided and separate title, recorded terms of previous abandoned arrangement, inclusion of fencing covenant in memorandum of transfer and parties' subsequent behaviour when L acquired another adjoining property to establish depot; on L's evidence, he only addressed separation between his business premises and new depot by P's property when he contacted C's solicitor following P's death; L's expressed interest in purchasing P's property back 'at fair market value' indicated knowledge P had become owner of legal and beneficial interests; C's evidence of P's desire property should be permanent home for P's caregiver not inconsistent with P's belief he was fully entitled to bequeath property; any presumption of resulting trust rebutted by evidence; appeal dismissed.

WARDSHIP

Te Whatu Ora Health New Zealand Te Toka Tumai Auckland v A

Te Whatu Ora Health New Zealand Te Toka Tumai Auckland v A, [2023] NZHC 1864, High Court, Gault J, 18/7/2023

Family law – Guardianship– Guardianship of Court

Family law – Wardship– Medical treatment – Blood transfusion

Health law – Medical treatment – Consent– Minors

Media – Publishing – Non-publication orders

Successful urgent application by TTT for M to be placed under guardianship of Court until completion of treatment; M, 18 month old, required urgent treatment for rare malignant tumour on his liver (hepatoblastoma); parents consented to medical treatment except for use of blood or blood products due to their beliefs as Jehovah's Witnesses; M required chemotherapy and surgery; clinical opinion that it would be irresponsible to commence treatment without ability to give blood transfusions due to life-threatening complications; parents agreed to abide by Court decision but asked for every effort to be made to avoid need for blood or blood products and if required administration be minimised; TTT sought leave to appoint two doctor's as agents of Court for particular purpose of consenting to administration of blood products to M.

Held, TTT has a bona fide interest in M's welfare giving it sufficient basis to apply for order; High Court and Family Court both have jurisdiction to place child under guardianship of Court where interests of child require it; found "real and substantial risk" that in course of medical care situation requiring blood transfusion could develop and a transfusion be necessary; prefer balance rights of parents to manifest their religion and child's right not to be deprived of life; where rights not able to exist alongside one another parents right to manifest their religion should not risk health and welfare of child; limited guardianship order in M's best interests so the administration of blood or blood products can be consented to by two named doctors; M's parents general agents of the Court for all other purposes than consenting to blood and blood products; application granted. ■

Turbulence

BY **JOHN ADAMS**

On my life's flight, words
enlightened the path to guide
emergency movement along the plane,
shifting, shiftily, throughout the ride.

'*Gender*' once plotted in parallel;
the eel trap of '*marriage*' confined;
the intensifier '*bloody*' was far too rich
for '*company*,' '*mixed*' or '*refined*.' –

Already on the loose, pronouns
exercised some '*he*' and '*she*' play –
but we rarely heard, in those blindfold days.
such a thing as the singular '*they*.'

And my innocent youth would have guessed,
if offered a goad or a carrot,
that '*polyamorous*' likely referenced
a person, fond of 'their' parrot.

CPD *Calendar*

NZLS CLE Ltd
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PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
FAMILY				
SECTION 21 AGREEMENTS – LAWYERS' LIABILITY *1.5 CPD hours*	*Elizabeth Heaney*	Section 21 and s 21A agreements, whether to contract out or settle disputes under the Act, continue to be commonplace and practitioners often face significant time pressure when drafting them for clients. These agreements can expose lawyers to real risks when they are put to the test as clients' circumstances change over the course of time. This webinar will consider some of the key issues in this area, pitfalls to avoid, and the practical steps that you can take in order to mitigate your liability risk.	Webinar	9 Aug
ROLE OF THE TRUSTEE *2 CPD hours*	*Sarah Kelly* *Silvia McPherson*	Estate administration can be a minefield that can catch out unwary practitioners and an area that is ripe for complaint. This webinar builds on a well-received session at the Auckland General Practitioner CPD Day in February this year and will take a practical approach in providing you with tips and tricks for resolving some of the key issues that you are likely to face in this area.	Auckland Live Web Stream	29 Aug
ORANGA TAMARIKI ACT – INSPIRED LEGISLATION OR SOMETHING ELSE? *3.5 CPD hours*	*Judge Peter Callinicos* *Chris Holdaway* *Brintyn Smith* *Stormie Waapu*	Many practitioners and those on the lawyer for child lists find Oranga Tamariki Act 1989 (OT Act) cases complex, time-consuming and at times confusing. This workshop will clarify your understanding and allow plenty of time to ask and discuss questions, and will include practical application in the form of case scenarios.	Christchurch	31 Oct
FAMILY LAW CONFERENCE – TE HONONGA *12 CPD hours*	*Chair:* *Siobhan McNulty*	After a long absence NZLS CLE Ltd is delighted to be holding the Premier NZ Family Law Conference, now in its 15th year, in Christchurch. This biennial "must-go" event will provide you with the usual high quality business sessions presented by an impressive line-up of speakers together with three days of networking opportunities.	Christchurch Live Web Stream	1-2 Nov 1-2 Nov