Greatest Hits of Child Law 2009

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"viewed as a continuum" (at [56]). The continuum is from the beginning of life to death (administration). Whether inherent jurisdiction could provide jurisdiction depended on whether it was exercised in circumstances that fall within its proper scope and where there was no conflict with statutory or regulatory provisions. On that basis, "the existence of the continuum favours this Court's ability to do such things as are necessary to protect the interests of a living child, after death … and covers the very situation that has arisen in this case" (at [55]-[56]). Accordingly, jurisdiction was confirmed.

Justice Heath then considered whether the Court should exercise its jurisdiction. He examined domestic legislation which made reference to human remains. In his view, "in New Zealand, the need to treat human remains with dignity and reverence is reflected in both civil and criminal law" (at [59]). His Honour cited the United Nations' *International Convenant on Civil and Political Rights*, the *Coroners Act* 2006, and section 150 of the *Crimes Act* 1961. He also referred to decisions of the European Court of Human Rights, and other New Zealand and UK decisions.

His Honour decided to exercise his discretion to not make any order. "The question of prior entitlement to bury or cremate and determine the way in which human remains will be disposed of must be determined after death, in light of the circumstances prevailing at that time. It would be premature to make an order now, when it is unknown how long [the child] will live or whether (through some tragic event) [his paternal grandmother or] biological parents may predecease him" (at [80]).

Guardianship and contempt of Court

In 2008, Judge von Dadelszen referred *KLP v RSF* as a test case to the High Court under section 13 of the *Family Courts Act* 1980. Justice Joseph Williams provided the answer as to whether the Family Court had the power to punish a person for contempt of Court (not being limited to contempt in the face of the Court) in *KLP v RSF* (10 July 2009, High Court, Palmerston North CIV 2008-454-000817).

Justice Joseph Williams defined (at [7]) the three broad categories of contempt as:

- Contempt "in the face of the court" – refusal to comply with a lawful order or direction of the Court made during the course of proceedings in the courtroom or before the Judge him or herself;
- Contempt outside the Court involving statements or actions that might denigrate or undermine the authority of the Court; and
- Contempt outside the Court being wilful disobedience of a Court order.

In this instance, category three contempt was at issue. A parent had wilfully disobeyed an order for direction as to guardianship (schooling).

The High Court examined four potential sources for the power to punish for category three contempt:

- Statutory enforcement regime available to the Family Court.
- Express statutory references to contempt.
- Common law sources for power to punish for contempt.
- Provisions of general application – section 41 of the *District Courts Act* 1947 (DCA).

> "Even a few weeks delay in enforcing an order could well seriously impact on a child's well being and best interests"

It was agreed that there was an absence of express power to punish for contempt of a guardianship order under COCA, and other statutory references to contempt in the Family Courts' jurisdiction (*Family Courts Act* 1980, for example) did not assist. Common law sources were also examined, with reference to New Zealand and English authorities. In both instances, they did not assist with category three contempt.

The solution to Judge von Dadelszen's difficulty was found in section 41 of the DCA. Section 16 of the *Family Courts Act* imports most of the DCA's provisions, providing most of the relevant powers of the District Court to the Family Court. Section 41 is of particular relevance. It states:

> "Every Court, as regards any course of action for the time being within its jurisdiction, shall … in any proceedings before it:
> a) Grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional; and
> b) Give such and the like effect to every ground of defence or counterclaim equitable or legal, as ought to be granted or given in the like case by the High Court and in as full and as ample a manner."

Justice Joseph Williams commented (at [47]-[49]):

> "[T]he phrase 'relief, redress, or remedy' in [section] 41 is to be read in light of the fact that the interests of the subject child are the first and paramount consideration. The general jurisdictional wording is to be read in a manner that will best achieve that statutory purpose…
>
> "I am satisfied that it will often be in the interests of a child whose guardians are embroiled in a dispute, for the court to be able to move swiftly to enforce its orders. For example, if a parent unilaterally moves a child to another school, or even another district, in breach of an order of the Family Court, each day that passes has a potentially serious effect on the interests of that child. Leaving enforcement to an application to the High Court or a request of the Solicitor-General to bring enforcement proceedings may very well not be in the best interests of the child. Even a few weeks delay in enforcing an order could well seriously impact on a child's well being and best interests…
>
> "[T]he terms of [section] 41 are broad enough to encompass the ability to punish a party to proceedings for contempt if that party refuses to comply with a lawful order of the court."

Rights and custody

JKS v SLTS (22 July 2009, Family Court, Hamilton FAM 2008-019-1487, Judge Brown) concerned a US-based father seeking the return of a child. The twist – the child was *in utero* at the time of the mother's departure from the contracting state of origin. Could the father have rights of custody, in terms of the *Hague Convention on the Civil Aspects of International Child Abduction*?

Judge Brown held that seeking the return of a child born after departure is impossible pursuant to the Convention. "No evidence has been offered in support of this application that the state of Utah invests the father of an unborn child with a legal power akin to a right of custody before the child's birth" (at [21]).

His Honour also considered whether, after the birth of the child, it could be retained in breach of the father's rights of custody. His Honour found "for these rights of custody to have a legal consequence under the Convention the child must have been habitually resident in Utah at the date of his birth... It is quite plain that [the child] has never lived in the United States and has lived all his life in New Zealand … [his] country of habitual residence" (at [23-24]).

When is a smack physical abuse and "violence" under sections 58-62 of COCA?

On the facts of *P v K* (11 September 2009, Family Court, Christchurch FAM 2009-009-600, Judge Boshier), it was alleged that a baby was hit by its father from the age of seven months on numerous occasions – including an alleged occasion with an open-handed slap on the baby's thigh, leaving a red mark. The father admitted that he had used only light discipline – somewhere between a "tap and a smack". It was also alleged that an older child of the family had been hit with a horse whip and additionally two older children had been strapped as part of discipline.

The strapping and horse whip discipline were clearly abusive and violent. With respect to the baby, Judge Boshier noted that the force used here against a crawling baby of tender years did amount to violence and was abusive "by a slender margin" (at [27]).

His Honour order supervised contact, to be reviewed upon the father's completion of a stopping violence course and parenting course, and a demonstration of his commitment to non-violent behavioural management.