Greatest hits of child law 2010

By Maria Kazmierow, barrister and mediator

As we enter 2011, a retrospective of 2010's case law beckons. Last year produced a number of high-profile and noteworthy decisions.

Relocation and appeal rights

Kacem v Bashir [2010] NZFLR 884 concerned a mother's application to relocate to Australia. The key issues from the substantive relocation matter was whether the task of identifying and weighing up the relevant factors in section 5 of the *Care of Children Act* 2004 had involved the Court of Appeal allocating a particular weight to some parts of section 5 over others. In particular, this concerned principle (b), which appeared to be contrary to the "highly individualised" nature of the inquiry, and the need for "identification and weighing of all factors".

The majority of the Supreme Court regarded the Court of Appeal to have made erroneous statements of the presumptive weight of principle (b). However, the Supreme Court found "that the Court's erroneous statements ... were not carried into its reasoning when the Court evaluated the facts of this particular case". In other words, the decision, if remitted back to the Court of Appeal, would not change the outcome.

confirmed) the application of the principles of *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 in general appeals from decisions of the Family Court, noting at [31]-[32]:

> "The Court correctly observed that on a general appeal of the present kind the appellate court has the responsibility of considering the merits of the case afresh. The weight it gives to the reasoning of the court or courts below is a matter for the appellate courts assessment... [T]he High Court was required to reach its own conclusion, but this did not imply that it should disregard the Family Court's decision. What, if any, influence the Family Court's reasoning should have was for the High Court's assessment...
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> "[T]hose exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgement."

However, the Court observed that the principles in *May v May* (1982) 1 NZFLR 165 (CA) apply if the appeal is against a decision made in the exercise of a discretion.

The Court noted that the distinction between a general appeal and an appeal against a decision made in the exercise of a discretion is "not altogether easy to describe in the abstract". The Court clearly identified that the Family Court was not exercising a evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment" (at [35]).

Senior counsel Mark Vickerman voices concerns on the impact of *Austin, Nichols*, and its Supreme Court confirmation in *Kacem v Bashir*. "There must be concern that the more expansive approach to the appellate function will lead to parties seeking to effectively retry the case and for appellate judges to succumb to that without the benefit of all the dynamics of viva voce evidence in a full trial. If that happens, and there is some evidence that it is, the appeal courts will find their workload increases significantly at the costs of certainty and the integrity of trials at first instance. A change only warranted if there has been a loss of faith in the ability of first instance judges to make correct decisions. But, if so, an inadequate remedy."

International child abduction and habeas corpus

Kaufusi v Klavenes (High Court, Auckland CIV-2010-404-5635, 1 September 2010, Justice Rodney Hansen) involved an application by Ms Kaufusi under the New Zealand *Habeas Corpus Act* 2001 (HCA) for a writ of habeas corpus, so that the children would be released from their father's care in New Zealand to return to Tonga. A Tongan custody order determined care arrangements for the children, who had been removed from the Tongan jurisdiction. The father's detention of the children breached this order. The Tongan Supreme Court ordered Klavenes to return the children to

Child Abduction. The HCA enabled the mother to apply to have the children returned to Tonga from New Zealand.

A number of issues were raised in proceedings. First, as the unlawful detention commenced outside New Zealand, was there jurisdiction for the writ? Justice Rodney Hansen found there was nothing in the case law "to suggest that a writ may not issue ... regardless of whether unlawful detention first took place in a foreign jurisdiction" (at [14]).

Second, his Honour was bound to determine whether the detention was unlawful pursuant to section 14 of the HCA, and could not apply section 13 (referring the application to the Family Court) without having done so.

Third, the appointment of a lawyer to represent the children in such applications was not necessary, given the narrowly focused determination to be made (lawful or unlawful detention), as there was no enquiry into the best interests and welfare of the children.

The fourth issue was whether the Court should invoke section 13 and refer the application to the Family Court or Tonga as the appropriate *forum conveniens*. His Honour found there had been unlawful detention of the children by Klavenes in New Zealand in the face of a Tongan custody order. The correct forum to determine the best interests of the children was Tonga, given that there were ongoing custody proceedings there, and that the children had only been in New Zealand for a short time. The writ was granted.

Judicial review – *ex parte* custody orders – unborn children

In *CLM v Chief Executive, Ministry of Social Development & Ors* (High Court, Auckland CIV-2009-404-7117, 28 June 2010, Justice Harrison), the Ministry of Social Development (MSD) applied on an *ex parte* basis for an interim custody order, seeking that the mother's unborn baby be placed with approved caregivers, within 24 hours of birth. The mother was granted one hour's supervised access weekly, after placement.

Upon being served with the order, the mother applied to set aside the order, and the Family Court ordered a new interim custody order in favour of MSD, but on different conditions. The placement of the still unborn child was to be with the mother, under full oversight and residential care.

The mother judicially reviewed the actions of MSD and the Family Court. She sought a declaration that both had breached her entitlement to natural justice (common law and section 27(10) of the *New Zealand Bill of Rights Act* 1990 (NZBORA)) and an order for costs to be fixed on an increased or indemnity basis. The declaration was granted, and costs were awarded on a 2B basis.

The issues were essentially:

1. Was MSD justified in applying without notice for an interim custody order?
2. Did the Family Court have grounds to make the order on that basis?

In other words, was the test met, that the delay caused by applying on notice would or might entail serious injury or undue hardship or risk to the personal safety of the child?

The Court found that the power to make an *ex parte* order must be "used with great caution and only in circumstances in which it is really necessary to act immediately" (at [31]). Full and accurate disclosure was necessary in any without notice application.

MSD's decision to apply *ex parte* and to remove the child from the mother entirely was based on financial resource constraints within the Ministry, rather than this being a best interest consideration for the child. The consequences of this decision were likely serious and draconian. The "biological bond would be severely if not irreparably damaged by the state's forceful intrusion in removing the baby from her mother" said the Court (at [35]), and was contrary to section 5(b) of the *Children, Young Persons, and their Families Act* 1989 (CYPFA).

The circumstances had to be "truly exceptional, such as might show that the unborn baby's health and welfare was at immediate risk ... if an order was not made urgently, to justify depriving CLM of the right to be heard on this most fundamental of questions" (at [36]).

His Honour found that while there were clear care and protection concerns, there was no immediate danger to the child when the application was filed. Particularly, the social workers were aware of the mother's intention to keep her child, and up until the *ex parte* application, they did not propose the child being removed from the mother's custody. There was no particular urgency associated with the application.

Concerns were expressed about the decision-making process in the Family Court for *ex parte* orders. There was nothing to indicate that the Judge had considered why this particular application should proceed without notice to the mother, and without an alternative being explored. Justice Harrison suggested that the Family Court may be assisted if counsel making applications were required to file a supporting memorandum, fully explaining the legal and factual basis for the application without notice, creating "its own discipline on counsel, emphasising the duty to identify precisely the particular fact-specific ground which justifies dispensing with notice" (at [50]).

Adoption orders and de facto heterosexual couples

In *Re Application by AMM & KJO to adopt a child* [2010] NZFLR 629, a heterosexual couple in a 10-year, de facto relationship jointly parenting a child wished to adopt the child. The male was not the biological father, the mother was the natural mother, but the *Adoption Act* 1955 required a joint application from spouses.

The issue was "whether the court is able to do something about it, by giving 'spouse' a wider meaning" (at [10]). In particular, did section 6 of NZBORA permit the Court to give "spouses" a wider meaning than husband and wife, married (as per the *Adoption Act*), permitting a de facto, opposite sex couple to adopt?

The Court concluded at [50]:

> "[A] meaning more consistent with the right to freedom from discrimination can be found. It is to interpret 'spouses' as including de facto couples of the opposite sex. Although not the meaning that was intended at the time of enactment, it is a meaning that is consistent with the purposes of the Act, is not a strained meaning of 'spouse', and is workable within the other parts of the Act. It will have quite limited consequences beyond the area of adoption."

The Court referred to a number of statutes where spouse was defined to include de facto couples in support of this, and acknowledged that Parliament may well wish to correct the discrimination in its own time frame, before saying "we have come to the view that our task is to alleviate the discrimination now to the extent possible" (at [72]).

Family group conference privilege

In *H v H* [2010] NZFLR 821, the applicant sought a protection order, and provided evidence of domestic violence and the necessity for the order from an audiotape of a family group conference (FGC). FGCs are privileged, through section 37 of CYPFA. The evidence for the protection order application appeared inadmissible.

Judge Adams ruled on the extent of the privilege created by section 37. In particular, he considered the circumstances where an item is not "information, statement or admission". In this situation, "the behaviour of charging at another person is not within that exception", and is admissible (at [32]). He then considered "any information or statement or admission disclosed or made, but not in the course of [an] FGC". His Honour concluded at [36]: "Arguably upon a narrow interpretation, utterances which fall outside the purpose (or functions) of the [FGC] may not be protected."

Judge Adams then considered "criminal behaviour and domestic violence". His view was that the section should not be interpreted so that "an attendee can commit criminal offences with impunity, protected by the privilege" (at [38]).

"Domestic violence is a serious social concern," he said at [39]. "Where an attendee uses the cloak of privilege for the purpose of serious domestic abuse, that may raise a public interest in addition to the private interest of the person who suffers abuse."