IN THE SUPREME COURT OF NEW ZEALAND SC 62/2012

[2012] NZSC Trans 18

BETWEEN **ALYXE JOHN WOOD-LUXFORD**
Appellant

AND **MARK JOHN WOOD as executor**
Respondent

Hearing: 4 December 2012

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: G J Allan for the Appellant
R A Moodie for the Respondent
G P Mason and T R Vanderkolk for Logan Wood

APPLICATION FOR LEAVE

MR ALLAN:
May it please Your Honours, counsel's name is Allan and I appear for the applicant.

ELIAS CJ:
Thank you, Mr Allan.

MR MOODIE:
May it please Your Honours, I appear for the executor and trustee and my name is Moodie.

ELIAS CJ:
Thank you, Mr Moodie.

MR MASON:
Counsel's name is Mason. May it please Your Honours, I appear with my learned friend, Ms Vanderkolk, for Logan Wood.

ELIAS CJ:
Thank you, Mr Mason and Ms Vanderkolk. Mr Allan.

MR ALLAN:
Your Honours, on the day before the tragic accident in which the mother of the applicant and her husband, John Luxford, were killed, both the applicant, Alyxe, and his brother, Logan, then aged four and 15, were living with their mother and John Luxford. Both Alyxe and Logan were maintained by Mr Luxford; their situations were the same. On appeal, it would be argued that the moral duty owed to Alyxe was the same or at least equal to that owed to Logan. The day after the accident the effect of the statutory interpretation of the Court of Appeal means that a fundamental difference in the position of Logan and Alyxe was crystallised. In this respect Logan, irrespective of what Mr Luxford provided in his will, qualified for a benefit of being entitled to pursue a Family Protection Act claim against Mr Luxford's estate, whereas Alyxe did not qualify. And why? Only because Alyxe was still in his mother's womb, rather than having been born at the specified qualifying date. This arbitrary difference in treatment is the underlying concern for the applicant; it is, with respect, Your Honours, why the applicant perseveres.

The Court of Appeal is determined that the text and purpose of the relevant provision of the Family Protection Act compels one to such arbitrary outcome and that any concerns about this are really matters for Parliament to address. The applicant seeks leave to be able to submit on appeal to this Court that the interpretation of the Court of Appeal involves matters of important, both in terms of an injustice to Alyxe and generally in relation to the field of statutory interpretation.

ELIAS CJ:
Mr Allan, I should perhaps say that, for myself, I don't have any difficulty with the point of public importance. The area of concern I have is really whether it's arguable, the point of interpretation that you're contending for, and I think that that's the area on which we seek your particular help in this hearing.

MR ALLAN:
Yes, Ma'am, and that's the point I'm coming to now.

ELIAS CJ:
Yes.

MR ALLAN:
And that concern of course concerns the common law principle of interpretation discussed in *Elliot v Joicey* [1935] AC 209 regarding children in utero. As this is an application for leave, I'll just confine myself to these few point, Ma'am.

ELIAS CJ:
Yes.

MR ALLAN:
The applicant relies on the doctrine in respect children in utero as a principled one that was developed to ensure that such children were not left high and dry, not left in a legal vacuum merely because they were still in their mother's womb at the qualifying date for a benefit to which they would have been

entitled if they'd been born at such date. The applicant would argue on appeal that the principle is an overarching and universal one and is not a principle that can be held hostage to any particular set of facts, like being confined to the interpretation of testamentary instruments. Further, the applicant would argue on appeal that when Courts interpret language, whether in statutory provisions or otherwise, it is not just about the logic of the language, it is not just about the literal language, but that it must always involve judgement, the exercise of judgement, unless excluded, and that judgement having regard to the jurisprudence of the common law. The accumulated wisdom of the approach of the common law, whether developed or developing, ought not to be lightly disregarded.

One of the features of arguing this case has been that both my learned friend, Mr Mason, and I have both relied on *Elliot v Joicey*, and the applicant on appeal would argue that the relevant jurisprudence here lies in what is said in *Elliot v Joicey*, which is at tab 3 of the bundle, the classic statement of the principle, and I quote, "An unborn child is taken care of just as much if it were in existence in any case in which the child's own advantage comes in question." It is submitted that the focus of the Court of Appeal was an –

GLAZEBROOK J:
Can I just check what the – I didn't find the reference.

MR ALLAN:
I'm sorry Ma'am. Tab 3, page 238, third paragraph, Ma'am. Third paragraph towards the end, Ma'am.

GLAZEBROOK J:
So, "Starting from the earliest times," is that...

MR ALLAN:
Yes. And further, and further down Ma'am, down to the end of the paragraph where there's the translation of the Latin classical statement.

GLAZEBROOK J:
Thank you.

MR ALLAN:
Thank you Ma'am.

It's submitted that the focus of the Court of Appeal was an unduly narrow one, and in my submission that is indicated by where the Court said, at paragraph 32 of its judgment, "The rule in *Elliot v Joicey* has evolved in the context of the construction of testamentary instruments in the law of succession in England and Scotland."

But the common law principle in respect of children in utero lying behind the doctrine set out in *Elliot v Joicey* have been developed and evolved long, long before that. The principle, as per the classic statement, it is submitted is of wider scope than the specific doctrine applied in relation to the facts in *Elliot v Joicey*. So the applicant's reliance on *Elliot v Joicey* is this: it's about affirming the general principle of interpretation developed by the common law in respect of the unique position of children of children in utero.

ELIAS CJ:
In what connection though, Mr Allan? You say the common law has developed this position in relation to the unique position of unborn children, but is that not only in terms of succession to property?

MR ALLAN:
Well, the argument for the applicant, Ma'am, is no, it is wider than that, going back to the classic statement in which the children's own advantage comes into question. Clearly in *Elliot v Joicey* the issue was in respect of a testamentary instrument and was confined to the facts of arguing in respect of that case. I'm respectfully inviting the Court to go one step back to the general principle and say, "This is the principle of advantage."

That advantage here, of course, is argued that there's a benefit to Alyxe in being able to bring a claim. That's the advantage; that's the benefit.

ELIAS CJ:
So is your argument that the common law principle that the child in utero is to be protected by the common law is a principle of construction applicable to the Family Protection Act construction in this case?

MR ALLAN:
Well, plainly, Ma'am, the applicant says yes, because – for a number of reasons, Ma'am. It's starting, actually, with what was said by the then-Minister of Justice, Sir John Marshall, when speaking to the Bill itself, which is in my learned friend's bundle at tab 10, third page in. And there the learned Minister said, "The Government has recognised," this is in the right-hand column, on page 3292, and going down a couple of inches, Ma'am, "The Government has recognised that there are other persons who may have a moral claim on the testator's bounty and the Bill seeks, as far as possible, to provide that where members of such class of persons have that moral claim at present and should be entitled to apply," and then it goes on to say, "In substance the new class is comprised stepchildren who were being maintained."

So the Court –

ELIAS CJ:
That wasn't the test eventually adopted.

MR ALLAN:
Well, what I would say, Ma'am, is that if, in terms of assessment of purpose, the starting point is: what was the purpose of this amendment in 1955? To bring, to bring children and families where they're being maintained but not the natural child of one of the parents within the scheme of the Act. And that Parliament must have been taken to have known that children in utero were always regarded as being in a special position. Was it the intention to leave

those children effectively in a vacuum merely because of the timing of their birth? And, and the – what's happened with Alyxe is that he is born, he is then maintained by his, by the testator, the late Mr Luxford, and all the pointers in every respect are that he was such a person intended to have the moral claim, who did have a moral claim, and that it's not a step too far to say that he fits within the context of the word "living" as it was then understood to be in terms of the common law principle of interpretation.

Ma'am, I accept that it is a matter of construction, but the construction has inherent in it a matter of importance jurisprudentially. It's, it's not just about, "Well, this is how we're going to set about constructing a particular meaning." It's more than that. It's about saying, "There's an expectation in the community at large that these kind of persons, these children in utero, will not fall into a vacuum, that they will be protected, that they will be taken care of."

And if nothing else, the common law has always been the connection between the expectations of ordinary citizens and the operation of law, and that's what the principle did. The expectations of ordinary citizens, the operation of law by having a construction, albeit sometimes called a legal fiction.

So the argument is that it is an overarching one, and it comes to, I come in my submissions to a point of concern about what the Court of Appeal said, in particular at paragraph 32, because there in the judgment the Court said that the principle here was, "so far removed" from the principle, that's the common law principle of construction, as to, "have no material bearing".

With respect, Ma'am, how could that be? Surely the principle was right on the point of being, having material bearing on the, on the predicament of Alyxe in this particular case or, for that matter, any child in utero. And so it would be argued on appeal, if leave were granted, that the Court of Appeal was wrong to so limit the application of the common law principle.

I just turn then, briefly, to a second aspect of Their Honours' decision which the applicant would seek to argue on appeal, and that relates to the focus of

the Court of Appeal on provisions in other statutes which do mention children in utero or children en ventre sa mère. And there the Court of Appeal, and paragraphs 48 to 60 covered this aspect, said that the existence of such other statutory provisions which do mention such children counts against the interpretation asserted for the applicant because the provisions of the Family Protection Act, it obviously has to be conceded, have no mention whatsoever of children in utero.

In this regard on appeal the applicant would rely on the point made by Lord Denning that was quoted with approval by Justice Baragwanath in *Police v Raynes* HC Auckland AP86/98, 11 November 1998, which is at tab 6, and the quote comes from page 9 of the judgment where Lord Denning is quoted as saying, "Wherever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free of all ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman." Lord Denning continued to say that in such situations the Judge must, "Set to work on the constructive task of finding the intention of Parliament".

On appeal the applicant would argue that provisions in other statutes which do specifically mention children in utero are not to be regarded as evidence that Parliament did not intend children in utero to come within the definition of stepchild and, more generally, the applicant says that intention or purpose should not be assessed from what is set out in other statutes that had nothing to do with the remedial purpose of the Act being interpreted, it being important to remember the 1955 Family Protection Act was, amongst other things, specifically concerned with (inaudible 10:19:58) predicament of stepchildren.

The applicant would argue on appeal that, while it is accepted that the interpretation advocated for the applicant would not cure all the anomalies, all the inconsistencies which the Court of Appeal said Parliament might consider

addressing, any difficulty for Alyxe arising from a purely literal interpretation is, it is submitted, one that the Courts can and should address by setting to work to constructively address, by using the common law interpretation of the word "living" in relation to children in utero.

The Court of Appeal also said that Alyxe does not fall within a legal vacuum – that is at paragraph 61 of the judgment – and the reason Their Honours said that was that, of course, Alyxe still does have available to him a claim against his mother's estate. But on appeal it would be argued that the, on the Court of Appeal's interpretation, Alyxe does indeed fall within a legal vacuum, and that the whole point of the common law doctrinal principle of interpretation in respect of children in utero is to prevent persons like Alyxe from being left stranded in such a vacuum. Of course –

ELIAS CJ:
Mr Allan, are you saying that there are gaps in the legislation which could not be addressed by plugging this particular gap? You seem to acknowledge that.

MR ALLAN:
I think in this sense, Ma'am, to use Lord Denning's example, a fact situation, not perhaps ever in a direct sense in contemplation, comes before the Court, there's no obvious answer in terms of literal meaning arising from the text of the Act, and that's the situation where the argument for the applicant is that the sleeves are rolled up and the Court is respectfully asked to construct, and that in once sense, in a very general sense, yes, Ma'am, it does involve gap filling, but not quite – I'm trying to think how I would say this – not quite as one would normally think it, because it is the argument for the applicant that Alyxe was always within the content of the class stepchildren, that inherent in that word, that definition, he was, it was always, he would always fit within it because of the common law interpretation.

ELIAS CJ:

Sorry, the point that I was asking you about is that it may be one thing to plug a gap, as was, for example, done in the *Northern Milk* case by interpretation, if there's one gap in the statute, but if there are a number of gaps in the statute it may be that the Courts can't fill them because what the statute represents is a series of judgments by the legislature, so that it's difficult to say that there is some gap that the legislature didn't intend.

MR ALLAN:

I think my answer, Ma'am, and perhaps I'm getting bogged down in the word "gap", I would focus at that point on the word "purpose" and say that does Alyxe fit within the purpose, having regard to moral duty, being maintained by the late Mr Luxford, being those sorts of things. So I think that I perhaps retreat a little from saying there's a gap and simply say, there's a situation that perhaps was not directly in contemplation, but that the words of the Act and the purpose of the Act allow Alyxe still to come within that definition. I think that's as far as I can take that aspect, Ma'am.

CHAMBERS J:

Can you help me, Mr Allan, as to whether we apply the definition of "stepchild" as it was at the date of Mr and Mrs Luxford's death, or at today's date?

MR ALLAN:

I think, effectively, at today's date in the sense, Your Honour, of, Sir, of the date of death of Mr Luxford. I would say that's the crystallising date in terms of, that's the time – until Mr Luxford's dead, there is no ability to bring a claim at all. So that's the assessment point.

CHAMBERS J:

Yes, but the question is, do we apply the definition as it was at 2000 or as it was at the date this claim was made? Because the definition changed in the intervening period.

WILLIAM YOUNG J:

It would have to be in 2000, wouldn't it?

CHAMBERS J:

Well, the Court of Appeal has quoted the definition as it currently is –

MR ALLAN:

Yes.

CHAMBERS J:

– and it may have some bearing, because I don't know the facts, but is there any possibility that Mr and Mrs Luxford were living in de factor relationship? I don't know what the transitional provisions are, that's the point.

MR ALLAN:

Well, all I can tell Your Honour about that from the bar is that prior to Mr Luxford and Alyxe's mother being married they did live together in a relationship. But I took the reading of the Act, Sir, to mean that of the alternatives, either being in a de facto relationship or being married, that it was the, if marriage came after –

CHAMBERS J:

Ah, yes, yes.

MR ALLAN:

– then it would, that would be the operative date, Sir. I would of course acknowledge that Parliament is sovereign but, with respect, that it is not divorced from the common law, because that's the means, as I've already submitted, of the connection between the expectations of ordinary citizens and the operation of the law. And the applicant would say that if Parliament doesn't intend an expectation which application of common law principles of construction or interpretation would deliver, or Parliament wishes to negate such expectation, then Parliament ought to clearly say so. It is submitted that this is what Justice Fogarty meant when he said in *Armstrong v Barton*, which is at tab 4 of the bundle of the applicant, at paragraph 22 His Honour said that

the Courts, “Lend against the extinguishment of common law, unless it is plain that Parliament intends that consequence.”

It is also submitted that the position of the applicant is consistent with what His Honour Lord Cooke said in *R v Salmond* [1992] 3 NZLR 8, when His Honour said – and it’s at tab 5, page 13, lines 27 to 31 – and the quote there is, “In many cases this Court has emphasised the importance of a practical and realistic interpretation of Acts of Parliament. In cases of ambiguity or hiatus, they should be interpreted so as to be made to work. Gaps may be filled to cover problems not foreseen when the legislation was enacted, provided that the policy making function is not usurped by the Courts.”

WILLIAM YOUNG J:

It’s not really a gap though. It’s simply, what’s the expression mean? Now, isn’t the argument really that this is similar enough to the construction – a context that’s similar enough to that which is discussed in *Elliot v Joicey*, for the so-called fiction to be applied? That in referring to “children living”, legislation must be taken to encompass children who were en ventre sa mère, a child en ventre sa mere?

MR ALLAN:

Certainly, Sir.

WILLIAM YOUNG J:

But there’s no gap to fill.

ELIAS CJ:

Don’t fictions cover gaps?

WILLIAM YOUNG J:

Well, there isn’t a gap to fill. It’s just, what’s this expression mean?

ELIAS CJ:

Well, if it's – yes, if it's what the expression means, then perhaps what you're really arguing is, if you don't want to go to gaps – I don't myself have a problem with gaps – is that the expression "living" is ambiguous, and therefore should be construed in the light of the common law.

MR ALLAN:

I think, Ma'am, that Your Honour's assessment reaches the same destination as His Honour Justice Young's destination in that respect, so I would not take issue with either, but the, when His Honour Lord Cooke was talking about policy-making function, and of course this is an important aspect because this is the, this is the interface between Parliament's sovereignty and the common law, which I appreciate is an important one, what was the policy here, and I say that that was evidenced by what I've already read from Hansard that's, I've already covered in my submissions, that it is other persons who may have a moral claim on the testator's bounty and that such person should include stepchildren being maintained by their testator, that's the guiding, that the policy, there's no usurping of that, because Alyxe fits within that policy.

McGRATH J:

But the class concerned is a defined class, with some limitation.

MR ALLAN:

I have, I have to accept it is, Sir, and of course that's, that's the challenge to the applicant to persuade this Court and has been the challenge below, in the Courts below, to have the Courts accept that Alyxe is within the content of the class. That's, that's the key. And, and, and Alyxe, in my submission, most certainly is.

CHAMBERS J:

But isn't the class that Parliament has chosen the class of those that we can be sure the deceased knew about at the start of the marriage or at the start of the relationship and accepted, we know that acceptance is part of it because the other limb of it is you have to show that the deceased was maintaining the

child. Now, a child in utero is not necessarily known by the deceased and therefore is not within the class that Parliament devised in 1955 and then confirmed again in 2005.

MR ALLAN:

I think two points in answer, Sir. The first is that Your Honours will have seen in the Court of Appeal judgment reference to leave being sought to introduce some further evidence, and that evidence actually was about, evidence about the knowledge of the late Mr Luxford. But the second point, and perhaps the more important point in reply to Your Honour, is this: the perspective is from that of the child. That's the key, in my submission. The perspective is from the, from the child's perspective. The child is not involved in any moral judgments about whether or not it was accepted or not accepted.

ELIAS CJ:

I don't think it's being suggested at all that it's a question of moral judgments. It's a question of what's the policy behind the legislation, and it does seem to me that the question of acceptance is a pretty formidable argument that you have to meet here.

WILLIAM YOUNG J:

It may be met by the maintenance issue. That is, by maintaining a child one accepts them.

ELIAS CJ:

In the particular case, but as for qualification, which is what the interpretation is –

WILLIAM YOUNG J:

Maintenance is required.

GLAZEBROOK J:

Maintenance is required.

ELIAS CJ:
No, no.

WILLIAM YOUNG J:
Maintenance is a statutory requirement.

ELIAS CJ:
No, no, I understand that, but the qualification is the – I see, the doubling up.

McGRATH J:
An additional requirement.

ELIAS CJ:
It's an additional requirement.

McGRATH J:
Maintenance is the additional requirement.

ELIAS CJ:
Yes. Yes.

WILLIAM YOUNG J:
There's no requirement that the deceased knew of the stepchild at the time of the marriage.

ELIAS CJ:
No, that's true. That's true.

MR ALLAN:
And of course in a, in a broader sense what is of some relevance to this general point is this: is that, as I think I put in my written submissions, if, if Alyxe's mother had nothing in her estate, what, what a start predicament, a difference in predicament there is between Alyxe and his older brother. One with an entitlement to claim, the other left high, dry and stranded. And, and in my respectful submission Your Honours, that can't be right. And that's why

the principle, the common law principle was there: to prevent that, to make sure that that doesn't occur. And that is why, as I say, the applicant perseveres.

The moral, the moral duty aspect is of some importance.

WILLIAM YOUNG J:

Can I just entirely cut across? The will that was made at the time of the marriage, around the time of the marriage, does refer to any children, “born to me by the said Wendy June Luxford.”

MR ALLAN:

Well...

WILLIAM YOUNG J:

It’s quite clear that that wasn’t intended to encompass Alyxe.

MR ALLAN:

Well, all I can say, and I can only take it –

WILLIAM YOUNG J:

And I just want to know that has been addressed.

MR ALLAN:

Well, if leave were granted I think that I would be making a further application to this Court for leave to introduce the further evidence sought to be introduced to clarify the knowledge of the late Mr Luxford which is pertinent to that point, but, but I, I’m not in a position to take it any further right now Sir.

WILLIAM YOUNG J:

I just wondered. But that is – I mean, this is an entirely separate issue that’s got nothing to do with the Family Protection Act.

MR ALLAN:

At the end of the day – sorry.

WILLIAM YOUNG J:

Sorry, if that was intended, if it was intended to be a reference to the child then en ventre sa mere, then it might be that the whole thing's irrelevant.

MR ALLAN:

Yes. I see, Sir. Yes Sir.

In the end the applicant says to this Court that Alyxe must be seen to someone who was in contemplation of the class. If Parliament is taken to be aware of the principle that children in utero would be taken care of, to quote the classic statement of as if in existence if to do so would entitle such child to advantage, here the advantage of being able to bring a claim.

It is the submission for the applicant that there is a serious injustice, a substantial injustice for Alyxe, but it is also submitted that, in the broader context of this case, some issues relating to that interface between the common law, the principles that has developed and is developing vis-à-vis statutory provisions, is of something of some importance, and that it would be of use, and in more general sense, for that to be considered by this Court.

Your Honours, more could be said, but the applicant seeks leave to be able to do so. If Your Honours please.

ELIAS CJ:

Thank you Mr Allan.

Mr Moodie, do you want to be heard?

MR MOODIE:

Your Honours, as counsel for the executor trustee, of course I, my position is required to be a passive position because of the responsibilities of the executor trustee to both parties, and I only want to make one or two comments, Your Honour, out of some issues that have arisen in Mr Allan's submissions.

Specifically, I want to speak to the matter of the parallel that exists between the common law development, which is, goes back about 200 years, and the, and the statutory provisions, because whilst the common law was concerned with the reason and motives of gifts made in a testamentary instrument in its interpretation of the meaning of "living", the statute is concerned in a parallel way with the question of responsibility for children who are maintained or partly maintained or legally required to be maintained. And in that context stepchildren are a class and the description, and this parallels with Lord Russell's statements in his, his four categories, that is a description of the class of person who is covered by the Act.

Now there's a problem. So the purpose of the common law development has some parallel with the purpose of the statutory provisions and the context that both are concerned with the rights of beneficiaries, if you like, or persons who were entitled to be beneficiaries of the deceased's estate: one, by virtue of the provisions of the Family Protection Act, the other, by virtue of a construction of the testamentary instrument.

A difficulty arises in relation to the definition of "living" when you look at what Parliament's intention or purpose was, and the question has been raised about whether the, whether Parliament might have been concerned about stepchildren that were known being covered but stepchildren who were not known not being covered. And when you look at stepchildren born after marriage who are not covered in the legislation, although they might be, you know, might subsequently become children who were wholly or partly maintained by the deceased.

So I'm just raising those questions, not answering them, because they're not easily answered. But I'd like to close by just saying that we have a development in the common law that took absolute decades when interpreting statutory instruments, when applying their mind to the provisions of the Family Protection Act, surely the legislature must have, must have had in mind that the other route by which a person wholly or partly being maintained

would be taken care of is by virtue of the testamentary process, the testamentary instruments of the deceased. So “living” must have been a factor in the mind of the legislature, and the legislature, I submit, must have known that “living” had a history in this context through the doctrine in relation to children in utero.

That’s all I wish to say, Your Honours.

ELIAS CJ:
Thank you Mr Moodie.

Yes Mr Mason, thank you.

MR MASON:
May it please Your Honours.

My friend Mr Allan has referred to further evidence about the knowledge of the late John Luxford. I’m bound to say that there is not a unified position on what his state of knowledge was, whether he ever knew or when he knew, and in my submission that lack of clarity about his knowledge has some bearing on the wisdom of Parliament in framing matters they way they did.

GLAZEBROOK J:
Can I just check, because we’re talking in – when you say “when knew”, is that what –

MR MASON:
Whether he –

GLAZEBROOK J:
Whether he ever knew that Alyxe wasn’t his child?

MR MASON:
Or whether he knew before his death or before marriage.

GLAZEBROOK J:

Because one explanation for what Parliament has done is that any child born in marriage would be assumed to be a child of the deceased and, in fact, that Parliament thought that they would come just within the ordinary definition of "child". Whether or not they happen to be a child of the deceased, that they thought that that was where – so in fact that Alyxe would qualify under the definition of "child", not "stepchild". And that wouldn't matter whether or not Mr Luxford actually knew in this particular case. It would be Parliament's assumption, and especially given at the time the difficulties of deciding whether somebody was in fact a child of the marriage or not.

MR MASON:

Yes.

GLAZEBROOK J:

So is the explanation that you only deal with those living, and perhaps not even en ventre de sa mere, depending on – I mean, for myself I am undecided on that question in terms of *Elliot v Joicey* in terms of the interpretation question, but if it went against Alyxe in this case, then is the other argument that in fact he would have been seen as coming within the definition of "child"? And I have to say that I'm not overly keen on the decision in relation to, which, whatever the one that was relied on in the High Court. Anyway, never mind.

WILLIAM YOUNG J:

Keelan v Peach [2003] 1 NZLR 589 (CA).

GLAZEBROOK J:

Yes.

MR MASON:

Yes.

GLAZEBROOK J:

So I'm not overly keen on that decision either, personally, just on an immediate...

MR MASON:

I'm grateful for that, Ma'am.

Under consideration is an aspect of a definitions section where perhaps of all places Parliament has tried to be most careful. This is a definition section which comes armed with a relatively comprehensive set of definitions. I'm not in a position to give a particularly intelligent answer to Your Honour's question about the definition of "child of a marriage". There is one there and my recollection of it, not having it directly in front of me, is that Alyxe does not fall within that definition of "child of a marriage". It's one that includes children to the partners –

GLAZEBROOK J:

Oh, "after birth" I think, yes.

MR MASON:

Yes. But –

GLAZEBROOK J:

Well, I think that might be an argument to say that they were actually contemplating. Because obviously they, somebody who's en ventre de sa mère has to actually come somewhere within this, one would've thought .given that there's whole piles of people who marry young. Marry, especially at that time, after the child was in utero rather than before.

MR MASON:

Sure. And the child en ventre sa mère of both the parties to the marriage is specifically included.

CHAMBERS J:

Clearly covered –

MR MASON:

Yes.

GLAZEBROOK J:

So where does it say that?

CHAMBERS J:

– by the definition of "child". Yes.

MR MASON:

Indeed. The – one of the issues that –

GLAZEBROOK J:

Sorry, whereabouts is –

ELIAS CJ:

"Child of a marriage", do you mean?

CHAMBERS J:

By a "child of a marriage" "includes a child whose parents marry each other," "after the child's birth".

GLAZEBROOK J:

But that's not what happened here.

CHAMBERS J:

No.

WILLIAM YOUNG J:

Well it's a child of a de facto union.

MR MASON:

Mmm.

GLAZEBROOK J:

Yes, I must say it's just something that just occurred to me immediately, so I haven't looked at the provisions myself with that in mind.

ELIAS CJ:

What has happened to the presumption of paternity?

WILLIAM YOUNG J:

It's in the Status of Children Act, in somewhat attenuated form. There's a presumption that the child is a child of both, of the father – sorry, of the husband, but it can be displaced and there's no restriction on the parents giving evidence, which was the rule in *Russell v Russell*.

MR MASON:

Here, of course, we have a decision on paternity and there's no dispute, as I understand it, that that decision reflects the reality of –

ELIAS CJ:

What –

GLAZEBROOK J:

Oh no, no.

WILLIAM YOUNG J:

But when was the decision as to paternity made?

ELIAS CJ:

Yes.

MR MASON:

It was after death. I think it was 2003. The – it was well after the death of Mr and Mrs Luxford.

WILLIAM YOUNG J:

And was that made in the context of this dispute?

MR MASON:

Alyxe's natural father, Tamamutu Kimura, brought an application for paternity and then sought guardianship under then the Guardianship Act. His application for guardianship was declined by Judge Fraser.

In my submission part of the heart of this case is about the correct approach to this Act, and indeed, any Act. The fiction, the en ventre sa mère fiction, is about the presumed intent of the donor in a testamentary gift, and the difference between ascertaining the intention of Parliament, as Courts are enjoined to by the Interpretation Act, and presuming, perhaps generously, the intent of a donor, marks out that distinction. In my submission there is a wide gulf between what a Court can do with a testamentary instrument where the intent can be presumed and what it must do when approaching a statute, which is to ascertain the intent. There is not the latitude with a statute that there is with a will or with a deed.

And *Keelan v Peach*, in my submission, makes that point. It's quoted by the Court of Appeal at paragraph 42 of the judgment in this case where Justice Sir Kenneth Keith had talked about the scheme of the Act, the careful building of a precise list of claimants over a long period of time, while leaving the Court with a broad discretion to make provision for eligible claimants. The final sentence of the quote that the Court of Appeal in this case made of that decision, which is at paragraph 42, is, "The fact that in exercise of that power the Court recognises moral duties does not mean that it can by reference to such considerations rewrite the list."

In my submission, that's the very hope of the applicant in this case, is to bend the meaning of the word "living" so as to include Alyxe. In my submission, the decision under appeal is a careful review of the interpretation applicable to the word "living" in the statute and, short of something that I haven't seen yet, in my submission it's plainly right.

My friend has referred to Hansard, as well he might. The difficulty with a reference to Hansard is the speeches there don't come with definition sections, and we don't know precisely what was in Sir John Marshall's mind when he spoke of stepchildren. I provided to the Court of Appeal a copy of the 1952 reprint of the third edition of the *Shorter Oxford Dictionary*, which is the one in the local library in Palmerston North, and it says that a "stepdaughter" is, "A daughter by a former marriage of one's husband or wife." The definition in the current *Shorter Oxford* is a little broader than that and refers to, "Marriage or other relationship." But if that sort of precise definition, "The daughter of one's spouse by a former marriage," was in the mind of Sir John Marshall, then his speaking of stepchildren would not avail the applicant in this case. We cannot, in my submission, get into what was in the speaker's mind in Hansard there, in –

ELIAS CJ:

Well, statutes have to be always speaking, anyway, so –

MR MASON:

Indeed.

CHAMBERS J:

So in any event, this statute was amended in 2005 –

ELIAS CJ:

Yes.

CHAMBERS J:

– so what Sir John Marshall thought, with respect, takes us nowhere.

MR MASON:

It's been variously amended. The limitation in clause (b) of the definition has been maintained throughout its various forms since 1955, and if – my point is

simply to say, if my friend's calling in aid that Hansard speech, there are some real problems with that.

GLAZEBROOK J:

Can I just go back to what "child of a marriage" would have meant at the time that this was brought in? So whether in fact "child of a marriage" would have included perhaps slightly more presumptively somebody like Alyxe, who was born actually during the marriage?

WILLIAM YOUNG J:

But is "child of a marriage" part of our claimant? Is –

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

– is it? Well, what's –

GLAZEBROOK J:

Yes, well, it's – yes.

WILLIAM YOUNG J:

Right, okay. I was looking for that but I couldn't…

GLAZEBROOK J:

Yes, well, I'm sorry, it's just something that's occurred to me now, but I'm just trying to work out why they would have had that in there, and one explanation is – because it doesn't seem to be that the person knows it's a stepchild, or ever knew it was a stepchild, it's not part of the definition.

ELIAS CJ:

Where is "child of a marriage" referred to in the Family Protection Act?

GLAZEBROOK J:

Well, it's defined – well, it's defined, it's defined as being inclusive of that.

ELIAS CJ:

Because section 3 –

GLAZEBROOK J:

But then you have a –

ELIAS CJ:

– is about the children of the deceased, not the children of the marriage.

GLAZEBROOK J:

Well, that's why I'm not quite sure –

ELIAS CJ:

So there must be something else in the Family Protection Act.

GLAZEBROOK J:

– where the child of the marriage comes in.

MR MASON:

Section 2, Ma'am.

ELIAS CJ:

Sorry?

MR MASON:

Section 2, Ma'am.

ELIAS CJ:

No, I understand that –

CHAMBERS J:

Yes, but where does it come in –

ELIAS CJ:

– but where's the definition applied?

CHAMBERS J:

Where does it apply in the Act?

MR MASON:

There is one reference to it, from memory, in section 3.

CHAMBERS J:

Where?

ELIAS CJ:

Oh, I see, a little Roman (iii) under 1(a).

GLAZEBROOK J:

Oh, I see. But I'm just wondering whether that then refers back –

ELIAS CJ:

That's for the parent.

GLAZEBROOK J:

– to being the children of the deceased, because…

ELIAS CJ:

No, it doesn't, I don't think. I think – I don't think it does.

CHAMBERS J:

Is that the only place the words "child of the marriage" appear?

ELIAS CJ:
You'll have to pull it up and search.

MR MASON:
Yes, I'm not – I wouldn't stake anyone's life on it but, on my reading of it, yes, that's correct.

CHAMBERS J:
You – that's right.

GLAZEBROOK J:
So at the time this was passed, what was the presumption about children being children of the deceased at the – if they were children that were born?

WILLIAM YOUNG J:
It's in the Status of, in the Status of Children Act, it's a presumption…

GLAZEBROOK J:
Yes, which is 1969.

WILLIAM YOUNG J:
Yes.

GLAZEBROOK J:
Yes.

MR MASON:
My submission is the –

GLAZEBROOK J:
But before 1969 –

WILLIAM YOUNG J:
It was the same –

GLAZEBROOK J:
– with the stronger presumption.

WILLIAM YOUNG J:
– it was the same, but the husband and wife couldn't give evidence of non-access or otherwise challenge –

GLAZEBROOK J:
Right.

WILLIAM YOUNG J:
– the status of the child.

GLAZEBROOK J:
All right, well, it might be a red herring.

MR MASON:
My submission in relation to that, it was to clarify in relation to illegitimate children, which obviously in the '50s were more of an issue than perhaps than might be considered today. It was –

ELIAS CJ:
But the point about a presumption is that it may affect the interpretation of this legislation, because it may be that at the time it was enacted there was no gap for children in utero, because of the presumption.

MR MASON:
Ma'am, I'm simply not in a position –

ELIAS CJ:
Yes.

MR MASON:

– to tell you that that can be displaced by evidence of fact, as we have in this case –

ELIAS CJ:

Yes.

MR MASON:

– although obviously an affiliation order, which would have been the sort of order made at that time rather than a paternity order, would, I think – and I can put it no higher than that – have been available to a person in Mr Kimura's position.

ELIAS CJ:

But the paternity order was made in 2003, did you say?

MR MASON:

Yes.

ELIAS CJ:

So that's after, after the death?

MR MASON:

After death, yes.

GLAZEBROOK J:

My question was really, when you're interpreting this legislation, do you interpret it as saying that there was a gap, if later it turns out someone's a stepchild, or do you interpret it in the sense that a "child of the deceased" means a child who was recognised as a child and who was maintained, et cetera, so that Parliament didn't think there was a gap, so when interpreting it you either do the *Elliot v Joicey* interpretation or you say, well, it was intended that that be a child of the deceased and "the child of the deceased" is expanded to include a child who was born during the marriage, whether or

not the child was a child of the deceased, actually a child of the deceased, or not?

MR MASON:

It's not an argument, I'm bound to say, I've come today prepared to answer.

GLAZEBROOK J:

No, no, I understand that.

MR MOODIE:

Perhaps what I – turning to what I can answer in terms of *Elliot v Joicey*, in my submission it's a very clear decision about the general meaning of "living", obviously the word exactly under consideration of that decision was "surviving", but in terms of "born, living, surviving" the general meaning is that they are alive at the relevant, alive, having been born, not having died. There is a – the exception that my friend relies wholly on, that's a narrow definition that the House of Lords were careful to keep within the bounds stipulated by authority. It was not a general proposition but it was one that applied in restricted circumstances. And, in my submission, if the enquiry is what was in Parliament's mind in 1955 in adopting the word "living" that's been maintained throughout, there was a decision which was binding on the New Zealand Courts at the time saying that "living" required that one had been born. That limited – and we're talking about a limitation and subclause (b) of the definition – operated to exclude people, as limitations do, limitation periods. Perhaps the classic example of that, no matter how meritorious your case, if you're on the wrong side you're gone for all money. This limitation excludes some people. It excludes children born to one parent only in the course of a marriage, or one of the marriage only during the course of a marriage, in particular, and nothing in my friend's argue is going to touch their position which, I'm bound to say, must be rather more common than children in Alyxe's position. The issue is whether a liberal interpretation of "living", a non-literal interpretation, she be given that would cut down the scope of what was intended as a limitation on the right to claim.

CHAMBERS J:

Mr Mason, assume for the moment that we were with you, that it's unarguable that Alyxe is a stepchild, what if we thought, however, it was arguable he was a child of the marriage. Is it possible, would it be possible for us to hear the appeal on that basis, do you say?

WILLIAM YOUNG J:

You'd say because "child of the marriage" doesn't get you there. You've got to be a child of both – of the deceased.

MR MASON:

Mmm, yes.

WILLIAM YOUNG J:

"Child of the marriage" is not a recognised claimant.

CHAMBERS J:

Well, I'm assuming that the person may not come within the phrase, "the included part of the definition", but is it possible that throughout the life of the deceased the child was considered as a child of Mr and Mrs Luxford and therefore could come within the definition of "child of the marriage"?

MR MASON:

Sir, I –

CHAMBERS J:

It having, the child having been born when they were married.

MR MASON:

As I understand Your Honour's point, essentially you are saying, "Could we review what "the children of the deceased" means in section 3(1)(b)?

ELIAS CJ:

It's interesting. "The child of the marriage" is a pretty...

CHAMBERS J:

I see. I see. Yes, it doesn't get you there because –

GLAZEBROOK J:

Well it does assume a child of a marriage could claim, because if a child of a marriage can't claim then why worry about whether they are still living at the time that someone else can claim? So it seems to me arguable. I don't know what the end of that argument would get to, and obviously it’s not fair on you at all expect you to deal with this on the whole.

CHAMBERS J:

No. All I’m really asking is, would you say that was open to us or do you say it’s precluded by the way the case has been pleaded and argued up till now?

MR MASON:

I’m bound to say that it hasn’t been pleaded or argued this way. It’s been dealt with on the basis of the argument over “stepchild” in the High Court, in the Court of Appeal. As an ultimate Court of appeal you would be in effect sitting as a Court of first instance on that.

CHAMBERS J:

Right. So when Justice Ronald Young said –

GLAZEBROOK J:

Well, where is it just a matter of interpretation of the statute? Because there’s no evidence necessary in respect of that because it’s looking at whether, as an interpretation of the statute, there was a presumption that “child of the deceased” included anyone born and maintained by the deceased as their child. Whether or not they knew they were – and in fact in this case the facts would say they didn't necessarily know that.

MR MASON:

Nonetheless, it would be my submission that it would not certainly be best practice to have, to adopt that course.

CHAMBERS J:

Well, when Justice Ronald Young said at the end of para 1, "If Alyxe is not John Luxford's stepchild then he has no claim on Mr Luxford's estate," does that reflect the common ground of the parties in the High Court?

MR MASON:

Yes Sir, as I understand, and certainly that wasn't the subject –

CHAMBERS J:

Right.

MR MASON:

– of any appeal to the Court of Appeal.

CHAMBERS J:

Right.

MR MASON:

It's always somewhat deflating to say that really your argument amounts to supporting the Court below's decision for the reasons contained therein, but that is the reality of my position, although I have pointed to the fact that clause (b) is a limitation section which perhaps hasn't received attention in the two Courts below, probably because I haven't made that argument before.

GLAZEBROOK J:

Sorry, I think I probably missed what that argument was.

MR MASON:

We're talking about a limitation in clause (b) –

GLAZEBROOK J:

Oh, all right.

MR MASON:
– of the definition. But save for that point, I do support the decision of the Court of Appeal for the reasons therein. As Your Honours please.

ELIAS CJ:
Yes, thank you Mr Mason. Is there anything...

MR ALLAN:
One very –

ELIAS CJ:
Yes.

MR ALLAN:
– small point, Ma'am. Just, if Your Honours please, just touching upon this question of knowledge. If I just, might respectfully refer Your Honours to an aspect. Your Honours have the benefit of a copy of the will annexed to my learned friend Mr Moodie's submissions and, indeed, Your Honour Justice Young, I think, was referring to page 2 of the will, clause 5(c), where it talks about, "In the event of Wendy Luxford not surviving 14 days, that the beneficiaries are Logan Wood and any child or children who should be born to me and the said Wendy June Luxford," and Your Honour's point is giving me food for thought.

But added to that, my learned friend Mr Moodie annexed at the last page of his submissions a copy of the handwritten notes of the late Mr Luxford where he sets out amendments to his will, and I only draw Your Honours' attention to that because if Alyxe is specifically mentioned, that must mean that Mr Luxford did know that Alyxe was not his child.

WILLIAM YOUNG J:
Well it could be just updated.

MR ALLAN:

Well, in my submission, Sir, it tends to indicate that that would be the position. Because why else amend it?

And that's all I wanted to bring to Your Honours' attention. I think I've made all the other points I wished to make. As Your Honours please.

ELIAS CJ:

Thank you Mr Allan.

McGRATH J:

This note was taken by the solicitor, Mr Martin, was it?

MR ALLAN:

No. It is, apparently, Mr Luxford, the late Mr Luxford's own, in his own hand, Sir.

McGRATH J:

Thank you.

MR ALLAN:

If Your Honours please, that is the argument for the applicant.

ELIAS CJ:

Yes, thank you. Well thank you counsel for your help in this matter. We'll take some time to think about our decision on the matter.

COURT ADJOURNS: 11.06 AM