I Appendix: Cases relying on the s 12A(4) "any evidence" discretion (2014–2019)

Use of s 12A(4) to admit hearsay evidence

In ***H v W*** **[2019] NZHC 616, [2018] NZFLR 1015**, the High Court found that the District Court Judge, considering an application for a protection order, should have admitted a report prepared by a social worker in relation to Care of Children Act proceedings. The report was hearsay, the report-writer not having been called to give evidence, and contained hearsay statements made by other parties. The High Court noted the importance of having all relevant information, including in the present instance detailed evaluations of Mr Webster's conviction and domestic violence history, especially in the context of a domestic violence proceeding where evidence is inherently "hard to come by" (at [59]). However, the High Court also noted that the report could have potentially been admitted under s 18 of the Evidence Act, on the basis that it was reliable and that it would cause undue delay to make the writer appear.

In ***SG v DSG*** **[2019] NZHC 2579**, Fitzgerald J relied on s 12A(4) to admit affidavits sworn by a deponent who refused to appear in New Zealand proceedings relating to an international custody dispute, despite the deponent not being available for cross-examination. Although the Judge did not engage in a s 18 analysis, the affidavit could likely have been admitted under s 18 on the basis that the circumstances provided reasonable assurance of reliability and that the witness was unavailable (residing abroad and refusing to partake in proceedings).

L v R **[2017] NZHC 590, [2017] NZFLR 177,** concerned an appeal from a final protection order against L granted, in part, on an affidavit containing hearsay statements made by Ms P, a former partner of L. The statements were made in a Facebook private message conversation between Ms P and Ms R, asserting that L had treated P in a manner similar to the claims by R. Ms P's statements were before the Judge by way of an annexure to an affidavit sworn by Ms R. In his affidavit in reply, L said of the paragraphs detailing the conversation with P: "I do not intend to respond to this. No evidence has been put in by [Ms P]."

The Judge inferred that Mr L did not deny Ms P's claim because he knew them to be correct.[1] Accordingly, the Judge took the evidence into account as a factor in determining the protection order application. On appeal, L maintained the statements were hearsay and should not have been received. On appeal, Karen Clark J found that the Judge did not err in regarding Ms P's evidence. She cited s 12A(4), and noted that L had ample opportunity to respond to or deny Ms P's statements.

Application of the Evidence Act may have led to the same result of admission, but would have required considering factors of reliability and necessity in choosing to admit the hearsay. *L v R* shows that, although the Evidence Act applies in the Family Court, counsel cannot assume that

[1] NS, acting for L in the above matter, had previously represented Ms P. In a separate disciplinary proceeding against NS, the Standards Committee found that this conflict prevented NS from pursuing arguments on behalf of L when the Facebook material was offered, and that the Facebook material should have been tested. He was fined $2,000 and ordered to pay costs of $1,000. On appeal, NS argued the Facebook material was so lacking in weight and worth as to not require any response. The appeal Committee did not accept this argument: *LCRO 151/2016:* Applications for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 *NS v TD, TD v NS.*

non-compliant evidence will be excluded by the Judge in the absence of an express challenge to admissibility. "Best evidence" principles would demand calling Ms P to give evidence directly as to the alleged offending, or to consider the reliability of her statements and the necessity of admitting them in her absence. Relying on Facebook posts rather than Ms P directly clearly erodes the natural justice rights of L. Section 18 is broad enough to allow hearsay to be admitted for compelling reasons, but only provided there is reasonable assurance of reliability.

In ***Malcolm v Lloyd*** **[2015] NZHC 1483**, an appeal from a Family Court order to return a child who had been relocated from Auckland to Wellington without the father's permission, Muir J indicated he would have been prepared to accept under s 12A(4) an affidavit containing a hearsay statement. However on our reading, the s 12A(4) discretion was not needed in this case, as the statement would have passed a s 18 analysis (the circumstances provided assurance of reliability and the statement-maker was unavailable to be a witness).

Use of s 12A(4) to admit opinion evidence

In ***M v Ministry of Social Development*** **[2014] NZHC 3398**, parents of S sought to regain custody from the Ministry of Social Development. At issue was the admissibility of expert evidence of Dr Irwin, who had provided advice both to the Court and to a litigant simultaneously. This led Judge Ullrich QC in the Family Court to conclude that Dr Irwin's position as expert had been "irredeemably compromised" and the evidence could therefore not be "substantially helpful" in accordance with the requirements of s 25 of the Evidence Act. On appeal, the High Court held the reports in question were admissible, because they met the low s 12A(4) standard of "may assist". However, it is not obvious from the judgment that the Court needed to rely on s 12A(4), given that the Court also noted that arguably by ordering the report, "the Court [had] already indicated that it would find expert psychological evidence … substantially helpful" (at [39]).

Gibbs v Watt **[2015] NZFC 5715** concerned an interlocutory application to remove the affidavit of Mr Markham, a chartered accountant, from proceedings for orders under the Property (Relationships) Act 1976. The affidavit related to debt owed to Mr Watt by the Watt Family Trust. Judge Johnston found that although the evidence would not meet the "substantial helpfulness" test in s 25, the test under s 12A(4) of "may assist" is lower and it could be admitted on that basis. However, it is not clear that the evidence in question was in fact expert *opinion* evidence such that the s 25 test should have applied, in that it consisted of an accountant's review of balances owed and interest calculations. On our reading of the case, the calculations were properly subject only to the general admissibility rules of ss 7 and 8 of the Act, which they would have passed without resort to s 12A(4).

Bethell v Bethell **[2018] NZHC 3171** concerned (inter alia) an appeal from the Family Court's decision to admit an affidavit-in-reply from the respondent's accountant. In the High Court, Nation J found that the evidence was fairly admitted in the exercise of the s 12A(4) discretion. The affidavit included opinion evidence. However, it is not clear that the accountant's opinion evidence would have been inadmissible under the Evidence Act 2006, given that Act's flexible definition of expertise.

Use of s 12A(4) to admit privileged information

Goodwin v Rensford **[2015] NZFC 2156** concerned the admissibility of privileged settlement communications, sought to be introduced by the respondent, which corroborated her de facto relationship with the deceased. The Court found the communications were privileged under s 57 of the Evidence Act 2006, but that s 12A(4) applied and the policy reasons for preserving privilege were overridden in this case by the need to provide the Court with evidence in the present instance. Since *Goodwin* was decided, s 57(3)(d) has been inserted in the Evidence Act 2006, which allows for the disclosure of settlement documents where the need for disclosure in the relationship property proceeding outweighs the need for the privilege.

In ***Arrington v Slater*** **[2016] NZFC 5176**, a division of relationship property dispute, the applicant sought disclosure of legal documents relating to the respondent's employment settlement payment and a trust he had set up which had purchased a house some months after separation. Judge Twaddle found the documents in question satisfied the s 12A(4) test of "may assist the Court" so that the protection afforded by s 54 (legal professional privilege) could be displaced. Noting the public policy reasons behind legal professional privilege, the Judge elected to inspect the documents himself to determine whether the claim for privilege should be sustained in light of their relevance to the dispute. However, we are of the view that recourse to s 12A(4) was unnecessary in this case. In the absence of clear proof about the source of the funds, the Court could properly have drawn an adverse inference that the funds consisted of relationship property, effectively imposing a reverse onus on the respondent to prove how the purchase had been funded in the face of his refusal to waive privilege. This approach would obviate the need to rely on s 12A(4) or to subvert the strict conventions about the sanctity of legal professional privilege. We also note that since the case was heard, s 57(3(d) of the Evidence Act 2006 has been inserted, which would have allowed for disclosure of the settlement documents on the basis that the need for disclosure in the relationship property proceeding outweighed the need for the privilege.

Other uses of s 12A(4)

In ***Gebrien v Todd*** **[2015] NZFC 4949**, a case concerning applications for parenting and protection orders, the Court noted that the law of evidence applies in the Family Court, but that the Court has discretionary powers under s 12A(4) of the Family Court Act. However, the Court noted that ss 7 and 8 of the Evidence Act should remain the "guiding principle" in the exercise of the s 12A(4) discretion (at [33]). The Court noted that during the oral hearing, there were numerous instances where challenges could have been made under s 8, but were not, so as to allow for the flow of evidence. However, the Court specifically omitted some details of events from its judgment, because "had the s 8 rule been applied, such matters might well have been excluded" (at [33]).

In ***OG v JK*** **[2016] NZFC 9831**, OG applied for orders revoking an enduring power of attorney signed in favour of JK, relating to their mother's personal care and welfare. The Court exercised its s 12A(4) discretion to accept as evidence an affidavit signed by the mother, despite it being in improper form (there was no evidence that an oath was taken, or that the witness was qualified).