

THE FAMILY COURT – CONTEMPT AND INHERENT POWERS

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This article honours the achievements of Professor ATH Smith both in New Zealand and abroad. Its focus is on aspects of the New Zealand Family Court. The law of contempt is now governed by the Contempt of Court Act 2019. The earlier leading case on the contempt powers of the Family Court is analysed, followed by the changes made by the 2019 Act and their implications for the Court. The discussion is on the basis that the Family Court does not have inherent powers to deal with contempt situations not covered by the statutory scheme. As a part of the District Court, its inherent powers are limited to matters of procedure: contempt is a substantive matter, not one of procedure. The article concludes by briefly raising the wider question of whether the distinction between the senior courts and the lower ones, such as the Family Court, is helpful.

I PROFESSOR ATH SMITH

Professor Tony Smith came to Wellington to be Dean after a distinguished academic career in Britain. He was a New Zealander by birth and so he was returning to his roots. I played a "bit" role in that process. I was his "minder" – the official term I was given – when he flew out for his interview. This meant making sure that he got to his interview on time, but also ferrying him to other appointments with senior officers of the university, many of whom are on a different campus from the Law Faculty. He met various others as well, including groups of students. In the short time he was in Wellington and despite the inevitable effects of a long-haul flight, he managed to get a very good gauge on how the system worked and what staff and students saw as the pluses and minuses. My role as minder ceased after a few days, but fortunately Tony was not put off. He accepted the offer of the deanship, which extended for eight years.

Another more tenuous link is Glanville Williams' *Learning the Law*, first published in 1945. Ahead of becoming a first-year university law student, I rather nerdishly read the edition of the day, as recommended by the Victoria University of Wellington Law Faculty. It cannot have done me too

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much harm as I was ultimately led into an academic career. Today the author of Glanville Williams' text is "ATH Smith", as Tony is more commonly known on the other side of the world.

Tony is especially well known for his research and writing on criminal law and public order. However, it is his work on the law of contempt that led me to pen this contribution on the Family Court, dealing primarily with its contempt powers. In New Zealand today, the Contempt of Court Act 2019 is the first port of call, but, after an introduction to the Family Court, I wish to begin with a case that pre-dates the Act. The reason for this is that the case gives rise to a wider discussion of the Family Court's powers, especially its inherent ones.

II THE FAMILY COURT

The Family Court has been in existence for over four decades. It was one of the main recommendations of the Royal Commission on the Courts chaired by Sir David Beattie.¹ The Family Courts Act 1980, later changed to the Family Court Act 1980,² created the Court and came into force on 1 October 1981. Its original jurisdiction was relatively narrow, covering separation and dissolution of marriage, along with "ancillary" matters relating to the "custody"³ of children and financial matters. The hallmarks of the Court were specialist judges, informality, privacy, an emphasis on non-adjudication, and the role of non-legal professionals. Over the years, changes have occurred to just about all of these, except that the Court is still a specialist one with specialist judges. The latter must be suitable by reason of their "training, experience, and personality" to "deal with matters of family law".⁴ Family Court judges are coincidentally also District Court judges and they may sit as District Court judges. Indeed, there is an expectation that they will do so in order not to be siloed in the family law area. This can be valuable as the District Court Act 2016 and District Court Rules 2014 can apply in family cases, although the Family Court Rules 2002 are the primary source of rules relating to procedure in the Family Court. This all ties in with another point about the Family Court: it is not a stand-alone court but a division within the District Court.⁵ By and large, however, the Family Court is bound by the terms of the relevant family law legislation. Sometimes an issue may arise where such legislation does not provide an answer. Can the answer be found in the law more generally? We consider this question later.

1 *Report of the Royal Commission on the Courts* (1978).

2 District Court Act 2016, s 249. People talk of one Family Court rather than a cluster of "Family Courts".

3 The Care of Children Act 2004 replaced "custody" and "access" with "day-to-day care" and "contact": s 4(1)(b).

4 Family Court Act 1980, s 5(2)(b). Similar language is found in cl 4 of the proposed Family Court (Family Court Associates) Legislation Bill 2022 (148-1), which inserts a new s 7A(4)(b) into the Family Court Act 1980.

5 Family Court Act 1980, s 4; and District Court Act 2016, s 9(b).

The Family Court has not always received good press. The 2019 *Te Korowai* report in particular was critical of the failure to sufficiently incorporate te ao Māori and provide for child participation.⁶ Parliament has addressed the latter with the Family Court (Supporting Children in Court) Legislation Act 2021, which amends the Care of Children Act 2004 and the Family Dispute Resolution Act 2013 to upgrade participation and refer to art 12 of the United Nations Convention on the Rights of the Child.⁷ Despite the criticism, if we look more broadly at the four decades of the Court's life, we see a pattern of enhancement of its jurisdiction rather than a loss of confidence in its achievements. Early on, the Court's jurisdiction was extended to include the Protection of Personal and Property Rights Act 1988, the Children, Young Persons, and Their Families Act 1989 (now called the Oranga Tamariki Act 1989 or the Children's and Young People's Well-being Act 1989), the Mental Health (Compulsory Assessment and Treatment) Act 1992, wardship powers that used to reside solely with the High Court (see now Care of Children Act 2004, ss 30–35), and inheritance claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. More recently, we find powers under the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 and the Trusts Act 2019. Although the Court has some inheritance powers and a very residual power in the Wills Act 2007 (s 9), the High Court retains control of other inheritance issues, such as the power in s 14 of the Wills Act 2007 to declare a non-compliant document to be a will.⁸

In short, in terms of subject matter, the Family Court has a wide jurisdiction that is expanding, not contracting. It affects a wide range of personal activities, not just those that hit the headlines. What about the Court's powers in a more general sense? We turn now to the law of contempt.

III CONTEMPT

A KLP v RSF

The question of the extent of the Family Court's contempt powers arose in *KLP v RSF*.⁹ The case was a dispute over schooling, hence a guardianship issue under the Care of Children Act 2004. The father, who was the primary caregiver, unilaterally moved the eight-year-old daughter to a new school. The mother, as joint guardian with the father, was not consulted. Judge Ullrich QC of the Family Court directed the father to return the child to the old school, which he refused to do. The Care of Children Act 2004 contains various measures for the enforcement of a parenting order, but they did

6 *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, Wellington, 2019) [*Te Korowai*].

7 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

8 The Law Commission in its succession report *Review of succession law: rights to a person's property on death* (NZLC R145, 2021), insofar as it goes, recommends at [72] that the Family Court and High Court have concurrent jurisdiction in relation to inheritance matters.

9 *KLP v RSF [Contempt of court]* [2009] NZFLR 833 (HC).

not apply to a guardianship order such as the one in this case. Therefore, when the matter came before another Family Court Judge, Judge von Dadelszen, he considered committing the father for contempt, but was uncertain as to whether he had jurisdiction to do so. A case was stated to the High Court for a ruling on the matter.

When the hearing took place before Williams J, the parties had actually resolved their dispute, but a ruling was nevertheless sought because of the importance of the point. For the purposes of the judgment, the Judge divided contempt into three categories: (1) contempt in the face of the court; (2) contempt outside the court denigrating or undermining the authority of the court; and (3) wilful disobedience of a court order.¹⁰ In short, it was concluded that the Family Court had jurisdiction with respect to (1) and (3), but not (2). As the case was about a failure to comply with an order, (3) was especially relevant. If the parties had not reached a settlement, the Family Court could have committed the father for contempt.

How did we get to the position whereby a court with significant power over people's lives can invoke contempt in some situations, but not all? The problem is that the Family Court, as a division of the District Court, is what we used to call an "inferior" court, lacking the inherent jurisdiction of the "superior" courts (that is, the High Court and above). While we now use less deprecating language since the passage of the Senior Courts Act 2016, the distinction still persists.¹¹ Under s 12 of the Senior Courts Act 2016, the High Court retains the jurisdiction that it had before the passage of that Act. Williams J stated that "being an inferior court, the Family Court has no inherent or self-constituting jurisdiction and there is no express statutory power covering category (3) contempt".¹² He later mentioned "the general rule that inferior courts have no inherent jurisdiction".¹³ It follows that Family Court powers depended on the existence of statutory authority.

With respect to contempt category (1), the answer was easy: s 112 of the District Courts Act 1947, the law at the time, expressly stated that a District Court, which, as already noted, includes the Family Court, had power to commit for: wilfully insulting a judge, witness or court officer; wilfully interrupting proceedings or otherwise misbehaving in court; or disobeying an order or direction during proceedings.

As to category (2), Williams J did not spend long on it as it was category (3) that was the subject of the case. However, in the absence of statutory authority, the Family Court had no power under category (2). It would have to rely on a request to the Solicitor-General to bring proceedings or on an

¹⁰ At [7].

¹¹ See Senior Courts Act 2016, s 4(2): "A reference in any enactment to a senior court in New Zealand must, unless the context otherwise requires, be read as a reference to the High Court, the Court of Appeal, or the Supreme Court."

¹² *KLP v RSF*, above n 9, at [13].

¹³ At [32].

application directly to the High Court. A possible example is a celebrated case involving a Member of Parliament and the media. The background to this case, *Solicitor-General v Smith*,¹⁴ was that a child had been with a relative for most of his life, approximately six out of seven years. The parents had had a very abusive relationship, which apparently had been remedied. They sought an order to recover care of the boy. This claim was ultimately lost on appeal to the High Court in an important judgment that refused to prioritise parental interests over the welfare and best interests of the child.¹⁵ The case, however, attracted media attention and the parents' local Member of Parliament got involved. The latter engaged in pressurising a litigant, the caregiver, and making comments to her that were "neither fair nor reasonable nor moderate".¹⁶ What he said was "contemptuous, because its purpose was to persuade the caregiver to give up the case and concede custody to the parents".¹⁷ Media releases and statements on the radio were also held to be contemptuous. In various ways, the Member of Parliament had sought to influence the Family Court's decision. Radio New Zealand and TV3 Network Services were also held to be in contempt.

The point of the diversion to the *Smith* case is that, although it was in relation to proceedings about the care of a particular child, the actions did not directly affect what went on in the courtroom. Indirectly, they may have done so or at least had that potential, but they were outside the Family Court, despite undermining the authority of the Court. The Family Court did not have jurisdiction in respect of contempt and it was the Solicitor-General who pursued the matter in the High Court.

What then of category (3)? Williams J noted several express references to contempt, including s 125(6) of the Care of Children Act 2004, which states "[n]othing in this section limits the power of the Family Court to punish a person for contempt of court". However, while this acknowledges that the Family Court has power in relation to contempt, it leaves blank what the actual substance of the power is. The Judge therefore looked for some other statutory basis from which could be inferred a contempt power in relation to disobedience of orders. He found it in the old District Courts Act 1947, which was of course relevant to the Family Court because of its status as a division of the District Court. The relevant part of the now repealed s 41 is as follows:

Every court, as regards any cause 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

14 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) per Wild and MacKenzie JJ. See also *Solicitor-General v Smith* [2004] 2 NZLR 570 (HC) (where the Member of Parliament was fined \$5,000, TV3 \$25,000, and Radio New Zealand \$5,000).

15 *K v G* [2004] NZFLR 1105 (HC) per Gendall and Ellen France JJ.

16 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [57].

17 At [57].

...

as ought to be granted or given in the like case by the [High Court] and in as full and as ample a manner.

In interpreting the phrase "relief, redress, or remedy", Williams J held that it includes a power to enforce, such as contempt. He did not, however, give the Family Court carte blanche. He noted that it had to be in relation to a proceeding before the Court and it must be "reasonably necessary in the context of the statutory objective and the facts of the case"; that is, it must be "sufficiently significant for the Court to adopt the serious option of punishment for contempt".¹⁸ What would meet this standard? The Court would need to be sure all else has failed and that the matter is far more than trifling. Throwing a parent into prison is not necessarily going to help the child.

This leads to a broader point that assisted Williams J in construing s 41 and implying the necessary power to punish by contempt. A case about a child, especially about schooling, is one where it is necessary to move swiftly. The child must have security and continuity. "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 interest of the child."¹⁹ Under s 4 of the Care of Children Act 2004, the welfare and best interests of the child are "the first and paramount consideration". The Family Court needs the right tools to meet this imperative. The Solicitor-General can, in an objective way, determine whether the situation justifies contempt proceedings, but this will cause extra delay and cost.

KLP is important for its ruling on contempt, although, as we see, the law is now covered by legislation. In a more general sense, it is important for its methodology in answering the question about the role of the Family Court and its comment on inherent powers. The latter is something that we come back to shortly as the statements in the case need to be refined somewhat.

B The New Legislative Framework

KLP must be read in the light of two legislative changes. First, the District Courts Act 1947 has been replaced by the District Court Act 2016. The equivalent of s 41 in the 1947 Act is s 84 in the 2016 Act, which reads as follows:

... in a proceeding a Judge may, in the same way as a Judge of the High Court in the same or a similar proceeding,—

- (a) grant remedies, redress, or relief:

¹⁸ *KLP v RSF*, above n 9, at [50] and [51].

¹⁹ At [48].

The drafting has been modernised but in substance the provision is arguably the same. The new phrase "remedies, redress, or relief" is very similar to the old one "relief, redress, or remedy". The broad interpretation that Williams J adopted should still apply.

The more significant change is the Contempt of Court Act 2019.²⁰ By s 15A added to the Family Court Act 1980, the relevant parts of the 2019 Act apply to the Family Court.²¹ These are subpts 2 and 4 of pt 2, along with ss 25 and 26(1) and (2). Under s 10 of the Contempt of Court Act 2019, a judicial officer can deal with disruptive behaviour in court or a refusal to obey an order or direction made during the course of proceedings. The person concerned can be excluded from court or cited for disruptive behaviour and ordered to be taken into custody. Section 11 sets out the procedure when someone is held in custody. Ultimately, the person can be imprisoned, fined or ordered to do community work. Although the language of contempt is not used, this provision is the equivalent of Williams J's category (1), contempt in the face of the court. The latter is therefore abolished under s 26(5) of the Contempt of Court Act 2019.

Subpart 4 of pt 2 relates to the enforcement of court orders and undertakings, the issue that was before the Court in *KLP*. Under s 16, a failure to comply with an order or undertaking may lead to imprisonment²² or a fine, but there are several important qualifications. First, the section depends on an application by the party who sought the order or undertaking, by a person who benefits from or has an interest in the order or undertaking, or by the Solicitor-General. The latter, however, must be "satisfied that there is a high degree of public interest" in enforcement (s 16(2)(c)). An order about a child's schooling is unlikely to satisfy the Solicitor-General. The Family Court itself has no power to act on its own initiative.

Further, action under s 16 cannot be taken if other forms of enforcement are available. The Care of Children Act 2004 contains various such mechanisms in relation to parenting orders (day-to-day care and contact). So, it would be only after these have been exhausted or found to be inappropriate that s 16 could be used. It means that s 16 is very much a residual or last resort procedure. In *Han v Zhu*,²³ the sale order of a house had not been carried out for several years. An application under s 16 was declined because the applicant "simply has not given *any* evidence of what steps he took in the four intervening years to enforce the order. It seems none."²⁴ Alternative steps were to seek further

20 This follows the Law Commission report on the subject: *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017).

21 Contempt of Court Act 2019, s 29 and sch 2.

22 For an example of a custodial sentence involving a pre-meditated abduction of a child during contact, see the decision of the Family Division of the High Court of England and Wales in *Re Malone (contempt of court)* [2021] EWHC 2723 (Fam), [2022] 1 FCR 184 per Arbuthnot J.

23 *Han v Zhu* [2021] NZHC 3007, [2021] NZFLR 596.

24 At [36] (emphasis in the original).

directions from the Family Court or to get the Court to appoint someone to carry out the sale under s 33(5) of the Property (Relationships) Act 1976.

Section 16(3)(b) of the Contempt of Court Act 2019 contains three other qualifications: the order or undertaking must be "in clear and unambiguous terms" and clearly binding on the person; the person must have had knowledge or notice; and the person without reasonable excuse must have knowingly failed to comply. Arguably, an order about schooling is going to be clear and in a case like *KLP* will be known to the parent concerned. The parent might claim a reasonable excuse, for example, that the child refused to go to the designated school, but otherwise, if there is no such excuse, the statutory version of contempt could be used if a legitimate person applied.

Section 17 of the Contempt of Court Act 2019 contains two further qualifications:

17 Jurisdiction to take certain action under section 16

- (1) A court may take action under section 16 to enforce a court order to pay a sum of money only if the default in making payment is within an exception listed in section 3(2) of the Imprisonment for Debt Limitation Act 1908 or the order applies to money held by a person, trust, or entity other than the defaulter.
- (2) Only the High Court may take action under section 16 to enforce a court order for the recovery of land.

In *Connolly v Eckhout*,²⁵ the daughter of her deceased father obtained an award under the Family Protection Act 1955 against the widow of the estate who was the administrator. The latter failed to pay. Various charging orders proved fruitless and so an order was sought under s 16 of the Contempt of Court Act 2019. Under s 3(2) of the Imprisonment for Debt Limitation Act 1908, the default must be by a person acting in a fiduciary capacity and relate to a sum of money in the person's "possession or control". Campbell J held that the widow as administrator was in a fiduciary capacity towards the daughter. Further, the widow had declared that she had estate funds that exceeded the amount of the family protection judgment and "[i]t is no answer for the defendant to say that she has since spent the money."²⁶ He then ordered the arrest of the widow under r 17.84 of the High Court Rules 2016 because the default was "flagrant".²⁷ The arrest order was delayed a month to give the widow the chance to pay. The case illustrates not just a successful use of the new legislation, but also the interplay with other statutory provisions. The case was in the High Court because the family protection proceedings were in that Court, but under s 3(2) of the Imprisonment for Debt Limitation Act 1908,

²⁵ *Connolly v Eckhout* [2022] NZHC 293.

²⁶ At [30]–[32].

²⁷ At [36].

the Family Court would not have had jurisdiction anyway. Is there not an argument that it ought to have jurisdiction in relation to its own orders?

Subpart 3 of pt 2 of the Contempt of Court Act 2019 relates to juries and is therefore irrelevant to the Family Court, which does not have jury trials. Subpart 5, however, deals with false statements about a judge or a court. It is not included in s 15A of the Family Court Act 1980, but it does apply to any court or judge, which includes the District Court and the Family Court as a division of that Court. For an offence to be committed, a false statement must be one that "could undermine public confidence in the independence, integrity, impartiality, or authority of the judiciary or a court" (s 22(1), Contempt of Court Act 2019).²⁸ The undermining must have been a real risk and the offender must have known of it or reasonably ought to have known. Assuming all these things were in relation to a Family Court judge, a charge can proceed only with the consent of the Solicitor-General.²⁹ This means that cases will be carefully filtered, especially to ensure that the "public confidence" element is satisfied and that false statements that are trifling, minor or patently wrong are not going to clog up the system. Further, the Family Court cannot itself deal with the matter. Under s 23(2) of the Contempt of Court Act 2019, a case must be transferred to the High Court to be heard there.

Subpart 5 fits into Williams J's second category of contempt. The subpart's constraints on the Family Court mean that the Court is really nothing other than a conduit when contemptuous activity occurs outside the courtroom. The constraints are therefore in line with the previous approach. However, subpt 5 is narrowly framed. The tampering with a litigant in the *Smith* case discussed above falls outside its ambit.

What about another situation that has been before the Family Court in England and Wales? Suppose a litigant surreptitiously records proceedings in the Family Court and then uploads the recording to a site such as YouTube? This happened in *Her Majesty's Attorney General v Dowie*,³⁰ where the Family Court sentenced a father to eight months' imprisonment following notification to the Attorney General (fulfilling the role of the New Zealand Solicitor-General). The England and Wales law of contempt is rather different, so how would this situation be dealt with in New Zealand? The taping occurred during court proceedings and at first glance could fall under subpt 2. However, taping is hardly disruptive, the opposite in fact because it is done secretly. It is not done in disobedience of a court order or direction. So, the subpart does not apply. If the judge gave a clear

28 Contempt of Court Act 2019, s 22(1)(c).

29 Section 23(1). This section also empowers "take-down orders", ie taking down or disabling access to false information, including online content.

30 *Her Majesty's Attorney General v Dowie (Committal Proceedings)* [2022] EWFC 25, [2022] 2 FLR 1033; and *Her Majesty's Attorney General v Dowie* [2022] EWFC 33, [2022] 2 FLR 1055 per MacDonald J. An improper recording was made during a family group conference in *H v H [Family group conference: privilege]* [2010] NZFLR 821 (FC), where the central issue was about privilege and where contempt would not apply anyway.

direction that no recording was allowed and made sure that the person concerned understood, but the next day the person again engaged in recording, then the position changes. Short of such a direction, the recording and uploading do not fall easily within subpt 5 as they do not involve a false statement. Indeed, a recording will be an accurate statement of what was said (unless the recording has been tampered with).

This brings us to s 26 of the Contempt of Court Act 2019, which applies to the Family Court under s 15A of the Family Court Act 1980. Subsection (1) provides that, where the Contempt of Court Act 2019 applies, no court or judge has inherent jurisdiction or power to punish for contempt. The corollary is found in subs (2), which provides that the High Court's inherent jurisdiction survives where the Act does not apply.³¹ So, the recording example, which ostensibly does not fit under the Act, would have to be determined by the High Court, presumably on application by the Solicitor-General. This of course will take time and the actual case in which it occurred will probably have been finalised. The Solicitor-General will likely act and the High Court punish for contempt only in egregious situations, maybe where a genuine example needs to be made. If a parent in a childcare case acted guilelessly and later acted in a genuine way to comply with a parenting or guardianship order, then it may be contrary to the child's interests for the incident to be taken further. If it was more blatant as in the *Dowie* case, a custodial sentence may be warranted, but under s 27 of the Contempt of Court Act 2019, the maximum sentence is six months' imprisonment.

IV THE FAMILY COURT AND INHERENT POWERS

The preceding discussion operates on the basis that the Family Court, unlike the High Court, does not have inherent jurisdiction or inherent powers. This is also the subtext of Williams J's judgment in *KLP*. However, the position is not as clear-cut as this.

The leading case is *Hirstich v Family Court at Manukau*.³² This was a judicial review case, where the dispute between the parties had unfortunately dragged on for 16 years, with 99 applications, mostly by the mother, and 26 lawyers. The particular case was about child support even though the children were by now in their 20s. In the Family Court, Judge Rogers had concerns about the ongoing nature of the litigation but declined to use s 163 of the Family Proceedings Act 1980, which is about vexatious proceedings. Instead, she made the following direction:³³

I will direct that any proceedings filed in this jurisdiction by Ms Hirstich against Mr Kahotea are to be referred to me in the first instance for assessment having regard to the provisions of r 194 of the Family

31 For a discussion of the inherent jurisdiction, see Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 *Canta LR* 220.

32 *Hirstich v Family Court at Manukau* [2014] NZCA 305, [2015] NZFLR 317.

33 Recorded at [10] of the Court of Appeal judgment, in which the emphasis was added.

Court Rules 2002 [sic] which allows the Court to order that proceedings be stayed or dismissed if the Court considers, in relation to the proceedings or to the application, that—

- (a) there is no reasonable basis for the proceedings or application; or
- (b) the proceedings are frivolous or vexatious; or
- (c) the proceedings are an abuse of the Court's process.

No statutory warrant existed for this direction. The judicial review action thus challenged whether there was any jurisdiction to make it. If any, it had to be inherent and yet the lack of inherent jurisdiction in relation to contempt was the very reason why Williams J hunted hard to find a statutory basis for his decision. The *Hirstich* Court, however, referred to "the inherent power of the Family Court to regulate its own procedure" and stated that it is now "well established that a statutory inferior court such as the Family Court has such a power".³⁴ The Family Court thus has inherent procedural powers, but not substantive ones. The Court of Appeal then asked whether the direction quoted above was a proper use of the inherent power. Was it a backdoor method of denying a person access to justice? Or was it designed to save time and money and not impose a burden on the other party? There were other issues about the mother's right to be heard and the scope of the direction, but the Court upheld the direction: "[i]n effect, the direction was a form of case management procedure".³⁵

So, we now know that the Family Court has inherent jurisdiction so long as it is exercised in relation to procedural and not substantive matters. Judge Rogers in *Hirstich* was not using these powers to determine the parties' substantive rights in relation to child support, but only in connection with how litigation between the parties might occur in the future, that is, from a procedural point of view. In passing we might note that, at about the same time, Parliament inserted a rule into the Care of Children Act 2004 preventing parties from commencing proceedings that are substantially the same as those that have been decided within the preceding two years (subject to exceptions).³⁶ This is not the same as Judge Rogers' direction, but arguably there is some synergy between the two approaches.

So, what about contempt? In *KLP*, the problem there was not the substantive decision about which school the child should go to, but simply seeing that the decision was followed. In the recording situation, the concern was not about the care arrangements for the children, but a side issue that was tied up with the privacy of court processes. On the surface, could these situations not fall within the Family Court's inherent jurisdiction over procedural matters? This is what students suggest when I have discussed the point in lectures. However, this is not the answer as contempt is an offence and not a mere point of procedure. To punish someone for contempt is a substantive matter in itself independent of the substantive issues in the case where, for example, the recording took place. If a

34 At [21] and [22], citing *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

35 *Hirstich v Family Court at Manukau*, above n 32, at [27].

36 Care of Children Act 2004, s 139A.

situation falls outside subpts 2 and 4 of the Contempt of Court Act 2019, the Family Court cannot use its inherent powers in relation to procedure to punish for contempt. This is confirmed by s 26 itself, which expressly saves the authority of the High Court in relation to contempt and omits reference to other courts, like the Family Court, as they do not have such authority. Where the Family Court lacks power to act and the Act does not apply, it will have to rely on the High Court's substantive inherent jurisdiction. The Solicitor-General would most probably be invited to invoke such jurisdiction.

V THE BIGGER PICTURE

Does it matter that the Family Court's inherent powers are limited to procedural matters? Should it be able to deal with contempt issues as if it were a division of the High Court or even be reconstituted as such a division? The ethos of the Family Court, which is conceived to be more locally and people focused, does not gel that well with the supposedly "higher" ideals of the High Court. One of the changes following the *Te Korowai* report to improve the Court has been the appointment of navigators or Kaiārahi o te Kooti-a-Whānau,³⁷ designed to help people and whānau on their "journey" through the Court. With developments like this, there is no suggestion that the Family Court will be made a division of the High Court rather than the District Court and thus share the High Court's inherent powers.

Whether the Family Court really needs substantive inherent powers is another question. It has ample powers to govern its processes, including the powers in subpt 2 of pt 2 of the Contempt of Court Act 2019. So, it can deal with urgent matters, such as disruptions in the courtroom. Its contempt powers to enforce its substantive orders, established in *KLP* and now in statutory form, cover off subsequent matters that arise directly in relation to the outcome of a case. A circuitous route for this would be inconvenient for the parties and the Court itself. When a substantive issue arises where there is some doubt, it is hardly likely to be common or of such urgency that it cannot be transferred to the senior courts. For example, in *A v AH*,³⁸ Ellis J used her inherent jurisdiction to make an order about management in relation to property in Fiji when that country would not accept a Family Court order appointing a manager under the Protection of Personal and Property Rights Act 1988. On the other hand, Katz J in *Carrington v Carrington*,³⁹ where there were issues about testamentary capacity and the capacity to grant an enduring power of attorney, made it clear that the High Court's powers were residual and could not be used when the Protection of Personal and Property Rights Act 1988 gave the Family Court jurisdiction. So, occasionally the Family Court will lack powers, but on most occasions it will be able to deal with the situations that come before it. Where necessary, it can state

37 Ministry of Justice "Kaiārahi o te Kooti-a-Whānau" (30 May 2022) <www.justice.govt.nz>.

38 *A v AH* [inherent jurisdiction - appointment of manager] [2016] NZHC 1690, [2016] NZFLR 598. See also *Johnston v Schurr* [2015] NZSC 82, [2016] 1 NZLR 403, where the Court referred to its inherent supervisory jurisdiction over a manager.

39 *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571.

a case for the High Court or transfer proceedings.⁴⁰ Enough has been said about the interplay between the courts that the Family Court's lack of inherent jurisdiction over substantive matters, including contempt, is not a massive problem.

There is the bigger question of why the distinction between senior and inferior courts is retained. Is it one of those bequests from the common law that is of less relevance in Aotearoa in an age when we are starting to look more to tikanga for inspiration? The Senior Courts Act 2016 was passed only a few years ago and so a change is highly unlikely. Nevertheless, should issues arise about the jurisdiction and smoother operation of the Family Court, then perhaps a review of powers such as those relating to contempt should be undertaken.

40 Family Court Act 1980, ss 13 and 14.

