

PRESENTERS

Vivienne Crawshaw, Gubb & Partners, Auckland

Now a partner at Gubb & Partners, specialising in family law, Vivienne has been in practice since 1988. In the last eight years she has focused primarily on family law. She is on the Counsel for Child Panel and has appeared as counsel in recent high profile cases in both the High and Family Courts involving interpretation of the Guardianship Act. Vivienne is a contributor to the Legal Practice Manual, updating the relationship property section. She is a member of the ADLS Family Law Sub-committee and was part of the working party for the Family Law Section on the Care of Children Bill. She is a regular columnist for the NZ Herald, presenting articles to the public on family law issues, and has written articles on legal developments for legal publications.

Judge O'Dwyer, Family Court, Dunedin

Judge O'Dwyer was appointed a Family Court judge in 2002 and sits in Dunedin. She was admitted to the Bar in London in 1978 and is a member of Grays Inn. Judge O'Dwyer practised as a barrister in London for 15 years. From 1993 she practised in Christchurch, from 1997 as a partner in Cuninghame Taylor. Prior to her appointment in 2002 she was an executive committee member of the NZLS Family Law Section and convener of the Women's Consultative Group. She has an interest in legal education and raising the standard of advocacy in the Family Court.

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.

CONTENTS

INTRODUCTION.....	1
What are we going to cover?	1
1. WHERE ARE WE NOW – 2004	3
Background – the changing social context	3
Greater protection from domestic violence.....	3
Without notice procedures	4
Impact on custody/access.....	5
Increasing scrutiny	6
Providing protection: respecting rights.....	6
Improving procedures	7
Is this legislation failing families?	8
2. GENERAL LEGAL CONTEXT	9
Legal history	9
Ex parte applications exceptional	9
Duty to disclose.....	10
Interim injunctions	10
High Court Rules	10
<i>256 Determination of ex parte application.....</i>	<i>11</i>
Pickwick procedure.....	11
Conclusion	11
3. HIGH COURT AUTHORITIES	13
Application to DVA 1995	13
Adopt a critical approach	14
Recent High Court authorities	14
Risks vs rights	15
Discussion.....	16
4. FAMILY COURT AUTHORITIES.....	17
Section 13 of the Domestic Violence Act.....	17
Fair process	18
Solicitor’s certificate.....	19
Pickwick procedure.....	20
General adherence to approach of High Court	20
5. THE LEGAL TESTS.....	23
Range of applications.....	23
Follow the rules.....	23
Jurisdiction – range of orders.....	24
Temporary protection order	24
Risk arising from delay	24
Residual discretion.....	25
Parties with language difficulties.....	26
Applicants’ inconsistency	26
Delay by applicant	26
Occupation and tenancy orders	27
Legal interest.....	27

Reasonable needs	28
Tenancy orders without notice	28
Furniture orders.....	28
Discharge of orders	29
Interim custody applications	29
6. BEST PRACTICE - ACTING FOR APPLICANTS	31
Objectives and options for action	31
Duty of counsel – disclosure of all material evidence – best evidence	31
Drafting style	32
The possibility of defence – focus on the hearing – draft in haste, repent at leisure.....	33
With or without notice?	33
Do not cry wolf	34
Costs.....	35
Other matters.....	35
Adverse outcomes	36
<i>Options</i>	36
7. BEST PRACTICE ACTING FOR RESPONDENTS	37
Non- disclosure of material facts	37
Toolbox of legal action to take on behalf of respondent	38
<i>Options</i>	38
Process is important	39
Section 16B hearing	39
Approach to defence	39
Further thoughts	40
8. COUNSEL FOR CHILD’S APPROACH	41
9. PROGRAMMES.....	43
Sustainable change.....	43
Domestic violence programmes.....	43
Uptake of programmes.....	44
Protected persons programmes	44
Timing and information	44
Adult protected person’s programmes	45
Group vs individual	45
Proactive encouragement	45
Children’s programmes.....	46
Respondents’ programmes.....	46
Objections and dropouts	47
The summons hearing	47
What men say.....	47
Lawyer’s role	48
10. BACK TO THE FUTURE	49
Effect of delay.....	49
Early review dates.....	49
Jurisdiction.....	49
Early appointment of counsel for child.....	50
Discontinuance.....	50
Undertakings	51

The 42-day rule	52
Information for respondents.....	52
Affidavits	53
Conclusion	54
APPENDIX 1 : LEGISLATION AND RULES.....	55
Guardianship Act 1968	55
<i>Section 11</i>	55
<i>Section 12(A)</i>	55
Domestic Violence Act 1995	56
<i>Section 13</i>	56
<i>Section 60</i>	57
<i>Section 70</i>	58
<i>Section 78</i>	59
Family Courts Rules	60
<i>Rules 22O</i>	60
<i>Rule 34(C)</i>	60
District Court Rules	61
<i>DCR 287</i>	61
Application under DVA1995: Form DV3	62
Schedule 5 to Family Court Rules 2002: Form DV4.....	68
APPENDIX 2 : PROGRAMME GOALS	69
Rule 32 Goals of Respondents' Programmes (Domestic Violence (Programmes) Regulations 1996 and Amendments 2001)	69
Rule 28 Goals Of Programmes For Adult Protected Persons (Domestic Violence (Programmes) Regulations 1996 and Amendments 2001)	69
Rule 30 Goals of Children's Programmes (Domestic Violence (Programmes) Regulations 1996 and Amendments 2001)	70
APPENDIX 3 : PROTECTION ORDERS STATISTICS	71
Details relating to applications for protection orders: National summary – July 1998 to June 2004	71
APPENDIX 4 : EXTRACT FROM NZLS SEMINAR – DOMESTIC VIOLENCE LEGISLATION 1996.....	73
CHAPTER 4. ACTING FOR AN APPLICANT.....	73
Who are documents written for?.....	73
Parties.....	74
Jurisdiction - domestic relationship	74
Jurisdiction - domestic violence.....	75
Necessity and the judicial discretion.....	75
Representative action	76
Standard or special conditions	76
CHAPTER 5. ACTING FOR RESPONDENT	77
Targeting the defence.....	77
Moving towards a better relationship	77
Defence	77
Check list	78
Task of court and counsel	79
CHAPTER 6. INTERPRETATION OF TERMS	79
Domestic violence.....	79

Sexual abuse	80
Psychological abuse	80
Minor or trivial acts	81
Domestic relationship	82
APPENDIX 5 : MEMORANDUM TO COUNSEL 1995.....	83
INDEX OF CASES	87

FOREWORD

Without notice applications are unquestionably the most sensitive aspect of Family Court work. On the one hand, there may often be a desperate battered party who needs security and safety instantly. Delay will but exacerbate the harm. On the other hand, the making of orders against parties who perceive unfairness and injustice in such procedure can lead to enduring bitterness. Getting the balance correct is crucial. This seminar will be important in revisiting legislative and judicial trends, and in looking at the consequences of what we do.

Judge Peter Boshier
Principal Family Court Judge of New Zealand