Family Files

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Greatest Hits of Child Law 2011

As we enter 2012, a retrospective of 2011's case law beckons. Last year produced a number of high-profile and noteworthy decisions. Many cases were worthy of publication in this "Greatest Hits 2011" column. A selection of those of particular significance is noted below, with reference to other "great cases", which column space does not permit to expand on.

Court of Appeal

Intent and breach of parenting order

A test case, *New Zealand Police v K* [2011] NZCA 533 (21 October 2011), explored the legal issue of whether there was a mental element to be proved in order to prove a breach of a parenting order under section 78 of the *Care of Children Act* 2004 (COCA). Specifically, was proof of motivation to breach required, or was it sufficient to prove knowledge that the breach would result in non-compliance?

K had been charged and convicted in the District Court for a breach of a parenting order under section 78. That section makes it an offence to contravene or prevent compliance with a parenting order "without reasonable excuse and *with intent* to prevent a parenting order from being complied with" (emphasis added).

K appealed the convictions to the High Court. The appeal was allowed. The High Court said that the words "with intent to prevent a parenting order from being complied with" suggested a "high threshold". The informant had to prove the defendant's motive was to place himself in breach, ie beyond intentional breach.

The Court of Appeal rejected this. The Court noted that section 78 immediately followed a subpart of COCA entitled "making parenting orders work". Making parenting orders work supports the statutory paramountcy of the best interests and welfare of children. This was a clear legislative policy consideration (at [34]).

This part of COCA gave the Court and parties a range of options for making an order work. One option was the offence provision in section 78.

In this context, the Court found there was nothing in section 78 to introduce a requirement that the prosecution prove the motive of a defendant charged with contravention of a parenting order.

The Court held at [35] that the intention element in section 78(1) only requires proof that the defendant deliberately did an act (or deliberately omitted to do something) which breached or prevented compliance with the parenting order and the defendant knew that the relevant act or omission would result in the order being breached.

The prosecution did not have to prove an added element or intention that the defendant's motive or purpose was to breach the parenting order. This was contrary to the legislative policy considerations.

High Court

Jurisdiction to suspend guardianship rights

JS v CR (High Court, Auckland CIV-2011-404-2711, 26 October 2011, Justice Woolford) was an appeal against a Family Court order suspending the appellant's guardianship rights for a two-year period. The order was made pursuant to sections 16(3) (exercise of guardianship) and 56(1)(c) (variation and discharge of parenting orders) of COCA. It was made without there being any application by any eligible person to remove, suspend, or vary guardianship rights.

The Family Court Judge, when making the order, noted that the stringent tests under section 29 of COCA (court may remove guardian) could not be met. However, the Judge considered that subsections 16(3) and 16(4) provided the jurisdiction to make the order to enable the Court to tailor appropriately the ongoing relationship between the parents as guardians. This was reinforced by section 56(1)(c), which permitted the Court, on application, to vary or discharge an order about the upbringing of a child. The Judge concluded that guardianship status was an order about the upbringing of a child and could be suspended.

The decision was appealed as being without jurisdiction and contrary to established principles under COCA. In response, it was argued that there was an unfettered discretion under section 48(5) of COCA to make a parenting order subject to any other terms and conditions the Court determines.

The High Court allowed the appeal. Justice Woolford found the Family Court Judge "exceeded his jurisdiction in purporting to suspend the appellant's guardianship rights. Guardianship is a fundamental right of a parent. Section 16(3) cannot be interpreted as conferring on the Court a general power to deprive a parent [of] guardianship rights, even temporarily, without applications, prescribed procedures or specific guidelines" (at [20]).

The Judge noted guardianship rights can be removed, varied, or suspended under COCA via section 29. That power was not available under section 16.

Further, section 56(1)(c) provided a power to "vary or discharge … an order about the upbringing of a child". There was no order in place to vary or discharge in this case. Section 56 is available on application by an eligible person. There was no application for the suspension of JS's guardianship rights by an eligible person as defined in section 56(3) of COCA.

Section 48(5) gave no unfettered discretion to suspend JS's guardianship rights. Although a parenting order could extend to certain matters of guardianship, it could not include the deprivation of a parent of guardianship of his or her child.

Justice Woolford quashed the order suspending guardianship rights and obligations, and remitted the order to the Family Court to rehear argument on the parenting plan.

Consent Order cautions

In *GEH v Family Court at North Shore and Auckland* (High Court, Auckland CIV-2011-404-81, 6 December 2011, Justice Venning), a consent order was made arising from a judge-led mediation conference. One party was legally unrepresented. The consent order included a clause that neither party would bring proceedings in future under COCA, except in the case of an emergency that put the children at serious risk (clause 12).

The consent orders were appealed on the basis that section 15(2) of the *Family Proceedings Act* 1980 (FPA) was breached (that provision allowed the conference to be adjourned until the unrepresented party had taken legal advice). Did that breach make the order invalid? A breach of section 15(2) was also grounds for appeal, on the basis it was inconsistent with section 4 of COCA (child's welfare and best interests paramount).

The High Court found that it was clear that section 15(2) of the FPA had not been complied with, as the appellant had not been represented. The appellant needed to expressly state he didn't wish legal advice on any consent order for that obligation to be discharged. The requirement that an unrepresented party have an opportunity of taking legal advice reflected a concern that parties not make decisions in haste, noted the Court at [39]. Although there was no evidence that the appellant had been improperly pressured into giving consent, those orders should be set aside as the breach of section 15(2) was absolute. However, as the consent order did no more than record orders which had been effectively made by the prior telephone conference, in this case, the absolute breach of section 15(2) did not have effect. Those orders remained valid.

Clause 12 of the consent order was held to be inconsistent with section 4 of COCA. There was no jurisdiction to make an order in terms of clause 12, and the Judge regarded it as offensive that it purported to exclude the jurisdiction of the Court (at [51]). Justice Venning held that, to the extent to which the 2011 orders relied on or followed the 2010 orders, they were set aside.

Family Court

Adoption Act, same sex civil union parents, and international surrogacy

An unusual adoption case, *Re An application by BWS to adopt a child* [2011] NZFLR 621, concerned an application to adopt by male civil union partners who were US citizens and New Zealand residents. They engaged a surrogate in the US, while living there. Two eggs, one fertilised by each applicant,

were implanted. Twin boy and girl babies were born in the US.

Prior to the children's birth, the Superior Court of California declared the applicants both to be the legal parents of the children. New Zealand immigration authorities would not allow the twins to remain in New Zealand unless the New Zealand Central Authority (Authority) approved. The Authority would not approve the children's immigration into New Zealand. The only way for the family to remain together in New Zealand (as had always been their intent) was to adopt the twins.

The issues were whether:

1. the *Adoption (Intercountry) Act* 1997 applied to these children;
2. consent to the adoption was required from the egg donor;
3. section 25 of the *Adoption Act* (prohibition of payments in consideration of adoption) had been breached;
4. special circumstances existed under section 4(2) of the *Adoption Act* 1995 (restrictions on making adoption orders) to justify the adoption of a female child by a male applicant; and
5. the requirements of the *Adoption Act* were satisfied, that the the applicants were fit and proper persons to adopt, and adoption was in the best interests of the children.

Judge Walker heard this highly unusual adoption case and allowed the applications.

Her Honour found the *Adoption (Intercountry) Act* did not apply, as the parents had always intended to return to New Zealand, where they were habitually resident. The children's habitual residence was not the US, as their habitual residence was determined by the intention of their parents, whose habitual residence was New Zealand.

On the issue of consent to the adoption, section 7(2) of the *Adoption Act* requires the consent of the child's parents and guardians. Parental status is determined by the *Status of Children Act* 1969, not the US court order declaring the couple the twins' parents. Under that Act, the egg donor was not a parent, and the consent to the adoption of the relevant legal parent – the surrogate – was properly obtained.

Payments that had been made to the US surrogate for the surrogacy and the costs associated with pregnancy did not breach section 25 of the *Adoption Act*. As the legal parents of the children in US law, the applicants had never intended or expected to adopt the twins. Given this, a breach of section 25 would not necessarily prevent the adoption proceedings.

Her Honour found that section 4(2) was enacted to protect female children from sexual abuse. Judge Walker found that society now recognises parenting forms departing from traditional paradigms. She accepted that special circumstances are more likely to be found where there is an existing family relationship. Special circumstances existed to justify the adoption, given this.

As there was no dispute that the applicants were fit and proper persons to raise the children, and that the adoptions were in the best interests of the children, the existence of immigration benefits did not in itself prohibit the making of an order, provided there were ancillary benefits flowing from the order which were independent of immigration. The orders would enable the twins to be brought up together with their biological fathers.

Her Honour noted that this case raised complex issues regarding surrogacy and gamete donation. She noted that the surrogacy arrangement could not have occurred in New Zealand, as it did not comply with the *Human Assisted Reproductive Technology Act* 2004. Law reform was necessary.

A number of other cases were of particular note, and are listed here for the interest of readers:

1. *Forum Conveniens*: *AND v MMN* (Family Court, Christchurch FAM-2011-009-341, 8 July 2011, Judge E Smith) – whether the Family Court or Subordinate Courts of the Republic of Singapore ought to have the jurisdiction to decide competing applications for day-to-day care of children.
2. *Hague Convention Cases*:
   (a) *AHC v CAC* (Family Court, Auckland FAM-2010-004-2326, 7 January 2011, Judge Twaddle), and the appeal, *AHC v CAC* [2011] 2 NZLR 694 (HC). The concept of 'anticipatory breach' was not challenged on appeal.
   (b) *PH, of Stirling, ACT, Australia, Father* v *SAC of Wainoni, Christchurch, Mother* (Family Court, Christchurch FAM-2010-009-2804, 24 November 2010, Judge E Smith).
   (c) *M-SCN v JAW* (Family Court, Rotorua FAM-2010-063-851, 28 February 2011, Judge MacKenzie).