

GUIDELINES FOR LAWYERS DRAFTING RETURN APPLICATIONS

The task of the appointed lawyer is to file the evidence necessary to establish the jurisdictional threshold for the return application. The evidence is provided by way of affidavits and must provide evidence:

- of the removal.
- that the removal was not consented to.
- that the person applying had rights of custody that were breached by the removal.
- that those rights of custody were being exercised at the time of removal.
- that the child/ren involved were habitually resident in New Zealand.

There will be two affidavits. One by the Applicant parent setting out the **relevant** facts. This is the narrative affidavit. The other affidavit is prepared by the appointed lawyer. This affidavit addresses the issue of rights of custody and should answer the question - ***Does the applying parent in this case have rights of custody? If so, what is the legal basis for those rights?*** This is referred to as the affidavit of applicable law.

Return applications have been unsuccessful because the supporting affidavits have failed to provide evidence on critical issues – often that issue relates to rights of custody. For example:

- What is the effect of a protection order on an applicant's rights of custody?
- What is the status of a parenting agreement?
- Is a custody order in favour of grandparents sufficient to establish rights of custody?
- Does an unmarried father have rights of custody?
- What is the effect of a parenting order on the applicant's rights of custody?

Set out below are the relevant sections of the Care of Children Act 2004 and the key cases to be borne in mind when preparing the evidence on the issue of rights of custody for the affidavit of applicable law.

The relevant Legislation

I Care of Children Act 2004 – the Convention provisions

Section 102 – the jurisdictional grounds for applying. (Note: It is essential to establish a right of custody in order to make an application).

Section 97 – "*rights of custody*" defined.

Schedule 1 (attaches the Convention) Article 3 and Article 5 – defines "*wrongful removal*"

II Care of Children Act 2004 - The domestic provisions:

Section 15 – guardianship defined.

Section 16 – exercise of guardianship.

If you are a guardian, the powers conferred by s 15 and the effect of the exercise of those powers as described by s 16, equates to a "right of custody" as defined by s 97 (i.e. by the Convention). In other words, if the applying parent is a guardian then he/she has established one of the jurisdictional threshold requirements.

Sections 17 and 18 – defines guardianship in New Zealand based on parental status.

Sections 19, 23 and 27 – where guardianship acquired by Court order.

The Act makes a distinction in terms of guardianship acquired by parental status for those children born *before* 1 July 2005 (when the Care of Children Act 2004 replaced the Guardianship Act 1968) and children born *after* 1 July 2005, the date on which the Care of Children Act 2004 came into effect.

The effect of these sections on the guardianship status of parents for children born *after* 1 July 2005 is as follows:

- For mothers, marital status is irrelevant. She will always be the guardian.¹
- For fathers, if married or living with the mother between conception and birth he will be a guardian.
- For a father, if registered on the birth certificate, he also will be a guardian.

In the case of children born *before* 1 July 2005, the following rules apply:

- The rules for a married father are the same as above.
- For unmarried fathers the mother will be the sole guardian unless she was living with the father of the child as a de facto partner at the time the child was born.²

Status of Non-Guardian Applicants

If there is conflicting evidence or no evidence of a de facto relationship in the case of a pre-July 2005 father, will such a father have rights of custody? According to *Fairfax v Ireton* [2009] NZFLR 433 the answer may be "yes". If there is evidence:

- of a Parenting Agreement that confers on a father a role of providing day-to-day care³ and
- that this is an agreement that was in effect,

then, based on the Fairfax authority, there is an agreement which gives the father the right, jointly with the mother, to determine the child's place of residence. That combined with the role of providing day-to-day care satisfies the definition of right of custody in s 97⁴ of the Act.

¹ Unless removed by Court order, s.29.

² Therefore, there must be evidence for fathers in this category of the necessary de facto status at the time of birth. Identification on a birth certificate for these pre-July 2005 fathers will not be sufficient. (See below De facto Relationship and Care of Children Act 2004.)

³ In this case 6 days out of a fortnight.

⁴ See para 84 *Fairfax v Ireton*

Significant Cases

It is helpful to be familiar with the following New Zealand cases:

<i>Gross v Boda</i> ⁵	[1995]	NZFLR 97
<i>Dellabarca v Christie</i>	[1999]	2 NZLR 548 (CA)
<i>M v H [Custody]</i>	[2006]	NZFLR 623 (HC) followed <i>Dellabarca v Christie</i> ⁶
<i>Fairfax v Ireton</i>	[2009]	NZFLR 433

De Facto Relationship and Care of Children Act 2004

If there is an issue in terms of s 17(3) of the Care of Children Act 2004 as to the domestic nature of the parental relationship, lawyers should familiarise themselves with s 29A of the Interpretation Act 1999, as de facto partner is defined here. The section says:

- 29A Meaning of de facto relationship
- (1) An enactment, de facto relationship means a relationship between two people (whether a man and a woman, a man and a man, or a woman and a woman) who –
- (a) Live together as a couple in a relationship in the nature of marriage or civil union; and
 - (b) Are not married to or in a civil union with, each other, and
 - (c) Are both aged 16 years or older.
- ...
- (3) In determining whether two people live together as a couple in a relationship in the nature of marriage or civil union, the Court or person required to determine the question must have regard to –
- (a) The context, or the purpose of the law, in which the question is to be determined; and
 - (b) All the circumstances of the relationship.

Note that this definition is broader and less specific than the definition of de facto partner/relationship as defined in ss 2(C) and 2(D) of the Property (Relationships) Act 1976.

If addressing this particular issue in affidavit evidence, be aware that it will be for the Court of the receiving country to determine whether the de facto relationship existed but before drafting the affidavit it will be helpful to read:

<i>Ruka v Department of Social Welfare</i>	[1997]	1 NZLR 154 contains a much cited definition of de facto relationship.
<i>Fairfax v Ireton</i>	[2008]	High Court decision CIV 2008-404-4279 Justice Priestley's comments, paras 48-52 ⁷
<i>MW v Director-General of the Department of</i>	[2008]	HCA 12 ⁸

⁵ Described in *Fairfax v Ireton* as a "definitive statement of NZ domestic law and for purpose of NZ jurisprudence of the Convention para 118, Baragwanath J

⁶ *Fairfax v Ireton* Says no reason to depart from *Dellabarca v Christie*

⁷ "The focus of s 17 of Care of Children Act 2004 is an enquiry into a de facto relationship where the over-arching purpose is a child's welfare. The New Zealand approach must be to apply the s 29A definition with this purpose in mind".

⁸ A case where arguably the failure to adequately address the issue of the de facto relationship in the evidence was fatal to the applicant's application.

<i>Community Services</i>		
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THE AFFIDAVIT OF APPLICABLE LAW

Format

There is no need to observe New Zealand Family Court Rules in terms of the presentation of the affidavit. It is perhaps best practice to replicate the format of the Request for the Return which is a standardised International document. Annexure 1 provides a template as to form.

Use of standard template

It is preferable to prepare the affidavit of applicable law anew each time. It may not always be necessary or relevant to refer to recent case law or the sections in Care of Children Act 2004 referred to in these guidelines. As with the applicant's narrative affidavit, the affidavit of applicable law should confine itself to only relevant matters.

Ensure that the law is applied specifically to the present application. Examples of appropriate sentences are:

"In this case the applicant father has rights of custody because" or

"The effect of" or

"in summary the legal position is"

Language/Terminology

Be aware of your audience. Is English the first language in the receiving jurisdiction? If not, keep language uncomplicated. Be conscious that other jurisdictions may not use the term guardianship. Be prepared to explain our terminology and always relate it back to the Convention definition (because of its universal application).

THE NARRATIVE AFFIDAVIT

Because of the summary nature of the proceedings it is not always possible to provide supplementary evidence at a later time to plug any evidentiary gap that emerges. So it is good practice to approach the drafting of the first affidavit with an eye to any possible defences either of a jurisdictional nature or one of the positive defences.

Be aware also if some jurisdictions have specific requirements in terms of the evidence. This can be checked with the New Zealand Central Authority. For example, the Australian Central Authority requires the applicant to annex copies of the child's birth certificate.

Other common potential defences involve arguments relating to habitual residence, consent and acquiescence. It is important to be familiar with the caselaw (and it is extensive) in relation to these issues prior to drafting the affidavit. Corroborate the evidence with correspondence, copies of travel documents where relevant etc.