



EFFECTIVE LAW IN AN EFFECTIVE STATE

*Local conditions in the global context in the face
of 21st century challenges of fighting crime.*

The Child in New Zealand Family Law - Guarantees and Entitlements

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Abstract

The present paper discusses selected issues in the area of family law and the place of the child in the legal environment. The paper focuses on both legislative issues, particularly the paramount sources of law, as well as judgments issued by courts operating within the jurisdiction of New Zealand and relating to the title issue of, e.g. protection from abduction, and guaranteeing adequate maintenance.

Preface

The primary legal act governing custody and the rights of children in New Zealand is the *Care of Children Act*¹. The welfare and best interests of the child are always paramount in proceedings under the *Care of Children Act* (with the exception of proceedings referring to *the Hague Child Abduction Convention*). Importantly, the terms ‘daily care’ and ‘parental responsibility’ do not appear in New Zealand legislation. However, ‘day-to-day care’ can be likened to ‘daily care’, and ‘guardianship’ is very similar to ‘parental responsibility’ (recognised in other jurisdictions). In most cases, the guardians of minors are the parents of the child. Nevertheless, in some situations the mother may be the child’s sole (only) guardian, including when the mother:

- was not married to the child’s father at any time between the child’s conception and birth;
- did not reside with the child’s father during the entire period between the conception and birth of the child.

Independently, the court may appoint additional guardians for the children if the legally protected interests of the minor so require. In such a case, the co-guardians have equal rights until the court decides otherwise. In general, the responsibilities, authority, rights and duties of a guardian concern important issues affecting the child’s life, such as education, religion and health.

¹ *Care of Children Act* - <https://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html> (accessed on: 17.09.2023, 18:00).

1. The child in New Zealand family law - guarantees and entitlements

New Zealand law does not distinguish between maintenance claims (income and capital) for children of marriage and claims for children whose parents were never married. Child support claims are governed by the *Child Support Act*². Child support liability, under this Act, can only arise if the child in respect of whom support is claimed is domiciled or resident in New Zealand. If the child does not meet this criterion, then it is possible to sue for child support under the other provisions of the *Family Proceedings Act*, provided that the country in which the child is domiciled or resident is a party to the *United Nations Convention on the Recovery of Maintenance Abroad 1956*³. ‘Responsible parent’ within the meaning of the *Child Support Act* may be a person who is a New Zealand citizen, has a permanent residence in New Zealand or is a resident of a country with which New Zealand has a reciprocal agreement for the enforcement of maintenance (currently only Australia).

Financial claims may be asserted on behalf of minor children under the *Property (Relationships) Act*⁴. In any proceedings under the Act, the family court must have regard to the interests of any minor or dependent children of the marriage, while being free to make an order settling the relationship property for the benefit of the children (Section 26 of the *Property (Relationships) Act*). Unfortunately, however, Section 26 is not widely used in jurisprudential practice, and family courts do not make use of this competence because, in their view, this could result in the complete displacement of property rights and the statutory interests or claims of the parties under the *Property (Relationships) Act*⁵.

Pursuant to Section 26A of the *Property (Relationships) Act*, the family court also may make an order postponing the vesting of any share in the relationship property, until a specified future date or until the occurrence of a specified event if the court is satisfied that immediate

² The *Child Support Act* - <https://www.legislation.govt.nz/act/public/1991/0142/latest/whole.html> (accessed on: 18.09.2023, 16:00).

³ The *United Nations Convention on the Recovery of Maintenance Abroad* - https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=en (accessed on: 18.09.2023, 16:00).

⁴ The *Property (Relationships) Act* - <https://www.legislation.govt.nz/act/public/1976/0166/latest/whole.html> (accessed on: 18.09.2023, 16:00).

⁵ See the judgment in the case of *Walker v Walker* [1983] 2 NZFLR 240 (CA).

vesting would cause undue hardship for the party who is the principal provider of ongoing day-to-day care for one or more minor or dependent children in the eligible relationship.

Moving forward, it is important to note the manner in which maintenance due to minors is calculated. The New Zealand Inland Revenue Department calculates and collects child support if an appropriate application is filed. The amount of child support that the named parent is required to pay is determined according to a statutory formula available online. This arrangement is particularly apt as it clearly and accessibly indicates the amount of maintenance due. The proportion of the period for which the responsible parent exercises custody of the child may affect the amount of the due child support. The role of the New Zealand court is residual in such cases, as it deals with ready applications. In addition, the parties on their own may voluntarily agree to a different manner of paying child support than that provided for in the *Child Support Act*. A voluntary agreement is not enforceable if the parent with the principal care receives a pension or a state-funded benefit. The registration of a voluntary agreement does not prohibit either party from seeking at any time an assessment of the amount of child support ordered. A voluntary agreement that is not registered with the Inland Revenue Office may be enforced under general principles of contract law, and unpaid child support could then be recovered as a debt. It should be pointed out that the child support obligation exists until the child reaches the age of 18 or, if the child is enrolled and attends ‘school’, then until the child reaches the age of 19⁶.

According to New Zealand law, neither minor nor adult children can personally claim child support against their own parents under the *Child Support Act*. However, the *Property (Relationships) Act* provides that adult children may be parties to proceedings concerning their parents’ property. It was emphasised in the case of *H v R* [2017] NZFC 761, in which adult children who were the final beneficiaries of a maintenance trust filed an application under Section 37 of the *Property (Relationships) Act* to join it as parties in a property dispute.

The above description shows that the scope and manner of the adjudication of maintenance is very clearly defined in New Zealand legislation. On the other hand, there remains the issue of custody of a minor when there is a separation or divorce of spouses. The term ‘custody rights’ has been interpreted very broadly by the courts. As a result, parents have

⁶ [https://en.wikipedia.org/wiki/Inland_Revenue_Department_\(New_Zealand\)](https://en.wikipedia.org/wiki/Inland_Revenue_Department_(New_Zealand)) (accessed on: 18.09.2023, 16:00).

been considered to have the requisite right for custody, whereas they had no such right before, but only the right to have contact with the child⁷. In the lack of a court order, no parent or guardian has a superior right to custody of a child after a declared separation. A parenting order issued by the family court may specify that a parent will act as day-to-day guardian, but a parenting order cannot be issued in the case of the child over the age of 16, except in special circumstances. A parenting order may specify the nature and frequency of contact that the non-custodial parent should have with the child on a day-to-day basis and it may impose additional conditions of care. In this respect, the family court has wide discretionary powers. The parent, legal guardian or spouse/partner of the child's parent has the right to apply for a parenting order. Other members of the child's family group can only do so if they have obtained a permission to apply. Importantly, in all ongoing custody disputes, the court must appoint a lawyer to represent the children (Section 7 of the *Care of Children Act*⁸). It is good practice in New Zealand for judges to meet directly with children to hear the views of minors. Any views expressed by the child must then be taken into account by the court. The court may additionally request an environmental wellbeing report from the state social worker and/or a mental wellbeing report from a court-appointed psychologist. Thus, the court acquires a broad knowledge of the minor's situation and can make the most appropriate judgment to protect the minor's legal interests.

The child in New Zealand family law also has special protection in the event of abduction. New Zealand is a party to the *Hague Child Abduction Convention*. New Zealand's obligations under the Convention have been implemented into domestic law in Sections 94-124 of the *Care of Children Act*. Therefore, the courts in New Zealand strictly adhere to the immediate return policy. As jurisprudence practice demonstrates, it is difficult to successfully defend an application for return to another country, however, in the recent Court of Appeal case of *LRR v COL* [2020] NZCA 209, the court refused to order the child's return to Australia on the basis that there was a serious risk that returning the child to Australia would expose the child to domestic violence. The above case represents the prevailing trend⁹.

⁷ See the judgment in the case of *Fairfax v Ireton* [2009] NZFLR; 433 [2009] NZCA 100.

⁸ The *Care of Children Act* - <https://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html> (accessed on: 17.09.2023, 18:00).

⁹ <https://www.rnz.co.nz/news/national/476769/new-zealand-s-brutal-family-court-system-has-to-change-campaign> (accessed on: 18.09.2023, 20:00).

The New Zealand central authority may ask the New Zealand Police for assistance in locating the abducting parent and the child. New Zealand provides free legal representation to left behind parents in cases arising under the *Hague Child Abduction Convention*. The central authority in New Zealand will appoint a lawyer to represent them and apply to the court for the return of the child to their home country. Generally, the presence of a parent residing in the country from which the child has been abducted is not required during court proceedings in New Zealand. The New Zealand courts give exceptional priority in their practice to the requirement to deal expeditiously with applications under the *Hague Child Abduction Convention*, and most cases are resolved within two to four months. It is worth noting that the court has the power to make an order preventing the removal of the child from New Zealand and, if necessary, to make an order for the upbringing of the child in order to facilitate the return of the child to his or her country of permanent residence/domicile. If, on the other hand, the child has been abducted to New Zealand from a country not covered by the Hague Convention then the parent may apply to the New Zealand court, under the *Care of Children Act*, for the following orders:

- an order resolving a dispute between guardians as to where (in which country) the child should live if the parent left behind is the guardian;
- a parenting order granting the applicant day-to-day care of or contact with the child or imposing a condition that the child should reside in a particular country;
- an obligation to comply with a parental order¹⁰.

When considering such applications (and in fact in all proceedings under the *Children Care Act*, with the sole exception of applications relating to the *Hague Child Abduction Convention*), the court must always decide the case in the best interests of the child. Therefore, it would only order the return of the child to the original jurisdiction if it considered that such a judgment was in the best interests of the child. In a situation where the child has been removed from New Zealand to a country not covered by the *Hague Child Abduction Convention*, the remedies available to the parent remaining in the country of abduction are very limited. In the case of *Jayamohan v Jayamohan*¹¹, the court held that where children have been unlawfully taken from New Zealand, but the abductor remains within the jurisdiction, the High Court may

¹⁰ <http://www.nzlii.org/nz/journals/VUWLawRw/2016/2.pdf> (accessed on: 19.09.2023, 19:00).

¹¹ See the judgment in the case of *Jayamohan v Jayamohan* [1996] 1 NZLR 172.

issue a writ of *habeas corpus* ordering the abductor to bring the children back to New Zealand, and he or she will be brought before the court on a charge of unlawful abduction of minors. If the abductor is not in New Zealand, the parent to whom the child has been abducted is usually required to have a lawyer appointed in the country to which the child was taken, and the case is proceeded with under the laws of that country¹².

In the case of *H v J*, the abduction took place in India and both parents returned to New Zealand. Gendall J exercised the court's guardianship jurisdiction, which stated that: "[...] the jurisdiction to designate children in the care of the Court [...] clearly exists where the parents are present in the area of jurisdiction in which the child or children are New Zealand citizens and are resident in New Zealand, deriving their place of residence from the place of residence of their parents"¹³. Since then, guardianship jurisdiction has been used in several more cases. However, the applicability of this measure is limited by the scope to which the justice system in a country not covered by the *Hague Child Abduction Convention* is prepared to enforce the New Zealand court's judgment and order the return of the child to New Zealand¹⁴.

The specific regulation of the child's legal position in New Zealand is the granting of permission to remove the child from the jurisdiction. Relocation of children, whether in New Zealand or overseas, is a custody decision and cannot be made unilaterally by one guardian. Therefore, a parent intending to relocate the child must obtain the consent of the other guardian or guardians to do so. Otherwise, they are expected to apply to the court under the *Care of Children Act* for permission to move. If consent is not obtained prior to the transfer, it is highly probable that, on the application of the non-consenting parent or guardian, the court will order the child to return to the original residence. When hearing applications to transfer children, the paramount consideration for the court is always the welfare and best interests of the child. Some of the factors to be considered in determining best interests include the continuity of the child's relationship with each parent and their wider family group, the child's safety and the maintenance of the child's cultural identity. The court's investigation is extremely detailed and multi-faceted. It is inappropriate to attribute presumptive weight to one or more factors, and it is inappropriate for the court to apply one 'universal' checklist in determining relocation cases.

¹² <https://www.international-divorce.com/ca-new-Zealand.htm> (accessed on: 19.09.2023, 19:00).

¹³ See the judgment in the case of *H v J* [1997] NZFLR 307.

¹⁴ <https://www.justice.govt.nz/family/family-court/what-to-expect-at-the-family-court/what-happens-at-family-court/> (accessed on: 18.09.2023 19:00).

This means that it is frequently impossible to predict the probable outcome in a particular relocation case¹⁵.

In any disputed relocation case, the court may appoint a lawyer for the child or children if it has concerns about the safety or welfare of the child and considers it necessary to appoint one (Section 7 of the *Care of Children Act*). The child or children must be given the opportunity to express their views and the court must take them into account. The parent who is reasonably concerned that the other parent or guardian is proposing to take the child out of New Zealand without the consent or permission of the court may apply to the court for an order preventing the removal of the child from the jurisdiction and for a Border Alert. The Border Alert function places a computer alert at every international airport in New Zealand, the purpose of which is to prevent the child from passing through customs in New Zealand. It therefore serves as a practical and highly effective means of preventing their removal from the jurisdiction¹⁶.

¹⁵ See the judgment in the case of *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

¹⁶ <https://www.justice.govt.nz/assets/border-alert-request.pdf> (accessed on: 18.09.2023, 19:00).

Summary

The family court hears cases on a wide range of issues. It includes, but is not limited to, child custody and protection, adoption and surrogacy, separation, property in a relationship, wills, domestic and sexual violence, child abduction, mental health and child support. The present paper focuses only on selected themes relating to the title issue.

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