

FAMILY LAW SUMMARY



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1. The Framework of Family Law

1.1 INTRODUCTION TO FAMILY LAW

The family is a basic social unit which is often regarded as the foundation of society. Article 23 of the UN International Covenant on Civil and Political Rights provides a concise definition of a family as the “natural and fundamental group unit of society.”

There are primarily two types of families:

- **Marriage-based families** – the traditional family which involves a husband, wife and/or children.
- **Cohabitation-based families** – the contemporary family which involves any relationship between two or more individuals sharing residence (includes de facto and domestic relationships).

The legislation which is relevant for both marriage-based and cohabitation-based families in New Zealand includes:

- The **Family Court Act 1980** – This Act established the Family Courts of New Zealand as a divisions of the District Courts, setting out the constitution, jurisdiction and powers of the Family Court (as per the preamble of the Act).
- The **Family Proceedings Act 1980** -
- The **Care of Children Act 2004**
- The **Status of Children Act 1969** (with important amendments in 2004)
- The **Domestic Violence Act 1995**
- The **Child Support Act 1991**
- The **Marriage Act 1955**
- The **Civil Union Act 2004**
- The **Human Assisted Reproductive Technology Act 2004**
- The **Property (Relationships) Act 1976**
- The **Children, Young Persons and Their Families Act 1989**
- The **Adoption Act 1955**

This is by no means an exhaustive list of all the legislation which is relevant to Family Law in New Zealand. A fuller list with explanations can be found on the Family Court website.¹ Also relevant are the **Family Court Rules**, which deal with the procedure for bringing claims under many of the above Acts.

Since 1980, all family legislation in New Zealand has been “**no fault**” legislation. For instance, in order to be granted a divorce, one of the parties had to show proof of fault, such as adultery or abuse. This is no longer necessary.

1.2 HISTORICAL BACKGROUND OF FAMILY LAW

1.2.1 Ecclesiastical Law

In early Christian law, there were no formal requirements for the recognition of marriage. However, the Clandestine Marriages Act of 1753 (Lord Hardwicke’s Act) established a requirement that all marriages in England must occur in the Church of England. Subsequently, the Registration Act 1837 (Eng) required the Church of England to maintain a record of all marriages under English law.

Ecclesiastical law provided the following forms of relief when the marriage relationship broke down including:

- **Annulment** – principal form of relief which rendered the marriage void but required proof of a ground of nullity:
 - one of the parties was already married; or
 - the parties were related.

- **Parliamentary Divorce** – established under the Divorce and Matrimonial Causes Act 1857 but was limited to the wealthy classes due to its three-fold procedure:
 - the attainment of a decree of divorce *a mensa et thoro* through proof of adultery (the grounds were extended to cruelty, desertion for three years and incurable insanity, through the *Matrimonial Causes Act 1937* (Eng.);

¹ Family Court of New Zealand, Family Court Acts,
<http://www.justice.govt.nz/family/legislation/acts/familycourt-acts.asp>.

- the attainment of damages from the party at fault; and
 - the petitioning to the House of Lords for a divorce *a vinculo*.
-
- **Restitution of Conjugal Rights** – An order that the husband or wife return to the matrimonial home or to perform some act required by marriage.
 - **Jactitation of Marriage** – An order which prevented a couple from pretending to be marriage when they had not complied with the formal marriage requirements.

1.2.2 Important Trends in Family Law in New Zealand

The most important recent reform of the family law system in New Zealand came in 1980, which saw the passing of a number of Acts designed to change both the **substance and procedure** of family law.² These saw a strong shift away from the fault-based proceedings of earlier times, especially with regard to relationship breakdowns.³ More attention also began to be given to the **psychological and sociological aspects** of family disputes, so that family law has become less of a purely legal field.⁴

Another very important development is the importance given to the **views of children** involved in disputes.⁵ This is especially so in child care disputes, where the Family Court may now appoint a lawyer to represent the interests of the child.⁶ This shows a recognition that the best interests of a child are not necessarily those of either parent.

More recently, rights and protections that have traditionally only been given to married couples have also been extended to **other types of relationships**. Same-sex partners can now have many of the same rights as opposite-gender couples, either as de facto partners or as civil union partners.

² Dick Webb (et al) *Family Law in New Zealand* (v1, 13th ed, Lexis Nexis, Wellington, 2007), cviii.

³ *Ibid*, cxiv.

⁴ *Ibid*, cxv.

⁵ Mark Henaghan *Care of Children* (Lexis Nexis, Wellington, 2005), 7.

⁶ Care of Children Act 2004, s7.

1.3 THE FAMILY COURT OF NEW ZEALAND

1.3.1 Family Courts Act 1980

The Family Courts Act 1980 was passed as a consequence of the recommendations of the Royal Commission on the Courts of 1978. This report recommended the establishment of specialist courts to deal with conflicts affecting family life in New Zealand.⁷ The result of this was the establishment of the Family Court in 1981.⁸

The Family Courts Act established the **jurisdiction** of the Family Court under section 11 as dealing with claims under the body of family law legislation, in areas such as **marriage, adoption, parenting disputes, relationship property, domestic violence** (where the District Court also has jurisdiction), **separation and dissolution of marriages and de facto relationships, maintenance, paternity and testamentary disputes**. This jurisdiction has since widened to include **other areas**, such as the Mental Health (Compulsory Assessment and Treatment) Act 1992.

The Family Court also has the **implied jurisdiction** given to lower courts to do all that is necessary to carry out its functions. There have been several cases where it has been held to have a particular power not specifically given by statute that is nevertheless necessary for it to fulfil its functions and purpose.⁹



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⁷ See "Report of the Royal Commission on the Courts" (1978), 23.

⁸ Family Courts Act 1980 No 161 ("the Family Courts Act"), section 4 establishes the Family Courts as divisions of each District Court.

⁹ For example, in the case of *Re A Child, T* (1991) 8 FRNZ 180, it was held that the Court had the power to suppress certain information if a child's welfare and best interests required it.