Greatest Hits of Child Law 2009

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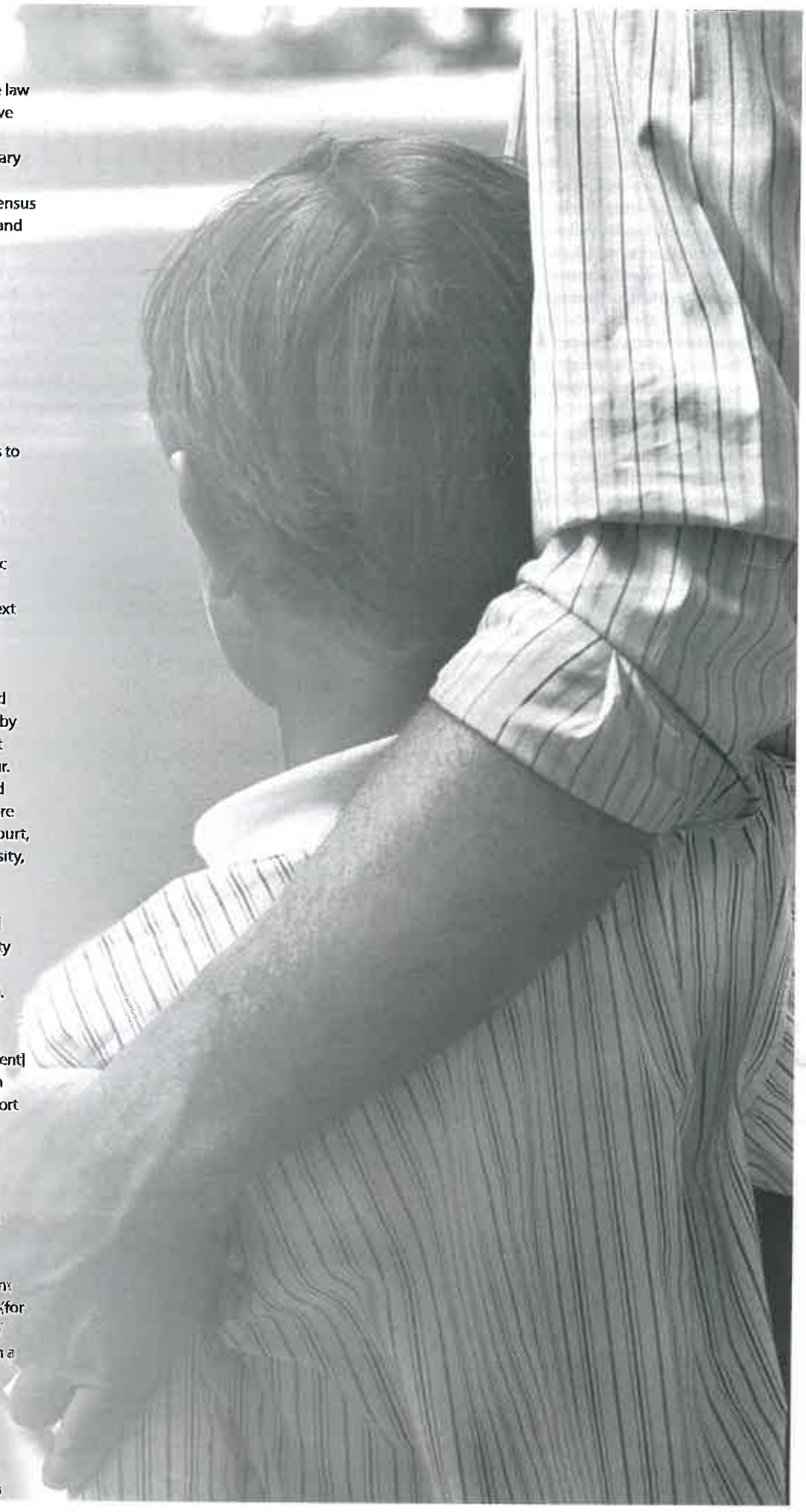
As we enter 2010, a retrospective of last year's case law beckons. A number of authoritative and innovative decisions were produced in 2009 covering the spectrum of the non-relationship property and monetary cases. Many cases were worthy of publication in this column. The cases selected for overview reflect a consensus of opinion from a non-representative range of judges and senior members of the Family Court Bar.



Are protection orders necessary?

Surrey v Surrey [2010] NZFLR 1, a decision of Justices Glazebrook, Robertson, and Arnold, is the seminal determination of the "necessity" test in section 14(1) of the *Domestic Violence Act* 1995 (DVA). It ensures that the threshold is reflective of the statutory objects and considerations, and is not set so precipitously high that victims of serious domestic violence fail to obtain orders to protect them from future violence.

The facts in this case involved physical, sexual, and psychological abuse, both pre- and post-separation, to the wife, from 1992, and increasingly serious physical and sexual abuse from 2006-2007. Findings of domestic violence were also made with respect to the couple's daughter, who had received a sexually inappropriate text message from her father.

In the Family Court, Judge Costigan directed that a Final Protection Order be granted. On appeal in the High Court, Justice Fogarty held that what was required when assessing necessity is a forward-looking analysis by the Court, including an assessment of whether the past abuse was "situational" and therefore unlikely to reoccur. In his Honour's view, a protection order can be declined even where an applicant's fears about future violence are reasonable (at [35] of *S v S* (16 September 2008, High Court, Christchurch CIV 2008-409-686)). In determining necessity, he also imported *Care of Children Act* 2004 (COCA) considerations (sections 59-60).

Justices Glazebrook, Robertson, and Arnold determined the test for necessity had been misconstrued. Justice Fogarty "effectively (and wrongly) placed a burden on Mrs S to prove that violence was likely to occur in the future" (at [36]). Applicants were only "required to prove . . . the existence of the past violence and a reasonable subjective fear of future violence. An evidential burden then passed to [the respondent] to demonstrate factors weighing against the necessity of an order" (at [77]). It was also found that it was incorrect to import COCA considerations when determining whether or not a protection order is necessary.

In their Honours' view, while reasonable fears that violence will reoccur cannot automatically lead to the making of a protection order, "where a victim's fears are based on having been subjected to a pattern of recent serious domestic violence, ...it is unlikely that a Court could rationally refuse to grant a protection order, absent very strong indicators that the order was not necessary (for example because the perpetrator is imprisoned with no possibility of contact or alternatively is hospitalised with a serious illness or some such matter)" (at [37]).

The Court of Appeal opined at [38]-[40]:

> "The assessment of necessity under section 14(1)(b) requires a broad-based assessment by the Court of the need for protection in the future, having regard to both

the objects of [the DVA] and the statutory factors set out in [section] 14, as well as any other relevant factors…

"[T]he level of risk of future violence will obviously be a relevant factor in assessing necessity. The [DVA] does not, however, envisage that there will be a full inquiry into risk levels with associated detailed expert evidence. That would be inconsistent with the requirement in [section] 5(2)(b) … that access to the Court should be as speedy, inexpensive and simple as is consistent with justice. The ascertainment of future risk is in any event a notoriously difficult exercise, even with expert evidence and the use of risk assessment tools…

"In our view, the scheme of [the DVA] envisages that the Court will assess the risk of domestic violence on the basis of past conduct, informed by the subjective views of the victim and any other relevant factors. It is implicit in [sections] 14(1)(a), 14(5)(a), and 14(5)(b) that the nature and seriousness of past domestic violence is relevant to assessing whether an order is necessary for the protection of the applicant, or a child of the applicant's family, in the future. It is also relevant under [section] 14(3) to consider if there has been a pattern of past violence. This is understandable. The single most robust predictor of future violence is a history of multiple prior offences…"

This landmark decision offers certainty, clarity, and consistency with statutory considerations and objects in defining the necessity test. It would appear to give hope to clearly deserving applicants who have suffered serious recent domestic violence, by emphasising the importance of the subjective view of the applicant and the importance of a pattern of past violence in determining risk. It offers victims of violence a realistic prospect of obtaining a necessary order.

Article 15 of the Hague Convention

In *Fairfax v Ireton* [2009] NZCA 100, the Court of Appeal addressed issues relating to a child's removal to Australia by his mother, following an Australian Central Authority Article 15 request as to whether the child's removal was wrongful within the meaning of Article 3 of the *Hague Convention on the Civil Aspects of International Child Abduction*. The issue was whether an Article 15 request enabled the Australian Courts to request a New Zealand domestic law opinion, or whether it permitted a determination of whether the removal was wrongful. Space constraints prevent this important case receiving the detailed and lengthy consideration it deserves.

Guardianship and death

In *Re Chief Executive, MSD v TS & SB* (16 November 2009, High Court, Auckland CIV 2004-404-3116), Justice Heath grappled with the issue of whether a Court can order guardianship of a child to be ongoing after death, to ensure the respectful disposal of that child's mortal remains.

This case dealt with a tragic situation of a child so terribly abused that he suffered severe brain damage inflicted by his mother, and was only able to respond to other human beings by touch. He was placed under the guardianship of the Court. During late 2009, the child's health deteriorated and it was feared he might die imminently. There was concern that if he were to die, there would be conflict between family members as to what should become of his remains. Lawyer for the Child sought a court order to resolve, in advance, that potential conflict.

The issues that arise from this application were:

- Jurisdiction: does Court-ordered guardianship end on death?
- If jurisdiction were to exist, and if the exercise of this jurisdiction was discretionary, in the circumstances, should any order be made?

On the issue of whether there was jurisdiction to make such an order, Justice Health identified three potential sources of jurisdiction:

1. By the Court making orders, as the child's guardian, under COCA;
2. The residual *parens patriae* jurisdiction of the High Court; and
3. The ancillary jurisdiction exercised by the High Court, in relation to the administration of estates.

The Court held that COCA was not of assistance. "None of the guardianship obligations, duties or responsibilities articulated in [COCA] are apt to deal with events that occur after death" (at [44]).

His Honour saw both two and three as being part of the High Court's inherent jurisdiction. In Justice Heath's analysis, inherent jurisdiction should be

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