MEDIA PRESENTATIONS : STUART CUMMINGS

Interview with Mike Hoskings on Newstalkzb relating to a Court ruling on children's religion after parent's separation. See link: http://www.newstalkzb.co.nz/on-air/mike-hosking-breakfast/audio/stuart-cummings-court-rules-on-childrens-religion/

Interview "Privacy fear for DNA dragnet" See link: http://www.stuff.co.nz/national/8199938/Privacy-fear-for-DNA-dragnet

Interview: The Listener "Rough Justice" See link: http://www.noted.co.nz/archive/listener-nz-2005/rough-justice/

Interview: Radio Live "The Berryman Case" See link: http://www.radiolive.co.nz/DEMPSEYMP-Chester-Burrows-followed-by-barrister-Stuart-Cummings-on-the-Berryman-case/tabid/506/articleID/7252/Default.aspx

RECENT CASES : STUART CUMMINGS

Roundtree v Tipsanich - [2016] NZFLR 99, Maude J, 3 July 2015

Counsel for the respondent

Parenting orders -- Application to vary parenting orders -- Application brought within two years of decision on same issue -- Whether proceedings should be allowed to progress -- Whether material change in circumstances -- Mother alleging domestic violence incident -- Child suffering emotional distress -- Child suffering from epilepsy -- Psychologist report -- Care of Children Act 2004, ss 4, 133, 133(5), 133(6), 133(7) and 139A.

Case summary:

The parties were the parents of a six-year old girl. In February 2015, the Family Court, on receipt of without notice application by Hazel Roundtree (Ms Roundtree) to vary a parenting order made on 27 November 2014, placed the proceedings on the "without notice" track and directed that Phillip Tipsanich (Mr Tipsanich) had three days to file a defence to the application.

Mr Tipsanich observed that Ms Roundtree's application required leave to progress because it was brought within two years of a final decision on substantially the same issues as were dealt with when final parenting orders were made on 27 November 2014. Mr Tipsanich's oral application for a rehearing

of the February 2015 determination of the Court was granted. The only issue was whether the proceedings properly should have been allowed to progress. The application of Ms Roundtree could only progress if the requirements of s 139A of the Care of Children Act (the Act) were met.

Section 139A of the Act allowed the filing of an application in respect of a child within two years after a final direction or order in proceedings substantially similar to the proposed new proceedings if there had been a material change in the circumstances of any party to the previous proceedings or any child who was the subject of the previous proceedings.

Ms Roundtree alleged that an incident occurred at her daughter's school on 23 February 2015 involving the arrival of Mr Tipsanich at the end of her lunch break with then conflict, including verbal abuse and physical force, employed against her in their daughter's presence. The police attended the incident. Ms Roundtree later applied for a protection order but this was withdrawn as a result of Mr Tipsanich providing an undertaking. Ms Roundtree alleged that her daughter now suffered emotional distress in relation to the incident, including bedwetting, and that she had recently been diagnosed as suffering from epilepsy.

Held: (allowing Ms Roundtree's application to continue and calling for a psychologist's report)
In respect of Ms Roundtree's application, it was the allegation of the dispute that occurred in February of this year, the breakdown of maternal and paternal family cooperation, and the supporting evidence of emotional distress manifested in bedwetting that led to the conclusion that the requisite material change had been established. That decision was not an indication that after hearing the parties' evidence and weighing it there would necessarily be a change (see [33], [34]).

Roundtree v Tipsanich [2015] NZFC 5488, Maude J, 3 july 2015

Counsel for the respondent

Case Summary:
CARE OF CHILDREN - application for parenting orders - final parenting orders made November 2014 determining shared care arrangements for 6 year old child - without notice application brought February 2015 on substantially similar issues - within 2 years of final decision - whether material change in circumstances - meaning of material change - February 2015 application for protection order - application withdrawn following respondent giving undertakings - whether allegations made would, if accepted, amount to material change in circumstances - recent diagnosis of epilepsy in child not sufficient to trigger change - breakdown of wider family cooperation in parenting - incident of father's verbal abuse and use of physical force against mother at child's school - child's emotional distress manifested through bedwetting - presence of conflict to extent alleged would affect determination as to child's safety and welfare - s139A Care of Children 2004 threshold met.

Firth v Bright [2015] NZFC 5007, Burns J, 15 June 2015

Counsel for respondent

Case Summary:
CARE OF CHILDREN - unsuccessful application for admonishment - mid-2014 appeal against 2013 judgment dismissed - embargo placed on future litigation for 24 months - whether a backdoor application for variation - difficulties in interpretation of s139A Care of Children Act 2004 -whether it applied to enforcement applications - best wishes and interests of child means Court will accept a variation - date from which embargo period applied.

Leopold v Leopold [2015] NZFC 2876, Neal J, 10 April 2015

Counsel for applicant

Case Summary:
SPOUSAL MAINTENANCE - successful application for interim maintenance - parties married 1992 - separated 2013 - two children aged 17 (Edmund) and 12 (Kane) - Edmund lives with respondent father and parents shared Kane's care on equal basis - respondent assessed for child support of $547.40 per month and applicant's assessment of $74.30 in respect of Edmund - applicant sought $2000 per month spousal support for 6 months - Court considered authorities in respect of interim maintenance - accepted applicant's reasonable weekly expenditure to be $1560 per week - applicant's weekly income from all sources $536 per week - income of both parties not such that standard of living during the relationship should be the test - Court found respondent could pay $400 per week - multiple factors hindered applicant in working fulltime - main caregiver to children - need to be with children when respondent deployed away - applicant has begun retraining. HELD: order made that respondent to pay interim spousal maintenance of $400 per week for period of 6 months or until earlier final determination of substantive application.

DLR v P [2015] NZHC 603, Brewer J, 30 March 2015

Counsel for appellant

Case Summary:
RELATIONSHIP PROPERTY - partially successful appeal from FC decision - FC delivered a judgment deciding certain relationship property issues between the parties - Judge directed appellant vacate the family home within 42 days, however, appellant wanted $45,000 to enable her to do this, for which she needed the cooperation of respondent - position of respondent was that agreement was reached on basis appellant would discontinue her appeal and her claim for spousal maintenance - dispute as to whether agreement was reached - at issue was whether: - (i) the Judge was correct that the parties had settled their disputes; - (ii) the Judge was correct to order appellant to pay the costs of counsel assisting; - (iii) appellant was entitled to pursue a s15 Property (Relationships) Act 1976 claim; - (iv) if appellant still had a claim or claims she could bring, should the case be remitted to the FC or decided in the HC - parties to a litigation might end it by agreement - an agreement required a meeting of the minds (Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd) - terms of the agreement had to be enunciated and accepted by the parties - negotiations had to have ceased in the sense that there was nothing left for the parties to resolve before the agreement could be given effect. HELD: the parties, through their counsel, reached agreement - proposal, or offer, was made on behalf of appellant in 4 Nov letter - subsequent correspondence clarified intent and details, before final terms accepted with one proviso (that the payment be accepted in partial settlement of entitlements previously ordered by Court) - requirement appellant discontinue the proceedings was simply a term or provision of the agreement and not a condition that had to be met before the agreement could exist - requirement to discontinue the proceeding was not subject to a right in the hands of appellant to decline to perform it, no such stipulation was ever mentioned and could not be inferred - R207 Family Courts Rules 2002 did not provide jurisdiction to order a party to pay the costs of counsel appointed to assist the Court (cf HC pursuant to s99A Judicature Act 1908) - doubtful Judge had the jurisdiction to order appellant to pay the costs of assisting counsel (or to reimburse the State), but regardless, the order was void for breach of natural justice - appellant was not given notice of the Judge's intention to

consider ordering her to pay the costs of assisting counsel and she was not heard on the issue (it was not an issue without complexity) - while the parties agreed to settle the disputes that were the subject of their correspondence, there was no agreement that all disputes between the parties, present or future, were settled - fact the Judge permitted appellant to file an affidavit on her s15 claim and she did not, did not mean she abandoned her claim or that it could be struck out summarily - in the circumstances the s15 claim remained open (noted s24 provided time limits for making such applications) - Parliament conferred primary jurisdiction in this area on the FC and the outstanding matter (the s15 claim) had never been argued in the FC - appellant was not altogether bereft of responsibility for the lengthy and difficult passage of the case through the processes of the FC - Judge correct to decide the parties had settled their disputes - Judge erred in ordering appellant to pay costs of counsel assisting and order quashed - s15 claim appellant was entitled to pursue remitted to the FC for determination - Court declined to retain appellant's case in the HC - given mixed success of appeal, costs to lie where they fell.

VP v RH [2015] NZHC 260, Katz J, 24 February 2015

Counsel for respondent

Case Summary:
EVIDENCE - unsuccessful application to adduce fresh evidence on appeal - parties were the parents of a 6 year old daughter - FC declined appellant's application to relocate the child with her to Australia and appellant sought to adduce fresh evidence in support of her appeal pursuant to R20.16 High Court Rules - new evidence primarily (but not exclusively) related to the reactions of appellant and the child to the Judge's decision - most or all of the matters traversed in appellant's affidavit were "fresh" in that they could not have been put in evidence before the FC - key issue was accordingly whether the proposed evidence was material (likely to have an important influence on the outcome of the appeal) - regard had to factors in H v H, Cornwall Park Trust Board (Inc) v Chen, Belling v Belling, Cromwell Corporation Ltd v Sofrana Immobilier NZ Ltd and Sulco Ltd v ES Redit and Co Ltd - Coates v Bowden relevant.

HELD: appellant's affidavit unlikely to materially assist the Court in determining whether the Judge erred in concluding that it was in the child's best interests to remain in New Zealand, rather than relocate to Australia - a person's reaction to a FC decision would need to be fairly exceptional before it could constitute fresh evidence that would be likely to significantly influence the outcome of an appeal - appropriate course would usually be for the unsuccessful party to obtain whatever support or counselling was necessary to enable them to work through any disappointment and distress and ensure any emotional impact on the child was minimised - noted evidence regarding the immediate reactions of appellant and child was likely to be significantly out of date by the time of any adjourned appeal hearing, as was evidence that there had been some difficulties transitioning to the new access arrangements - allowing in the proposed new evidence would risk cutting across the principle in Telecom Corporation of New Zealand Ltd v Commerce Commission where the Court disapproved of any notion that an appeal should be regarded as a new trial with the previous hearing acting as a "dummy run" - further, even if the new evidence did meet the materiality threshold the more appropriate course would probably for appellant to seek leave to reopen the relocation issue in the FC under s139A Care of Children Act 2004 - application for leave to adduce fresh evidence on appeal dismissed - costs reserved (preliminary view respondent would normally be entitled to costs on 2B basis)

Palmer v Holm [2014] NZHC 2268, Gilbert J, 18 September 2014

Counsel for respondent

Case Summary:
CARE OF CHILDREN - unsuccessful appeal against FC decision restricting appellant's contact with his alienated son (M), now aged 9 years - in the FC, appellant had sought an order placing M in his day to day care, proposing to support this transfer with a programme to be provided by Professor Richard Warshak (Prof W), an expert based in the United States (US) who specialised in assisting children to re establish their relationship with an alienated parent - at issue was whether the Judge: - (i) failed to evaluate properly the advantages and disadvantages of the three available options contrary to s5 Care of Children Act 2004 and Kacem v Bashir; - (ii) made material factual errors in reaching conclusion as to what was in M's best interests; - (iii) failed to take into account a number of material matters; - (iv) took irrelevant matters into account in determining appellant's ability to care for M; - (v) placed undue weight on impact of respondent's emotional state on M; - (vi) was wrong to conclude that the orders he made were in M's best interests.
HELD: (1) s5: - the Judge recognised that, to the extent reasonably possible, any orders for care and contact should meet the principle in s5(e) that a child should continue to have a relationship with both of parents - however, all relevant circumstances had to be considered, including the efficacy of any proposed order - in this case, despite various orders made in the FC from May 2009, it proved not possible to maintain a regime facilitating regular face to face contact between appellant and M - of the 49 scheduled visits between Jun 2010 and Apr 2012, only seven proceeded and there had been no face to face contact since Dec 2011 - although some criticisms were made of the role of Child Youth and Family (CYFS) in contributing to this outcome, it was plain that the biggest obstacle was M's persistent refusal to participate - in these circumstances it would serve no useful purpose to make yet more orders for face to face contact - Judge was correct in his conclusion that more significant intervention would be required to enable a relationship to be established between appellant and M - in light of evidence of Prof W and Dr S (court appointed psychologist), and the failure of prior contact orders to achieve their intended objective, further orders requiring similar such contact, supervised or unsupervised, would be extremely unlikely to succeed - the attempted implementation of any such orders would also carry a high risk of creating further hostility and dispute, contrary to M's best interests and welfare - would have made no difference in what order the Judge chose to consider this option because it was clearly not viable; - (2) alleged factual errors: - Judge did not make any material factual error concerning the length of time the parties had lived together following M's birth - the Judge did not purport to determine this disputed issue and did not need to - Prof W's programme was not suitable for all children who rejected a parent and for this reason a number of enrolment prerequisites had been established - in particular, children were not generally accepted into the programme in cases such as this where the Court found the child's relationship with the rejected parent was severely damaged but that, overall, it was in the child's best interests to remain with the favoured parent - was clear the Judge had a good appreciation of the nature and aims of the programme, its content, the success achieved with it, and the literature to support it - even though the Judge was wrong in thinking that appellant had applied to the Court for an order permitting him to take M to the US, this error did not have any material influence on the outcome; - (3) failure to take account of material matters: - clear that the Judge was concerned about the risk to M of ongoing alienation from his father - Judge had to balance this risk with the risks associated with removing M from his mother's care and prohibiting contact with her for sufficient time to enable the process discussed by Prof W to run its course - clear the Judge did not draw any adverse inference from appellant's decision not to continue his sessions with C, a psychologist he had met with to provide him with parenting advice - fact that logistical difficulties with CYFS played a part in the failure of some visits could not obscure the fact that a continuation of the existing orders was doomed to fail because of M's

entrenched attitude - in these circumstances there was no substance in appellant's complaint that the Judge should have referred in his judgment to the problems attributable to CYFS as a material consideration in reaching his conclusion - Judge did take into account the evidence of S, the child psychologist who assessed appellant's parenting skills; - (4) irrelevant matters: - no substance to this ground of appeal; - (5) undue weight on respondent's emotional state: - the Judge did not take respondent's distress into account as a factor weighing in her favour - on the contrary, the Judge viewed it as a negative factor in respondent's parenting which was causing M harm - the Judge recognised the potential benefit to M of appellant's alternative care proposal which was intended to enable M to have an ongoing relationship with both his parents - ultimately however, the Judge rejected this proposal because he considered that, in all the circumstances of this case, removing M from his mother and placing him in the care of his father, with whom he had little relationship, posed an unacceptable risk of causing M even greater harm; - (6) assessment of M's best interests: - no doubt M would continue to suffer as a result of not having a normal healthy relationship with his father - if M remained in his mother's care, the alienation and consequent harm was likely to continue - potential benefit to M through embarking on intervention discussed by Prof W had to be balanced against the harm he would undoubtedly suffer if he was suddenly removed from his mother's care against his will, prohibited from having any contact with her, and placed in appellant's sole care, at least temporarily - given the present state of M's relationship with appellant and his strong opposition to having any contract with him, this option would be highly disruptive and extremely distressing for M - the psychologists did not support proposal for a temporary reversal of care combined with participation in Prof W's programme - this was a difficult case to which there was no perfect solution - as the Judge recognised, each proposed option carried the risk of harm to M - in the particular circumstances of this case, the potential benefits to M of attempting to overcome the alienation by following this approach were outweighed by the significant harm that M would inevitably suffer from making such an attempt; - (7) result: - appeal dismissed.

LVB v PJG [2012] NZFC 9594, Burns J, 5 December 2012

Counsel for applicant

Case Summary:
CARE OF CHILDREN - unsuccessful application by mother for 12 year old child to travel overseas from New Zealand to Canada for six weeks - re-establish contact - mother lived in Canada - long history of litigation between parties - earlier proceedings found against allegations by mother that father sexually abused children - children alienated by mother - sabotaged relationship between children and paternal family - history of unilateral decisions made by mother - whether child at risk trip allowed - non-return to New Zealand - Hague Convention Proceedings - interruption to schooling - exposure to mother's worldview - potential for psychological difficulties - possible further allegations - failure of mother to undergo therapy and counselling as agreed - no evidence of change in attitude or behaviour - required reintroduction period between mother and child unable to occur in Canada - welfare and best interests of child - protection of child's safety from all forms of violence - psychological safety included.
HELD: application dismissed - no further contact until mother returned to New Zealand and underwent process consented to in orders made Dec 2010 - counsel to advise Court of costs incurred - order for contribution to be made against mother.

CPH v LP [2012] NZFC 3660, Southwick J QC, 25 May 2012

Case Summary:
CARE OF CHILDREN - unsuccessful application by mother to dismiss father's applications for parenting orders - finding that mother consciously and unconsciously alienated child (7 years old) - final order in 2010 placing day to day care with mother and child to remain under guardianship of Court - contact problematic since 2008 - delay in review of 2010 orders - s140 Care of Children Act 2004 power to dismiss proceedings - no live application, only orders made subsequent to application - father had not filed any applications since 2010 when mother unsuccessfully sought order restricting his ability to file - paramountcy principle - child's right to relationship with both parents.
HELD: no jurisdictional basis for mother's application - even if basis, threshold in s140 not met - no on-going role for Lawyer to Assist Court.

MPH v TMS, FAM-2007-011-000017, Lindsay J, 13 January 2011

Case Summary:
CARE OF CHILDREN - successful application by father for contact concerning child (4 years old) - proceedings filed in 2007 - interim orders made in 2008 with substantive hearing to take place when child turned 5 - mother unreasonably resisted extending contact - Judge anticipated contact would be increased within year - father never missed contact - overnight fortnightly - mother unrelenting in finding fault with father - different parenting styles and tension in parental relationship
HELD: need for continuity and stability for child best achieved by spending more time with father on graduated basis - by April, child to be spending 1 week in 3 with father - directions for filing affidavits for substantive hearing including schooling, contact and medical matters - updated psychologist report called.

MPF v CJF, FAM-2009-044-000001, Ryan J, 17 June 2010

Case Summary:
RELATIONSHIP PROPERTY - unsuccessful application for leave to bring application out of time in substantive proceedings pursuant to s24(2) Property (Relationships) Act 1976 - respondent cross-applied for an order for security for costs - seminal authority on s24(2) was Beuker v Beuker - no burden of proof in proceedings under the Act but Court to be satisfied to civil standard as to nature and extent of relationship property pool and existence of a certain state of affairs - at separation applicant adjudicated bankrupt and family home transferred into a family trust to protect against creditors to which both parties were discretionary beneficiaries and their children were the final beneficiaries - respondent claimed shares in her business were separate property - parties jointly owned valueless shares in X company and two vehicles - significant liabilities resulted in negative equity situation - whether or not to exercise discretion to grant leave related to doing justice between parties - fact applicant might have been entitled to X amount to be balanced against fact that at separation applicant was bankrupt and it was actions of respondent's father that parties retained any assets - no relationship property from which compensation could be paid
HELD: more likely than not a successful claim could be brought by respondent for compensation under s18B for post-separation contributions - leave to bring application refused - no order as to costs

EPK v TGB, FAM-2001-090-001013, Mather J, 5 March 2009

Counsel for respondent

Case Summary:
RELATIONSHIP PROPERTY - successful application for orders pursuant to s25(3) and 33(3)(c) Property (Relationships) Act 1976 for an interim distribution of relationship property by way of house contents fixed in value for the purpose of the application at $210,000 pending final distribution of relationship property following prior substantive Court decision and on the basis that the respondent had failed to comply with prior agreement to vest house in applicant and give applicant a $100,000 distribution as partial settlement - the Court identified the relevant issues to be: - (1) whether the respondent met his obligation to pay $100,000 to the applicant; - (2) what was the extent of the chattels and antiques which were properly defined as relationship property, and their value; - (3) whether it was just in all the circumstances to make a further interim distribution of relationship property in favour of the applicant, and if so on what terms - which party was responsible for delaying settlement of the relationship property - whether an interim distribution in favour of the applicant to address her concern at lack of access to relationship property funds could be made when there was no identifiable pool of money from which to make such an order - the house contents were largely comprised of antiques that the respondent had a hobby for and wished to retain but there was no apparent alternative source of funds to pay the applicant her relationship property interes .
HELD: order of the Court that the house contents were to vest in the applicant as her separate property unless the respondent paid by the designate date the sum of $150,000 - indication by the Court that the applicant was entitled to costs.

F v C, FAM-2006-004-003215, Fleming J, 4 September 2008

Counsel for applicant

Case Summary:
CARE OF CHILDREN - application for parenting orders relating to contact of father with two children of relationship aged 12 and 7 years - following relationship separation children in day to day care of mother with supervised care in favour of father with differing experiences of contact for each child - 3 s.133 reports requested (1) the father's drug and alcohol use (2) allegations of sexual abuse of the youngest child (3) an update on youngest child's development and progress in the contact between the father and both children - extensive drug testing of father over prolonged period - CADS report identifying father as low risk of relapse following counselling with service - potential link between drug and alcohol use and sexual offending - allegations of abuse: - (1) sexualised behaviour of child; - (2) opinion of cranial osteopath; - (3) disclosure of child; - (4) observations of child psychologist including observation that one explanation for behaviour was sexual abuse; - (5) social and developmental delay - mother contacted Child Youth and Family Services in relation to allegations of sexual abuse - link between behaviour of youngest child with behaviour of eldest child at that age - incident of 'non-contact abuse' - difference in attitude to contact by each child and eldest child opposed face to face contact - whether the allegations of sexual abuse were proven on the balance of probabilities - whether there was an unacceptable risk of sexual abuse if the children were in the unsupervised contact of the father - wishes of eldest 12 years old child 'not binding'.
HELD: finding that father ceased abusing drugs and at a low risk of reoffending that was able to be managed - in the best interests and welfare of youngest child that required continuity of supervised contact - interim direction for supervised contact with progressive implementation of unsupervised contact between father and youngest child and conditional on non-consumption of drugs and alcohol -

direction for parents and youngest child to attend 'Keeping Yourself Safe' programme - contact between eldest child and father reserved on reasonable basis - no order for costs.

G v R, FAM-2006-044-001888, Judge Walker, 2 September 2008

Counsel for applicant

Case Summary:
RELATIONSHIP PROPERTY - - application for distribution of relationship property following separation of de facto relationship with two children aged 10 and 7 years of relationship - dispute between parties as to date of separation - filing of Hague Convention proceedings by respondent following relocation of applicant to Australia with children - opposed application for extension of time granted when not raised at pre-trial hearing - issues for consideration: - (1) date of separation; - (2) status of the family house; - (3) extent of any relationship property being assets or liabilities; - (3) whether there should be a declaration that the applicant retain an unequal share of relationship property based contributions during the relationship - applicant claimed contribution to family home by way of renovations undertaken on it - applicant claimed relationship debts consisting of WINZ debt, student loan and bank loan - family home registered in name of mother of respondent - incident of property damage by applicant requiring police intervention - lack of evidence to support contention of applicant of alternative date of relationship separation other than date to physical separation - whether property belonging to a third party could be included as relationship property - property must be established as being relationship property -whether the Family Court had the jurisdiction to consider claim of relationship property held by way of constructive trust - whether property was an acquisition of either party under s8(1) Property (Relationships) Act 1976- circumstances of purchase of property by respondent with assistance of mother following death of former partner of respondent - lack of evidence supporting claims of relationship debt.

HELD: fining that family home was not relationship property - no orders to be made in respect to division of relationship property and each party to retain as their separate property any items in their possession - as applicant legally aided under s40(2) Legal Aid Act 2000 no order made as to costs.

M v R, FAM-2006-004-000750, Burns J, 25 May 2007

Counsel for respondent

Case Summary*:*
CARE OF CHILDREN - interim care arrangements - conditions of care - whether a hearing was required as to safety issues - extent to which child could be used in publicity campaigns - media presence of mother - criminal history of father - Select Committee debate on children exposed to publicity culminating in s139 Care of Children Act 2004 - extent of personal information in publicity material - type of 'media outlet' - need for party against which injunction may be made - whether family law provides jurisdiction for the Court to restrict publication or impose conditions accordingly - application of 'Hoskings decision' - whether publication amounted to a guardianship decision - consultation requirements between guardians - application of s15(a) - available remedies for parents restricting publication - publicity impacts on the rights of a child - whether a condition to a parenting order may be made.
HELD: consent orders - conditions of care - drug testing requirements - residence and non-removal - conditions if child taken in aircraft - cooperation of parties - participation of child in publicity is a guardianship issue - pursuant to s16 guardians must reach a joint decision on issues of public exposure

or make an application under s44 for dispute resolution - direction for consultation between parties - no condition attached to parenting order - costs to lie where they fall.

D v C, FAM-2005-044-001793, Ryan J, 30 March 2007

Counsel for respondent

Case Summary:
GUARDIANSHIP, CUSTODY & ACCESS - child aged seven - allegation of sexual abuse by step- sibling - risk of harm - nature of disclosure - reaction to alleged incidents - 'Keeping Safe' - s133 Care of Children Act 2004 report - police intervention - avoidance of criminal trial for protection of child - evidential proof on person making allegations to establish on balance of probabilities - corroboration - consistency of reaction - assessment of child's 'truthfulness' - evidential video interview - credibility - risk assessment required on finding of sexually inappropriate behaviour pursuant to s60 of the Act - nature of 'violence' - occurrence and frequency of 'violence' - likelihood of re-occurrence - harm caused to subject child - perception of mother - views of child - 'unacceptable risk' - welfare and best interests of the child as the paramount concern - continuity of care - primary responsibility of parents - protection from risk
HELD: allegations established to burden of proof - order for supervised contact.

P v I - [2004] NZFLR 611, Paterson J, 18 December 2003

Counsel for second respondent

Parent and Child -- Appeal against dismissal of application -- Application to revoke protection order, wardship order and costs award -- Parties involved in acrimonious separation and property dispute -- Unproved allegations of sexual abuse against the father of the child -- Mother continued to believe that the father had sexually abused the child -- Hindrance to access rights -- Whether grounds to continue the wardship order -- Protection order -- Application to revoke the other -- Costs -- Appeal against orders that the mother pay contributions to the costs of the father and counsel for the child -- Guardianship Act 1968, s 23 -- Domestic Violence Act 1995, s 14.

Barry v Barry - [2002] NZFLR 523, Randerson J, 8 April 2002

Counsel for the applicant

Practice and procedure -- Appeal -- Application to strike out -- Failure to serve duplicate of notice of appeal in time -- Failure due to an oversight by appellant's counsel -- Whether Court had the power to amend the error -- District Courts Act 1947, s 47 -- Guardianship Act 1968, s 31 -- High Court Rules, RR 11, 14, 705 -- District Courts Rules 1992, R 143 -- Companies (Winding Up) Rules 1956, R 191.

This case concerned the appellant's access to his two sons aged ten and seven. The Family Court Judge delivered judgment on 20 November 2001 which was a final decision for the purposes of s 31 of the Guardianship Act 1968. Following the decision, there was telephoned advice to the respondent's solicitors on or about 26 November 2001 indicating that the appellant intended to appeal. A notice of appeal was then filed in the High Court on 18 December 2001. Notice of an initial conference on 21 February 2002 was sent to the appellant's counsel and to the respondent but the appellant's counsel did not receive it until 18 January 2002. However, due to an oversight by the appellant's counsel, the

duplicate notice of appeal was not served on the respondent's solicitors until 4 February 2002. The duplicate notice should have been served either before or immediately after the notice of motion was lodged in the High Court (s 72(3) of the District Courts Act 1947).

The respondent applied to strike out the appeal.

Held (striking out the appeal)

The delay in service of the duplicate notice of appeal from 18 January 2002 until service was effected on 4 February was too long to comply with the mandatory provisions of s 72(3) of the District Courts Act. The explanation offered for the delay, namely counsel's oversight, could not explain it or excuse the failure to serve the duplicate notice of appeal promptly. It followed that the appeal had to be struck out.

G v D - [2002] NZFLR 289, Doogue J, 15 November 2001

Counsel for applicant

Custody -- Sexual abuse -- Rehearing -- Application for extension of time -- Delay -- "Fresh evidence" -- Discretionary power -- "Miscarriage of justice" -- "Justifying a rehearing" -- Whether fresh evidence showed miscarriage of justice that justified a rehearing -- Onus on applicant -- Whether fresh evidence could have been obtained before trial -- Whether evidence would have had an important influence on outcome of litigation -- Whether evidence is believable -- Onus on Court to ensure its processes concerning children advance children's interests -- Jurisdiction -- District Courts Rules, RR 493, 494.

The parties have a 9-year-old daughter. At a custody hearing on 24 March 1998, the Court held that "something of a sexual nature" had occurred between the applicant father and the parties' daughter. The Judge determined that the child would be "detrimentally emotionally affected by ongoing contact with her father". In making this decision the Judge did not rely principally on the sexual abuse finding, but on the psychological profiles of the parties, their interaction and conflict, the undermining of the health of the child's principal caregiver and the child's resulting stress. The applicant father appealed the decision, but was unsuccessful.

In October 1999, the applicant father was acquitted with respect to criminal charges relating to the alleged sexual activity between him and the child. The applicant father then applied for access, but was advised by the Court that he should apply for a rehearing. He was directed to apply within 28 days. The applicant father did not apply for a rehearing until 18 December 2000. He argued that the delay was due to the fact that he did not have any "fresh evidence" until after the criminal trial. The applicant father relied on inconsistencies in the child's video interview and on her admission that some of her statements in the video were lies. The applicant father also relied on evidence that showed that the child was unlikely to have contracted herpes from him, that there was no physical evidence of penetration, and evidence that cast doubt on the independence of the child's views and memories of the sexual abuse.

The applicant father brought an application for a rehearing, significantly out of time, and also for an extension of time to bring the application for the rehearing. Both applications were opposed by the respondent mother. The issue was whether or not the Court should grant an extension of time and whether it should grant a rehearing.

Held (refusing to grant rehearing and application for extension of time).

Carbajal v Paul - [2001] DCR 650, Joyce J QC, 21 May 2001

Counsel for Carbajal

Civil procedure -- Striking out -- Parties living on Waiheke Island and involved in various confrontations -- Orders made against both parties under Harassment Act -- Orders made on affidavits without cross-examination of parties or witnesses -- Directions made at subsequent conference for filing of further affidavits -- Matters of significance -- Jurisdiction -- Costs -- Harassment Act 1997, ss 3, 32(1).

The applicant and the respondent lived on Waiheke Island and had had various confrontations with each other, sometimes involving police intervention. The District Court Judge was satisfied that each party had made out a sufficient basis for the making of an order against the other under the Harassment Act 1997 and made orders accordingly, which were to remain in effect until December 2000. The orders were made on the affidavits, but after argument, and there was no cross-examination of the parties or any witnesses.

The respondent appealed against the order in favour of the applicant who in turn cross-appealed against the order in favour of the respondent. That appeal came before Paterson J on 28 June 1999. His Honour noted that the affidavits threw up various points of conflict, which were of a kind normally resolved with the help of cross-examination. In order to give both parties the opportunity to file further affidavit evidence and to have the opportunity of cross-examining at least the two parties, Paterson J remitted the proceedings to the District Court for rehearing.

Upon return of the files from the High Court, matters were set for an evaluation conference on 15 September 1999, which did not proceed. A conference was then scheduled for 1 November 1999 at which time directions were made for the filing of further affidavits. In an affidavit prepared for this conference, the applicant mentioned that she would consider an agreement by both parties that the orders be withdrawn. The next conference was held on 8 November 1999 but by that date no further affidavits had been filed. Apparently in reliance on the information in the memorandums filed by both parties, the Registrar who took this conference recorded that it was still a possibility that the matter would settle. Therefore there was an adjournment of the conference until 21 December 1999. The Judge then presiding indicated a willingness to case manage the matter from that point on but this did not eventuate. In February 2000 counsel requested a further conference. In late May the file was referred to the Judge who had dealt with the December conference. He directed an urgent conference, which was held before another Judge on 10 July 2000. That Judge was led to believe that the original orders had remained in effect, and issued a standard direction to apply should the matter proceed.

Each of the parties and their advisers assumed without question that the cross-orders remained in effect pending the rehearing. It was not until a conference on 14 February 2001 that they discovered that the original orders had not survived.

The applicant sought to strike out the application brought against her in 1998 by the respondent under the Harassment Act.

Held **(**granting application).

G v D - [1999] NZFLR 385, Randerson J, 18 March 1999

Counsel for the applicant

Access -- Order suspending father's access to his child -- Appeal -- Findings of sexual misconduct against the appellant -- Principles governing appeals under the Guardianship Act 1968 -- Challenge to factual findings of the Family Court Judge -- Evidence to support findings -- Guardianship Act 1968, ss 16A, 16B, 23 -- Sale of Liquor Act 1989, s 139.

The parties had separated in 1994. The appellant father had access to their six and a half year old daughter on a weekly basis until August 1997 when the child made explicit allegations of sexual and physical abuse against the appellant.

Following a hearing in the Family Court, the appellant's access to the child was suspended, the Family Court Judge having found that "something untoward of a sexual nature has occurred between the child and the father". The appellant did not seek to challenge the orders made in the Family Court but may in the future wish to apply for access. For that reason, he challenged the finding of sexual misconduct.

Held (dismissing the appeal).

Van Eycken v CIR - [1996] NZFLR 328, Bremner J, 9 February 1996

Counsel for the applicant

Child support -- Appeal -- Custodial mother's objection to a child support formula assessment against her had been disallowed -- Earlier decision of the Family Court had found that the non-custodial father was a person who shared the ongoing daily care of the child substantially with the mother -- Whether Court now bound by that decision -- Father had access to child over weekend -- Whether it had been shown that father now shared ongoing daily care of the child equally with the mother -- Object of the Act -- Child Support Act 1991, ss 4, 11, 12, 13, 14, 18, 100.

The mother's objection to the CIR having accepted the father's application for a child support formula assessment to be made against her had been disallowed. She now appealed. In an order in an earlier hearing over child support (see *Boulton v van Eycken* [1994] NZFLR 16), the Family Court Judge had found that while the father did not have the child for at least 40 per cent of the nights during the child support year under s 13(1), factors under s 12(b) increased the father's responsibility for the child so that the father's care of the child was substantially equal with that of the mother pursuant to s 13(2).

The facts now showed that the mother had custody of the child pursuant to a Court order. The father had access between 11 am on Saturday and 4 pm on Monday, although the child was now at school on Monday mornings. Each parent provided for the child while in his or her care, that was, food, clothing, housing and expenses.

Held (allowing the appeal).

S v S - [1994] 1 NZLR 540

Court of Appeal Wellington, Cooke P, Hardie Boys and Gallen JJ
28, 29 September; 29 October 1993

Counsel for the respondent

Infants and children -- Custody -- Appeal to Court of Appeal -- Correct approach to use and guidelines to apply in cases of alleged sexual abuse -- Standard of proof -- Welfare of the child the first and paramount consideration -- Unacceptable risk to child -- Guardianship Act 1968, s 23.

This was an appeal against a decision of the High Court suspending supervised access in respect of the son of the parties. In the Family Court it had been found that there was a real possibility that the child had been sexually abused by the father and there was therefore an unacceptable risk to the child if he was placed in his father's custody or his father had unsupervised access. In the High Court on appeal that Court suspended supervised access which had been ordered in the Family Court for the duration of a therapy programme organised for the child. In addition to evidence from a Court appointed psychologist the father filed, in the High Court, an affidavit from a registered psychologist engaged by the father's counsel which psychologist had been requested to assess the situation and prepare a report which was eventually annexed to the affidavit. Because the psychologist was not going to be available to give evidence at the appeal hearing an application was made for her evidence to be given and taken before the hearing. That evidence was taken before the Registrar rather than the trial Judge. The father appealed against the refusal in the High Court to have the evidence of that psychologist taken before the trial Judge, and the order suspending supervised access.

Held:

1 Sexual abuse and sexually inappropriate behaviour were not to be considered disjunctively but rather the behaviour included in the two definitions overlapped. Sexual abuse always included sexually inappropriate behaviour and sexually inappropriate behaviour might in some circumstances amount to abuse. A child should not be subjected to such behaviour, whether or not it amounted to abuse, if that behaviour was properly categorised as inappropriate. The important element of any behaviour under consideration was the extent to which it might reasonably be expected to cause harm to the child who was subjected to it (see p 544 line 42).

2 There must be actual evidence which, at the very least gave rise to the conclusion that behaviour might have occurred or might occur which had had or could have had deleterious effects on the child concerned. It must be more than mere conjecture but need not go as far as the proof which would justify a conviction (see p 546 line 43).
Appeal dismissed.

S v S - [1994] NZFLR 26

CA 168/93, Court of Appeal, Cooke P, Hardie Boys and Gallen JJ
27, 28 September, 29 October 1993

Counsel for the respondent.

Custody and access -- Appeal from order of High Court suspending father's access to his child -- Finding in Family Court of possible sexual abuse by father -- Correct approach in law to custody or access disputes in which allegations of sexual abuse made -- Welfare of child paramount -- Whether errors of law by High Court Judge in suspension of access -- Whether to interfere with the order -- Guardianship Act 1968, s 23; Children, Young Persons, and Their Families Act 1989, s 13.

In this custody and access case, allegations had been made in the Family Court that the appellant father of the child, now aged four, had sexually abused him. Although unable to make any clear findings as to the father having acted inappropriately towards the boy, the Family Court Judge had found that there was a "real possibility" that sexual abuse had occurred. An order for supervised access once a week had been made. The High Court had dismissed the father's appeal, but allowed the cross-appeal of the respondent mother to the extent that while the order as to supervised access remained in force, it would be suspended for six months pending completion of the therapy programme which the child was to undertake. (See report at [1993] NZFLR 657). In suspending access the Judge advanced a number of reasons to justify taking such a step. These included the possibility that suspension might lead to resolution of the factual question as to whether or not the behaviour complained of had actually occurred, and evidence from the mother that her relationship with her son was deteriorating as a result of unsupervised access taking place.

The father now appealed. This case raised similar issues as in *M v Y* [1994] NZFLR 1 as to the correct approach of the Court where allegation of sexual abuse are made, the judgments being delivered contemporaneously.

Held (dismissing the appeal).

S v S - [1993] NZFLR 657

HC 12/92, High Court Auckland, Thomas J, 14 July 1993

Counsel for the respondent

Custody and access -- Appeal -- Finding of Family Court that the father had sexually abused the child -- Correct approach to cases where sexual abuse alleged -- Guidelines to apply -- Standard of proof -- Welfare of the child the first and paramount consideration -- Review of evidence -- Application of principles to evidence -- Uncertainty as to whether sexual abuse had occurred -- Unacceptable risk to child if father had unsupervised access -- Suspension of access -- Reasons for suspension of access -- Role of counsel for the child in sexual abuse cases -- Guardianship Act 1968, s 23.

L, the child at the centre of this dispute, was aged four. His parents had separated when he was nearly two. Since then he had remained in the custody of the mother. In April 1991 the mother became concerned with L's behaviour when he began to behave in a highly sexualised and aggressive manner and made disclosures that he had been sexually abused by his father. A child psychologist appointed by the Court initially concluded that it was probable that L had been sexually abused, but by the time of the High Court hearing he had shifted his opinion to a belief that abuse was only a possibility. The mother remained convinced that the father had sexually abused L. At a hearing to define the father's access to L, the Family Court Judge had found that there was a "real possibility" that sexual abuse had occurred and that there was an unacceptable risk of permitting unsupervised access. An order for supervised access once a week had been made. The father appealed seeking a custody order in his favour.

Held (dismissing the appeal and ordering that L remain in the custody of the mother, with supervised access (suspended for six months) to the father).