IN THE SUPREME COURT OF NEW ZEALAND SC 62/2012

[2013] NZSC Trans 4

BETWEEN **ALYXE JOHN WOOD-LUXFORD**

Appellant

AND **MARK JOHN WOOD**

First Respondent

LOGAN WOOD

Other Party

Hearing:	7 March 2013
Court:	Elias CJ McGrath J William Young J Chambers J Glazebrook J
Appearances:	G J Allan and J A Signal for the Appellant R A Moodie for the Respondent (attendance excused) G P Mason and T R Vanderkolk for the Other Party

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CIVIL APPEAL

MR ALLAN:

Counsel's name is Allan and I appear with my instructing solicitor, Ms Signal.

ELIAS CJ:

Thank you Mr Allan, Ms Signal.

Mr MASON:

Counsel's name is Mason and I appear with Mrs Vanderkolk for Logan Wood.

ELIAS CJ:

Thank you Mr Mason, Mrs Vanderkolk.

MR ALLAN:

Your honours, I propose to start today at a somewhat unusual place. That place actually is a sentence in the submissions of my learned friend Mr Mason, to which I would respectfully refer your Honours. That is a sentence at his submissions on page 23. Right at the bottom of that page is a sentence that commences with the words, "If Courts", and it runs across to the next page, and I'll read it out, may it please your honours.

My learned friend says, "If Courts start interpreting statutes with a view to obtaining results they consider are more fair than otherwise would result, they will have abandoned ascertaining the meaning of a statute from its text and in light of its purpose."

I mention that sentence, your Honour, because there's two comments briefly I want to make about it. My first comment is to say to your Honours that the applicant in this matter is not inviting this Court in any respect to abandon the obligation to ascertain meaning in accordance with s 5 of the Interpretation Act 1999, and of course how could I? The whole thrust of the submission for the appellant is that the interpretation of the provisions of the Family Protection Act 1955 advocated for the appellant are consistent with the purpose of the Act and are not excluded by the text of the Act. It is accepted that s 5 is pivotal, both subss (1) and (2), although, of course, mainly the former.

The second comment, your Honours, I have about that sentence relates to what my learned friend calls in the sentence, "a more fair result". If, in my submission, a more fair result can be obtained by interpretation carried out in a manner consistent with s 5, then why wouldn't one adopt that interpretation rather than one that gives rise to a less fair result?

It's the appellant's contention that there is a principled interpretive pathway available which accords with s 5 which gives the appellant, Alyxe, the same entitlement to claim under the Act as his brother would have had if he had needed to. Of course he

does not. A result what my learned friend might call, “a more fair result.” And such a principled interpretive pathway is one that avoids the arbitrary result of leaving Alyxe with no remedy available to him merely because he was born about six months after his mother married Mr Luxford. A less fair result, one would presumably call it. A result where the appellant’s brother has an entitlement to make a claim if he needed to do so and where Alyxe does not. Indeed, it is such an arbitrary, in my submission, and discriminatory outcome – I did look at the provisions of the New Zealand Bill of Rights Act 1990 and of the Human Rights Act 1993 – to see if somehow the interpretation direction of section bill – s 6 of the Bill of Rights Act might be invoked, but it does not appear to me that the discrimination here is one that falls readily within the prohibited grounds of discrimination in s 21 of the Human Rights Act. So the appellant is not wishing to avoid in any way the requirements of s 5, but rather seeks to persuade your Honours that there is an interpretive pathway which accords with the requirements of s 5 and which results in Alyxe satisfying the provisions of the Act which would entitle him to bring a claim.

The argument for the appellant has always been that he, Alyxe, fits within the definition of stepchild as set out in s 2 of the Act. This remains the principal argument for the appellant. Before developing that argument though, I turn to address some of the relevant facts, which are set out more fully in my written submissions on pages 4, 5 and 6, but to these oral submissions into context I will traverse some of the facts fairly briefly.

Alyxe is now 17, but at the date of the death of his mother and her husband John Luxford in April 2000 he was only four and a half. Alyxe’s mother had one other child, Logan Wood, who was 10 and a half years older than Alyxe. Mr Luxford was not the biological father of either Logan or of Alyxe, who had different fathers. Alyxe’s mother and Mr Luxford married on the 11th of April 1995 when Alyxe was still in his mother’s womb, in utero. Alyxe is not provided for in either his late mother’s will or Mr Luxford’s will and neither estate has been distributed. As things stand, Logan Wood is the sole beneficiary of Mr Luxford’s estate and is beneficiary as to about two-thirds of him and Alyxe’s mother.

It is common ground that Alyxe is entitled to make a claim against his mother’s estate, and this has been facilitated by his litigation guardian, namely his maternal aunt who’s cared for Alyxe since his mother died. Logan Wood, it has to be acknowledged, has acknowledged that Alyxe should receive some provision from his

and Alyxe's mother's estate, although no agreement as to quantum has been reached. In the absence of determining this matter, that is difficult, of course, in terms of resolution. If this appeal were unsuccessful, then Alyxe would of course be confined to looking to his mother's estate in terms of provision for himself, and I do note in passing that even if Alyxe took all of his brother's share in his mother's estate, it would still leave his brother with nearly twice as much as Alyxe. Given the stance of Logan Wood, Alyxe's aunt in her capacity as litigation guardian felt obliged to also pursue on behalf of Alyxe a claim against Mr Luxford's estate.

We also know, your Honours, that Mr Luxford did have in mind to benefit Alyxe equally with Logan, but this was never implemented, and of course the relevant document that clearly indicates that is in the case on appeal at 154, which is, without taking your Honours to it right now, is the handwritten notes of the late Mr Luxford which deals with what he was proposing by way of change to his will within a year or so of the tragic car accident.

Indeed, the evidence overall is that Mr Luxford not only maintained Alyxe as a member of his and his wife's family, but he also regarded Alyxe as if a son of his own, even though he was not Alyxe's biological father. Of course, it goes without saying but I'll say it anyway, that Alyxe cannot bring a claim against the estate of Mr Luxford unless he fits within the class of persons specified in s 3. It is contended that Alyxe does fit within s 3, whereas of course it is argued for Logan Wood, his brother, that Alyxe is not entitled to claim against Mr Luxford's estate, even though Logan Wood, if he, like Alyxe, had not been a beneficiary of the will of Mr Luxford, he could bring a claim. This is discrimination as between two brothers which perplexes Alyxe's litigation guardian as being both arbitrary and unjust and hence this appeal.

I turn then your Honours to the main, or the principal, argument for the appellant, which, of course, centres around the definition of stepchild and in particular, the word "living" that appears in that definition. This takes me, in terms of my written submissions, to page 7 of those submissions I believe, in terms of submissions to Your Honours. I wasn't intending Your Honours, to simply read my submissions but rather to speak to them but of course I'm happy to be taken back to my submissions at any point should –

CHAMBERS J:

Well what I would like to take you to Mr Allan is, if we looked at the Family Protection Act as it was first passed which is at tab 2 of the respondent's authorities.

MR ALLAN:
Yes Sir.

CHAMBERS J:
And if you would turn please to section 2(1), page 1955, where we see the definition of stepchild. Now then go down to subsection (iii) which is concerned with an illegitimate relationship and, "It shan't be recognised unless the Court is satisfied that the paternity or maternity of the parent has been admitted by or established against the parent while both the parent and the children were living." Now in that circumstance, living must carry the meaning that Mr Allan [sic] contends for, at least in that circumstance, mustn't it?

MR ALLAN:
I'm mindful Your Honour, that of course the illegitimate aspects of matters since 1955 has been removed from the Act –

CHAMBERS J:
I know, I know, that's not the point of my query. My query is to see whether your definition of "living" can apply in other parts of the same statute where we find the word "living"?

MR ALLAN:
Yes, I think –

GLAZEBROOK J:
I was just –

MR ALLAN:
Sorry Ma'am.

GLAZEBROOK J:
– why you wouldn't be able to admit a child in foetus as your child because in fact that often happens, doesn't it, I mean, I don't know whether they meant that there but it will often happen that somebody admits paternity of a child while they're in utero.

CHAMBERS J:

Well the Court couldn't be satisfied of that matter until they were both alive.

MR ALLAN:

I think the focus there, of course, I think part of my answer Sir is that sentence requires two people to be living. The parent aspect of it doesn't involve the principle I'm going to argue for of in utero whatsoever. The principle I'm arguing for in respect of child in utero can only relate to the child, so that by introducing the element of both the parent and the child, the principle I'm arguing for can't have any application at all because it couldn't ever apply in respect of the parent, it could only apply in respect of the child. So I think my answer is that it doesn't affect the argument in terms of dealing with section 2 and the word "living" as it appears there because qualitatively "living" in section 2 is a different creature altogether than "living" in subsection (iii).

ELIAS CJ:

So you don't adopt the suggestion that's been put to you by Justice Glazebrook, that you could maintain the same interpretation of "living" in respect of the child in subsection (iii)?

MR ALLAN:

Only in relation to the child but not the parent Ma'am.

ELIAS CJ:

Well no, I understand that but a parent in utero is a rather odd concept.

MR ALLAN:

Yes. Yes, what I meant Ma'am is that – I'm just trying to think of a factual situation to deal with Justice Glazebrook's point, where the child might be in in utero, that couldn't be – the paternity aspect of it couldn't be established until the child actually physically had been born –

GLAZEBROOK J:

Well no, it says "admitted by", so if somebody says I admit that this is my child and when –

MR ALLAN:

Yes, yes –

GLAZEBROOK J:

– it's born I'm going on the birth certification. I mean, that would be sufficient I would have thought –

MR ALLAN:

I agree Ma'am, yes –

GLAZEBROOK J:

– because obviously – well I suppose they probably can test for paternity now in utero but they wouldn't in that I suspect it's a – they would have to do something that would be unacceptable but many people will say, this is how child –

MR ALLAN:

Yes –

GLAZEBROOK J:

– and I admit paternity of this child that my de facto partner is having in, whatever the time period and surely "admitted by", that's enough under this –

MR ALLAN:

Yes, I accept that an admission would satisfy that Ma'am. By other point I suppose, is that the focus of the issue in terms of the definition, as distinct from subsection (iii) that I'm concerned with, whether or not, in this case the appellant Alyxe, comes within the class. I'm not concerning myself with paternity in any sense and I'm not concerning myself in dealing with the word "living", if I was dealing with subsection (iii) with the principle that I'm advancing here.

GLAZEBROOK J:

Well although presumably, it could arise in the same situation where you had somebody admitting paternity, the child being born the day after –

MR ALLAN:

Yes –

GLAZEBROOK J:

– and then saying, illegitimately in this instance and then saying well sorry, the child can't claim despite the fact that it is actually the person's child and the person admitted it right from the start of conception, or at the time they found out that there had been conception. So the same argument will probably apply if you apply the benefit provision –

MR ALLAN:
Yes, yes, if –

GLAZEBROOK J:
– that you are suggesting should be applied.

MR ALLAN:
Yes and of course the benefit requirement in terms of the principle in relation to children in utero is an essential feature of it and of course the argument here is that the benefit is the right to claim.

ELIAS CJ:
Just looking at the definition in this – this is the first Family Protection Act, is it, the 1955 one? Yes. Looking at the definition of stepchild, a child of a former marriage it seems – there's no indication there, "Who was living at the date of marriage of the husband or wife to the deceased," so it's clear that it's envisaged that that will be a child in existence at the date of the marriage. I wonder whether this doesn't pull against your argument too and that – it's just curious that there's no equivalence.

MR ALLAN:
I think Ma'am, part of the answer there is that the use of the words "former marriage", the way that the definition was then couched in 1955, shall I say, reflected the prevailing values, as it were, at the time. I think – I can't find it right now but there's a provision in one of the material provided by my friend which I'll find in due course, where I think it's His Honour Sir Kenneth Keith, talks about factoring in the prevailing values that might applicable at the time. So I think that part of the answer is that well, I'm not actually dealing with the section as it stood in 1955, although I appreciate that I can't ignore the genesis of the section –

ELIAS CJ:

Well actually, now that I look a little bit more closely at it, maybe it is quite helpful to you because it's not – "A child by a former marriage of the deceased's husband or wife," and then there's the indication –

MR ALLAN:
The illegitimates – yes.

ELIAS CJ:
– that if it's an illegitimate child it must be living at the date of marriage, but one would have thought on this definition it was well arguable that a child in utero was a child by a former marriage.

MR ALLAN:
Can I just say in passing because Your Honour's raised it, the illegitimate aspect of it, and, and what – where the definition carries on to deal with illegitimate children I think tells us something about how one should be, in my submission, approaching all of this, because what that, that proviso is telling us is that the child's an innocent in this. That, that the perspective is from that of the child. Doesn't matter whether child is of a former marriage or illegitimate. It makes no difference to the circumstances of how that child's come into existence, or in my case, about to come into existence. The Act is not concerned about those moral judgments or – in any way whatsoever.

CHAMBERS J:
Well I'm not sure that really helps us, with respect, because going back to the Chief Justice's point that she put to you, the first part of the definition, that child of the former marriage would have to be living, because with divorce laws at the time the grounds for divorce, the fact there had to be decree nisi before it could become a – even if the deceased person had left the former marriage by the – at a time when a child was in utero, by the time of the new marriage and the creation of the stepchild, that child would have to have been born.

ELIAS CJ:
No. Not –

WILLIAM YOUNG J:
Well if theoretically possible it would have been pretty difficult. I mean if –

CHAMBERS J:

No, because you have to –

ELIAS CJ:

Divorce on the grounds of adultery, immediate decree nisi –

WILLIAM YOUNG J:

Three months later

ELIAS CJ:

– to be made absolute three months later.

GLAZEBROOK J:

And a pregnancy by someone else –

CHAMBERS J:

I suppose in theory it would've been.

ELIAS CJ:

I think – it seems to me, I don't want to put this too crudely, but the attitude may well have been that when you take on a marriage you, someone who has been married before, you take what comes, but an illegitimate child of which you might not be aware at the date of the marriage doesn't inevitably come unless you acknowledge that child when it's later, or who is living at the date of it.

MR ALLAN:

I just say –

ELIAS CJ:

I mean I do think that this definition does suggest that a child in utero would be within the definition of stepchild if a child by a former marriage. So I withdraw the earlier suggestion that it must be a child who's living. But what had to be made, what there had to be specific provision for was an illegitimate child. A cuckoo I suppose it might have been thought at that time.

MR ALLAN:

And, and I think the fact that the "and includes" words there mean that the legislature must have been mindful of the fact that there were this other category of children, children, cuckoos if one likes –

ELIAS CJ:

Actually we better not say that. It's a terrible thing to say.

MR ALLAN:

No, we better not say that. But children not, not of a former marriage, a woman alone who'd had a child, then so-called illegitimately, and making it clear that that child will be treated no differently than a child of a former marriage. So that's my point about the child's position is not to be judged. The child's position is the same whether its parent had been married formerly or not married formerly. No difference. And that would be appropriate because that's a balanced and equal treatment of the, of the child who of course has no control over the predicament giving rise to its birth.

ELIAS CJ:

Just while we're on the statutory history, so after the '55 Act, when does the – is it after the Status of Children Act 1969 that this gets amended, so about 1980 is it?

CHAMBERS J:

It traced through because –

ELIAS CJ:

Oh, right. I didn't –

CHAMBERS J:

– if you go to the next ones it gives all the amendments that are relevant.

MR ALLAN:

And I'm grateful to my learned friend Mr Mason because he's given the, the full sets of, of the Acts from '55 through and I'm, I'm grateful to him for it. Can I say in my own defence for not providing that is that I've taken the view that the focus is on the word "living" irrespective of the, of the, of the definition, and that it matters not what, how the Act has been amended. The word "living" tracks its way through – or shall I say not just "living", "living at the date of marriage", that phrase is consistent through all the amendments.

ELIAS CJ:

So is it the 2001 Act that makes the change that's material here, or is there one before then?

MR ALLAN:

I think the –

ELIAS CJ:

Or does the Status of – does –

MR ALLAN:

The Status of Children Act did have an impact, clearly, Ma'am, because it removed the illegitimate aspect of it altogether.

ELIAS CJ:

Did it make any – it didn't make any consequential amendment to the Family Protection Act did it?

MR ALLAN:

Well there would've been some consequence Ma'am because, as His Honour Justice Chambers has just pointed out, we had the subsection (3) that was dealing with illegitimacy, which presumably, I haven't checked straightaway, but presumably that's all now redundant by virtue of the Status of Children Act and, and of course even more recently the inclusion of civil unions, de facto relationships, et cetera.

I think I have to acknowledge that a key feature of the appellant's case is to have Your Honours accept the general principle that I have argued for in respect of children in utero, and that it is a principle of general application as a matter of jurisprudence, and indeed a matter of jurisprudence not just today but has been so for centuries, and I think it has to be a general principle because if it's not a general principle it's not, in effect, principled. It's, it's, it doesn't –it either, it either applies, as I think somebody once said, "If the law is anywhere it is everywhere," I think if the principle is anywhere it is everywhere. It must apply for the children in utero. Of course with the requirement, if born. I'm not losing sight of that. But in terms of the position of those children, we have a principle in our jurisprudence that's been there

for a long, long time which presumably, and Parliament's presumed to know, existed at the time that this legislature [*sic*] was enacted in 1955. And, and –

CHAMBERS J:

You mean *Elliot v Joicey* [1935] AC 209?

MR ALLAN:

Not just *Elliot's case*, Sir, because perhaps with the benefit of hindsight it's a case that captured me at the beginning, but as I looked further into this field I'm saying that *Elliot v Joicey* evidences a general principle, leaving aside the specific facts of *Elliot v Joicey* and, indeed, the somewhat arguably arbitrary outcome in that case, that there is a general principle, and that's why I've included in the appellant's bundle of authorities the Supreme Court of Canada decision in *Montreal Tramway Company v Paul Leveille* [1933] DLR 456 (SCC), because it does give a, a useful tracking of the history of the principle, and also –

CHAMBERS J:

I just don't see why a principle about the interpretation of a certain provision in a will would have been in any way in the mind of people trying to work out who should be able to claim under a statute for family protection purposes.

MR ALLAN:

I think my answer, Your Honour, is picked up on in some of the quotes that I have in my submissions on page 8 and 9 of my submissions, and in particular the quote there halfway down the page, it says, in all matters affecting its interests the unborn child in utero should be deemed to be already born", and across the page, the Roman law principle, at the top of page 9 of my submissions, "an unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes into question". So I'm saying it's a broad principle –

CHAMBERS J:

But that principle is just clearly not correct. I mean if one looks at the abortion law in this country, it does not, for instance, grant the unborn child in utero all rights of those already born.

MR ALLAN:

Because, Sir, the principle does have a caveat. The principle – the caveat of the principle is, "if born". You, you don't trigger, you don't trigger the, as it were, the rights of a child in utero until once born. And that's, that deals with the and puts to one side, and I don't wish to delve into it in any way whatsoever, the vexed question in around abortion et cetera, because the principle, even from Roman law days was, these are the rights of this child who was at this position at the qualifying date, but only if born. And so that's why I'm saying the principle is one that can only apply, and of course I argue that it applies for Alyxe because Alyxe was born, and he, he is in, in the position of having an arbitrary, to date, in my respectful submission, ruling on his eligibility simply because, through no fault of his of course, he had six months to go before the – after the date of his mother's marriage. And that's the very arbitrary outcome, in my submission, that the, the principle was designed to, to avoid. It was, it was intended to protect the position of people like Alyxe.

Of course, it won't often apply. I mean, there won't be many children who are ever caught in this situation, but it is important that, if they are caught, they have a remedy, they have a way out, and their way out is a jurisprudential principle that they won't fall into a legal vacuum, they won't be non-persons, they'll be somebody who can actually benefit from a benefit they would have got but for the accident of timing of their birth.

CHAMBERS J:

Well there will always be, as it were, hard cases. What – wherever one draws the line. Take the case where the deceased is a woman and her husband had sex with another woman in the week before their marriage and in the week after their marriage. And from sometime in that period a child was conceived. Now, providing the conception presumably took place prior to the marriage, that child would be in on your argument, not in if it happened from a sexual act the week after. For a start, how does one prove when the child was necessarily conceived in that circumstance, but the other point is there will still be hard cases of line drawing.

MR ALLAN:

Can I answer that in two ways Sir? The first is this: to deal with the case that Your Honour's given about whether conceived before or after a date of marriage within those narrow timeframes that you've just presented, the, the position, the starting position, of course, in terms of the position of the child is the presumption under the Status of Children Act. Presumed to be a child of the marriage. Let's say

that on the, the death, the, the issue of the paternity is put, is put in issue, and it's established that that child in fact was not a child –

CHAMBERS J:
That presumption doesn't help you in my example because the third party is the woman. She's not in the marriage.

ELIAS CJ:
But there is, of course, the condition of those entitled to claim which requires them to be being maintained wholly or partly at the date of death.

CHAMBERS J:
Much later. I agree.

ELIAS CJ:
So the – yes, I'm not sure that that isn't an answer though to the anomaly that –

CHAMBERS J:
Well the child may later be taken on by the couple.

MR ALLAN:
Yes. I assumed that Sir, I'm sorry.

CHAMBERS J:
Yes. Yes. But my point – I was really answering – trying to tease out from you, you were talking about the unfairness of the child actually having to be born, but I'm pointing out that mightn't there on your argument be equally hard cases depending on when conception occurred?

MR ALLAN:
Well this may sound a little bit glib, Sir, but isn't it, isn't it the case that if the child had been taken on within that marriage, and irrespective of paternity, well, either way, the child is either a child of the marriage or a stepchild. Because, in my argument, because either – let's say it was, the child was conceived prior to the marriage, albeit in a, not such a timeframe as perhaps we have here, but I would still be arguing for that child if paternity later established that it was not a child of that relationship but if it

was brought up and cared for within that relationship, I would say stepchild. It's a child in utero at the date of, if you could establish it, I appreciate there's issues around that. And to deal with the position that the matter of hard cases – can I say, Sir, that I've always struggled with this idea that hard cases make bad law or the phrase, because I've always taken the view that if, if the result is a just one, how can it ever be bad law?

McGRATH J:

Mr Allan, the principle of interpretation of wills that you've, you're relying on, how do we equate that? You know, what weight do we give that principle in relation to the direction of section 5 of the Interpretation Act? I mean does it in the end come down to the purpose of the legislation read, well, in light of it? The text of the legislation read in light of its purpose?

MR ALLAN:

I mean I accept that purpose is absolutely fundamental Sir. I accept that. Can I say that I'm not actually –

McGRATH J:

Which means you accept it's overriding do you, in this context?

MR ALLAN:

I think I have to, Sir, but that's where is say, and I think I've used the phrase "a principled interpretive pathway", and that pathway starts with what one can use under section, subsection (2) to ascertain meaning, and also I, I do have some support, I believe, in that pathway. But before I come to that, Your Honour has mentioned about wills and interpretation of wills. All I say is that that's one arena in which the principle has been used to, as it were, protect the interests of children in utero, but I'm arguing that the principle's wider than that. One of the ironies I think I might've said when I was last in this Court between the position of my learned friend Mr Mason and myself is that both of us have relied on *Elliot v Joicey*, and of course I, I rely on it, I would perhaps say, no disrespect to my friend, in a loftier sense in that there is a general principle that protects the position of these children in this predicament. Whether it's a matter of interpreting a will or whether it's a matter of something else, and in fact I'm referring, of course, to what I've already read out about in all matters affecting the interests of a child in utero, and this is one of those situations. This is a matter affecting the interests of a child in utero and also, I think

it's somewhere in my submissions, if I just can find it, but – yes, on page 11 of my written submissions where I quote *Bennion on Statutory Interpretation* where I say – sorry, I don't say, the quote is, "It has long been a rule of construction that where Parliament uses a word or term the meaning of which has been the subject to judicial ruling in the same or similar context". Now, in terms of *Elliot v Joicey* there's a same or similar context, but *Elliot v Joicey* is not the only example of that, and in fact the Canadian Supreme Court case gives another example of it, and that's why the Court in that case had to satisfy itself before it went on to deal with all the argument in that case that the principle was one of general application. If it's not accepted by Your Honours that the principle is, is not one of general application, then I think I'm in some difficulty. But if, if I say that there's sufficient judicial commentary, even in the limited material I've provided, that demonstrates it is one of a general principle, and as I say, doesn't it have to be a general principle? Because how can one arbitrarily say to a child in utero, "Oh, there's a principle that protects your position, albeit it's been said on many occasion in all matters, but I'm sorry, this is not one of the matters where you're protected." I can't see how that can work as a matter of practice.

GLAZEBROOK J:

Can you just articulate the general principle that you say comes from those cases or that has arisen via Roman law, et cetera?

MR ALLAN:

Yes Ma'am. I mean I have endeavoured to set it out, using, of course, others words, on page 8 of my submissions. I think that, ironically, Lord Russell put it rather well in the bottom of page 8, and I know my learned friend wishes to trim my sails in regard to that definition by saying, "Well, it's only civil law. It's not common law." I'll deal with that when I need to in respect of my friend when he makes his submissions, but the ordinary or natural meaning of the words –

ELIAS CJ:

All right. It might – it would help us for you to anticipate what he's provided in his written submissions rather than deal with that in reply.

MR ALLAN:

I'm happy, I'm happy to deal with it Ma'am.

ELIAS CJ:

Yes. Thank you.

MR ALLAN:

In, in my learned friend's submissions, and –

ELIAS CJ:

I didn't mean to interrupt your question.

GLAZEBROOK J:

Can I – yes. Because I would quite like state the principle, because I think your friend accepts that there's a principle but limits it to where there's intended to be a benefit. So as I understand, the difference between you may be that, yes, there is a principle that gives it a – is a benefit, but it has to be a benefit that's been intended is what I think the respondent's argument is. As against yours seems to be a more general view that where there's a benefit, likely then the principle applies. Now, I'm not sure if I've quite captured the difference between you, but that's my understanding. Now, one answer to that may be that the Family Protection Act works on duties and therefore what somebody should have been doing and the benefit they should have provided because of the moral duty, but as you point out, if that doesn't apply to stepchildren then grandchildren in utero, even acknowledged grandchildren in utero, and actually just on that point, the Status of Children Act makes it clear you can acknowledge paternity before a child's born. So I'm assuming that was the case actually in the 1955 Act as well. So admission of paternity can be done before a child's born, but...

ELIAS CJ:

Yes. Section 7 or something.

GLAZEBROOK J:

Yes. But that's slightly beside the point. But what you would say is that – but have I got your statement of the principle correct? Or would you – and how do you answer your friend's statement of the principle?

MR ALLAN:

Just to deal with the benefit aspect of it Ma'am, the benefit that I'm saying is relevant here is the right to make a claim. That's the benefit. Whether or not in fact that

materialises into a tangible award is a, is another matter altogether. One would anticipate that it would ordinarily. But so I'm saying there's a concrete benefit if you fall within the class called the benefit of being able to bring a claim.

GLAZEBROOK J:
Now your friend's answer to that presumably would be that that wasn't a benefit that was in the mind of the testator or the deceased and that that's where the *Elliot v Joicey* principle comes in that there is an intended benefit through the wording.

MR ALLAN:
Well in -

GLAZEBROOK J:
And there wasn't in fact.

MR ALLAN:
Yes, there wasn't in fact. And, and –

GLAZEBROOK J:
But the principle was that that's what you needed.

MR ALLAN:
Yes. And, and I'm saying that the existence, if you fall within the class of persons entitled to claim, is a concrete tangible right called a right to make a claim. It's an advantage, to use the words of, how the, it's been expressed, a benefit.

GLAZEBROOK J:
I'm not sure that anyone's necessarily disagreeing with that. What I'm putting to you is that your friend would say that doesn't come within the principle because it has to be within the contemplation of the person who has made the gift or not, being the deceased.

MR ALLAN:
Right. Now, that, I think, comes back to His Honour Justice McGrath's point of purpose, because the purpose of the Act indicates that, yes, this is, this is the very tangible benefit that's available to a whole new class called stepchildren, so that, so that the purpose of the Act itself tells us this was an intended advantage to a

specified class which I say Alyxe, the appellant, comes within. I do – I'm not losing sight of the fact that my learned friend says, "Well, that's somewhat circular because you go from section 3 and you have to be a stepchild to qualify." I'm really saying that section 3 should be read as a clear indication or a strong indication of purpose, the purpose being that there's going to be a benefit that wasn't previously available for a certain class of persons. No dispute that Alyxe was cared for by Mr Luxford and by his mother in a family; no question that his brother who happened to be born at the date of marriage qualified. What's left? What's left is, "Well, I'm sorry, you don't get through the gate because you were in utero at the date of the qualifying event," and my response is, aha, that's exactly what the principle was designed to protect.

McGRATH J:

Does the purpose not have some limitations written around it? It's, it's – isn't it the case that Parliament didn't intend everybody who might in a broad sense be described as a stepchild would fit within this new category who might claim? There was some limitations around it, and you've referred to a couple, and don't we have to examine what the purpose is in relation to the particular limitation that's encompassed by the word "living"?

MR ALLAN:

Well, of course that takes me right back to, to, to living and purpose. I accept that, what Your Honour says.

McGRATH J:

I think I'm wanting to bring you down to a more detailed consideration rather than the lofty consideration under your argument Mr Allan.

MR ALLAN:

Well, I suppose, and I have made some notes about this and I won't read them out, but I suppose my, my answer is – one might call it an of course argument. If one says, "Well, here's Alyxe. Yes, he's in this family. He's been maintained." No argument. And knowing that there is a principle, a general principle, one asked the question, "Well, did Parliament intend that children like Alyxe who were conceived but not yet born at the qualifying date and who satisfied all the other conditions that limitations, if you asked the question, "Is it intended that they be able to claim? Are they in the class?" And my answer to that is, of course.

CHAMBERS J:

Well if we just follow through what I may call your "moral argument", which is in a sense the one you're presenting, a fairness argument, why then would Parliament have excluded a stepchild born to one of the parties but outside of, two years after their marriage and who was then accepted into the family and maintained by the deceased? Why would Parliament have excluded that person?

MR ALLAN:

Sir, I think my answer is fair challenge, but I think all (inaudible 10:49:40 – audio glitch) can fit himself within it. I appreciate that that still arguably leaves out of the class, example that Your Honour's just given, and I don't think that I can argue against the example. I think Your Honour is correct that, that those children would arguably fall out of that category. There may be other arguments about whether they fall into other categories, but, but in terms of stepchild they, they would not qualify. I think I have to accept that. And that's why in this respect I'm at one with Their Honours in the Court of Appeal in the sense that there's no doubt that in some respects this legislation needs tidying up, and I think my friend quite properly has pointed out that in other jurisdictions it's been tidied up by throwing the net wider based around maintaining the maintenance of a child in situation.

I do – look at one thing. It's not in my submissions but I do see that under the Child Support Act 1991, I think it's section 99 and I'm happy to provide a copy of the section afterwards of the Child Support Act, that a custodian of a parent could apply for a declaration – sorry, a custodian of a child could apply for a declaration that a person is a stepparent, and the only reason I looked at that is that if one looks at the section 3 with the requirement – perhaps I could just take Your Honours to it. It's in the appellant's bundle at tab, tab 3, and we're looking at 3(1)(d), which is the stepchild provision. And it says there, "The stepchildren of the deceased who were being maintained wholly or partly", which of course we say Alyxe was, "or were legally entitled to be maintained". And arguably Alyxe would have been in a position where the argument could have been made if his mother had died and Mr Luxford was still alive and maintained him that his aunt, for example, could come along and say, "Well, I want you to be declared to be a stepparent pursuant to the Child Support Act." Little bit at a tangent but the reason I mention it is that the qualifying criteria under section 3 are not just maintained wholly or partly, but also deals with the issue of having a legal obligation to maintain. And I say that Alyxe, in support of the principle that he was a stepchild, is a person who Mr Luxford in that situation would

have been legally obliged, at least the case could have been made, to maintain Alyxe. Mr, Mr Luxford chose to do it himself and in fact, as I've indicated already, didn't just assume the responsibility; he said, "Alyxe is my son."

I don't know whether, Your Honour, I've answered satisfactorily the point that you were raising with me. I, I think that inevitably in dealing with, between section 2 and section 3, there is going, I think, always to be an element of circular argument. I'm relying on section 3 to indicate, to give an indication as to purpose of the section and, and that it, it is something to which one could have regard when considering the definition section. I think that's as far as I can take that. And, although I think it is important that here we have a young man who in every other respect qualifies without any argument at all, and his only, and I think the word when I was last before Your Honours came up was "gap", the only gap in his, his predicament is that he was six months shy at the qualifying date of having been born. And I say there's a doctrine here that helps him. It's always helped children in his predicament. It should help him here. And to answer Your Honour's question, it is consistent with the purpose of the Act.

If one looks at that illegitimate aspect that's, was raised earlier by Her Honour the Chief Justice, that also, I think, gives a bit of a steer. It's telling us he's a person who we, who we would ordinarily regard as within the embrace of the definition. And I suspect that I can say that in so many different ways and that I might well be repeating myself soon if I'm not already.

McGRATH J:
Yes. It's full, large and liberal interpretation, to use a sort of a phrase that counsel at the time might have picked up under your argument.

MR ALLAN:
Yes, and I, I think there is –

McGRATH J:
And a remedial statute.

MR ALLAN:
Yes. Yes. And, and I think there is some support for that, because my learned friend in his submissions, for example, and just a couple of examples, says, and I'm looking

at – I won't go through the initial pages but I think it begins on page 3 and runs through to page 4, page 5 at the top, paragraph 20. His – no, I'm sorry, top of page 6, paragraph 25, and his, and my learned friend is pointing out the, if you like, the civil law origins of the principle and says, well, to substantiate a common law principle, but, with respect, Lord MacMillan, for example, in *Elliot v Joicey* made the point that it was a civil law doctrine long received into our jurisprudence and, of course, I'm relying also on the Supreme Court of Canada's analysis that says, "This is a general principle that's part of our law. This is part of the common law jurisprudence," and the rather neat and nice distinction my learned friend would have one make between civil law and common law, in my respectful submission, is not one that can be made and doesn't have any value, in my respectful submission, in this matter.

We also have another quote in my learned friend's submissions which deals with something that His Honour Sir Kenneth Keith said, and if I can just find it, because – I think there's a law of the universe that one can't find it when one says one's going to, but I'll just... Yes, it's at page 23 again, which I've already referred –

ELIAS CJ:
Sorry, what tab?

MR ALLAN:
Sorry, at page 23 of the submissions at paragraph –

McGRATH J:
Your submissions?

MR ALLAN:
– 26 and it's tab 27 that I'm going to take you to, which is the green bundle.

GLAZEBROOK J:
Sorry, page 27 of the submissions of the respondent?

MR ALLAN:
Tab 27 of the green bundle of the respondent's bundle of authorities, and it's at page, page 367.

McGRATH J:

Sorry, you've lost me. Which –

MR ALLAN:

I'm sorry. It's –

McGRATH J:

This is...

MR ALLAN:

– green bundle, Sir.

McGRATH J:

This is not *Keelan v Peach* [2003] 1 NZLR 589 (CA), is it, you're going to now?

MR ALLAN:

No. It's the, the respondent's bundle with a green cover on it, Sir,

ELIAS CJ:

It's Burrows and Carter.

McGRATH J:

Okay. Then I've got it. Thank you.

MR ALLAN:

And at page 367 is the quote that my learned friend has in his submissions at paragraph 79. My friend quotes, "The Courts remain controlled *by* the text they are interpreting (that is the democratic imperative)". But the quote runs on to say, "But other matters, notably the wider values of the society, may nevertheless be relevant." So that's an invitation, in my respectful submission, that one can be large and liberal. One can look at what Parliament was trying to achieve, which we've got clear indications here within the Act, and also that other matters, notably the wider values of society, the position of children in utero has been part of the values of wider society for centuries. Why isn't it available? Why can't it be used? I, I don't understand, with respect, why it cannot be, but that, of course, a matter for Your Honours.

I'm in a position now, Your Honours, where I could take you, perhaps somewhat laboriously, through the rest of my written submissions, but I suspect that largely I'm going to be reiterating what –

ELIAS CJ:
It really comes down to a very narrow point, doesn't it?

MR ALLAN:
It does Ma'am.

ELIAS CJ:
Yes.

MR ALLAN:
It does Ma'am. And, and that's been acknowledged from, throughout the history of this litigation that, that that is the position.

Perhaps if I just might touch briefly on the alternative argument, which is children of the deceased.

GLAZEBROOK J:
Before you move on to that argument, it seems to me that it might well be possible that Parliament thought that as soon as the child was born it was a child as against a stepchild and that that might explain why children in utero or stepchildren in utero at the time were not put into the category, and they may well have just not assumed, perhaps, a slightly more modern view where people might leave a marriage and then come back to it and not get divorced in the meantime, the sort of example that Justice Chambers was putting to you of a stepchild born two years into a marriage.

MR ALLAN:
Yes Ma'am. It would be an explanation as to why it's not specifically there. I have previously in the Courts below, particularly because – the, the issue's been raised, "Well, children en ventre sa mère have been used variously in other pieces of legislation et cetera," as, as indication that, well, Parliament's done it before. Why hasn't it done it here? But I think Your, Your Honour's point is partly the answer. In fact, it might be wholly the answer as to why it's not specifically there, although in the material that my learned friend has provided from various texts, the point is often

made is that, is that there's a, there's a trap, there's a danger in saying, comparing one piece of legislation with another and it's all – I could take you laboriously through that, but, I mean, it seems to me obvious that one of the things that one must be looking at when looking at other legislation with similar phrases is to say, well, what, what was the purpose of that legislation? Is there similarity of purpose? What about text? And there's a raft of things that might be, be brought into account to say, well, it just doesn't help us. And in my submission it doesn't, it doesn't help us. For whatever reason it's not specifically there.

Of course the answer, the other answer to Your Honour's point could be that it's not there because Parliament said, "Well of course children in utero would be caught by this." That is the other answer.

ELIAS CJ:

Well, except Parliament hasn't said all children who come into existence after a marriage, children of one of the parties to the marriage, are eligible to make claim, even if they are living with the deceased at the date of death. So, I mean, that's the policy. That's the context. If one's applying section 5 to the whole structure of the Act, there really needs to be an explanation as to why, why that policy is, exists, and whether it applies equally to children in utero. Why is there this distinction made between the date of the marriage and afterwards?

MR ALLAN:

I take Your Honour's point, which of course echoes –

ELIAS CJ:

Yes. It's really what was –

MR ALLAN:

– a point that Justice Chambers raised –

ELIAS CJ:

– put to you by Justice Chambers.

MR ALLAN:

– Chambers raised it with me earlier. And of course it might've been thought that I was retreating to the position of saying, "Well I'm representing Alyxe, not all the other

children who might've, might be missing out," but the answer might be, Ma'am, is simply that no one ever actually thought of it. That it wasn't – no one actually turned – that Parliament didn't turn its mind to it.

CHAMBERS J:

Well it clearly did though. Because if it intended to catch the person that the Chief Justice has just referred to, they wouldn't have put in anything about limit. Because it could've been whenever the child was born, provided it was being maintained, that was enough. But Parliament clearly did not think the class should be that way.

MR ALLAN:

Except I think I'd also say, Sir, that, yes, there's a gate, and, and the gate will have a time limit on it, date of marriage.

CHAMBERS J:

But isn't it clear that what must have been in Parliament's mind, both in 1955 and at all the times this has been amended thereafter, it must be something to do with parties should get "lumbered with" only such children as they actually know about at the time they enter into the relevant relationship? Originally marriage, now civil union, also now de facto relationships. Mustn't that be the principle that Parliament was working on?

MR ALLAN:

Well of course Mr Luxford had a choice. He could've – he – Alyxe comes along –

CHAMBERS J:

But he didn't at the time he committed himself to that relationship –

McGRATH J:

We don't know that.

CHAMBERS J:

We don't know. No, but what Parliament has – I think it's a point the Chief Justice made earlier, that it's – mustn't the – the only logical policy I've been able to think of for this is that it's something to do with you can't force a human being that you didn't know about at the time you commenced the relationship, originally marriage, you can't force that person as someone to whom you've got a moral duty.

GLAZEBROOK J:

But wouldn't that person normally – the unborn child would normally have been held to be a child of the marriage, so you will be lumbering, if you like, somebody with someone else's child in situations where it –

CHAMBERS J:

But they wouldn't have –

GLAZEBROOK J:

– turns out not to have been.

CHAMBERS J:

But the child of the marriage is always subject to evidence to the contrary.

WILLIAM YOUNG J:

Well I can't remember. Was it then? What was the – how did the rule in *Russell v Russell* [1924] AC 687 (HL) apply?

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Was it an absolute – would it have been possible in 1955 to challenge the paternity of a child apparently born within marriage?

MR ALLAN:

I take Your Honours' point.

WILLIAM YOUNG J:

I can't remember how far the rule in *Russell v Russell* went.

GLAZEBROOK J:

Yes, that's what I was –

ELIAS CJ:

It wasn't absolute, was it?

WILLIAM YOUNG J:
I can't remember.

MR ALLAN:
I think I –
ELIAS CJ:
I don't think it was. Because –

MR ALLAN:
I think part of my answer to, to, to Your Honour is that I say you have to look at it through the child's eyes. If you start, if you start saying, well –

CHAMBERS J:
No, why do you have to look at it through the child's eyes? This is all about whether the deceased has complied with moral duties the law has imposed on him or her. That's –

MR ALLAN:
But Mr Luxford did. He assumed the moral duty.

CHAMBERS J:
He assumed the law – take it away from this particular case. Deceased people may choose during their lifetime to maintain all sorts of people because they like them or for whatever reason. That is quite different from saying they have a moral duty to look after them once they are dead.

MR ALLAN:
But if he, if he takes on the duty, consistent with section 3 –

ELIAS CJ:
But then there would only be section 3

McGRATH J:
Yes.

ELIAS CJ:

– and you would have those qualified simply if they were the child of a partner to the union and it would be irrelevant whether the child came into existence after the parties entered into the union or not.

MR ALLAN:

Well of course if Alyxe had been born and Mr Luxford said, “I’m sorry, I don't want a bar of this,” section 3 could never be satisfied and Alyxe wouldn't have a claim, irrespective of whether he qualifies pursuant to the principle I’m advocating or not.

ELIAS CJ:

But on the respondent’s argument, if a child was the result of an extramarital liaison after the marriage and the other spouse – well, you have to be father, but didn't know that the child was not his child, that child would be excluded on the definition we’ve currently got, wouldn't it?

MR ALLAN:

I think I’ve conceded that already to, to Justice Chambers that there, there are, there are people that, because of the – the Act is framed round having a specified date for qualifying rather than the more general definitions that my learned friend has referred to in other jurisdictions which talk about capturing people who have been maintained as the only criteria. But I, I think I go back always to say, well, yes, the gate opens or closes at the date of marriage but that there is a, a principle that allows that gate to be broader than just –

ELIAS CJ:

We can extend it a bit.

MR ALLAN:

Yes. We can extend it a bit.

GLAZEBROOK J:

Well your argument would probably be, well, because there’s one injustice doesn't mean you have to –

MR ALLAN:

Well, that’s...

GLAZEBROOK J:

– have give the injustice to everyone else.

MR ALLAN:

Your Honour anticipates me, because of course that is the reality of it. Is that one, one injustice doesn't mean that another should be allowed to stand, that of course being a matter for Your Honours not for me but I think that all I can say is that it is within the power of this Court in a principled fashion to cure Alyxe's predicament. I accept that there are potentially others who this Court or any Court could not but that's no reason not to fix it for Alyxe but that's probably as far as I can take that matter because I'm conceding His Honour Justice Chamber's point, that there are people who will, on the definition as it stands, not qualify as stepchildren, who in the ordinary common sense, or common usage of the word, people would say well, of course that's a stepchild but that's something I simply can't take any further.

That does bring me to the other argument where I should be relatively brief I think –

ELIAS CJ:

The child of the marriage definition is not an exclusive definition. Is there nothing else in any other statutes that throws any light on what a child at a marriage is?

MR ALLAN:

Well there's that aspect of it Ma'am because – and I think this has cropped up before which is includes, in other words, there could be other children other than the inclusion, who marry each other. It uses the words "after the child's birth" which I have to acknowledge in terms of that definition. Again, I suppose from where I sit, it would be an of course argument, is Alyxe regarded as a child of this marriage? Of course but –

CHAMBERS J:

But –

MR ALLAN:

– but there's the –

CHAMBERS J:

– there has to be a big but to that though, doesn't there, because if one says that it's because the child is being legally maintained, or whatever it might be, I'm not sure

how one does define it if isn't limited to a child of the mother and the father who are married. It cuts right across the entire definition of stepchild, doesn't it?

MR ALLAN:
I think –

CHAMBERS J:
It renders all that irrelevant?

MR ALLAN:
Yes, I think Your Honour is anticipating me, that in terms of the alternative argument with a child of the deceased or child of the marriage. I think I have to acknowledge, there's an elephant in the room for the appellant and that elephant is that there's a paternity order.

CHAMBERS J:
Mmm.

MR ALLAN:
And I don't think I can readily – I've endeavoured to in my written submissions to deal with it –

CHAMBERS J:
Well it wasn't really your argument, was it but you've been foisted with it.

MR ALLAN:
But there is, I think, potentially an argument there, in that whether it's a subjective or an objective test and I think this is touching upon Her Honour Chief Justice's point about the child of the marriage not being – it is inclusive of this but there could be others, I'm trying to think of what they could be but –

CHAMBERS J:
But the inclusiveness is just catching the child who was born before the parents married but it's still their child, it's just making it clear that it doesn't have to have been conceived and born during the marriage to be a child of the marriage.

MR ALLAN:

Yes.

WILLIAM YOUNG J:

But child of the marriage isn't a claiming category, is it?

MR ALLAN:

No, no, it's –

WILLIAM YOUNG J:

It's more significantly, I mean, it doesn't help you being a child of the marriage if you're not a child.

MR ALLAN:

No. No and that's why if there's any argument at all it has to be under –

ELIAS CJ:

Child of a parent.

MR ALLAN:

Yes.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

I mean, it comes in under section 3(1)(a), doesn't it –

ELIAS CJ:

Mmm, yes.

MR ALLAN:

Yes, yes.

WILLIAM YOUNG J:

– for a different purpose.

ELIAS CJ:
Yes.

MR ALLAN:
And in terms of child of the deceased, or children of the deceased, 3(1)(b). I've already acknowledged that in terms of an objective test, the paternity order does create a difficulty. Although, could that not be a subjective test? Could it not be that a deceased person says, as Mr Luxford did say, that this is my child, I'm embracing this child as if my own and if the evidence on that is, I think with respect, it's available unequivocal in his own hand in fact, in his own notes where he refers to Alyxe as "my child".

If one was permitted to take a subjective –

CHAMBERS J:
It couldn't be that broad though, could it because the couple might take on a cousin say, a young cousin, whose parents were killed tragically and they take that cousin on but there's never any – just the taking on and treating the cousin thereafter as a child of the marriage wouldn't be sufficient, would it, to make it a child of the deceased, for these purposes?

MR ALLAN:
Well there might be – in the argument that I'm advancing, I suppose there'd have to be some sort of evidential threshold where you'd say well yes, here's clearly a case where somebody has taken this child on board, has a child of their own and it could well be that that cousin could well be taken on. I'm thinking of what, just a quote I've just enlarged upon that my learned friend had in his submissions and I've read out to Your Honours, of Sir Kenneth Keith, about the values of society. I mean, have we reached a point and it's a speculative question, where society says well, if you do take on this child as if your own, then that's a child to whom you owe a moral duty in terms of section 3(1)(b).

I'm in the situation where I think I just have to put before Your Honours the written submissions I've made on this point and ask Your Honours to give such due consideration as you see fit to them but other than raising the subjective argument,

the subjective argument appeals to me just for this reason. How is it that Alyxe, who was clearly within the embrace in every sense of Mr Luxford, misses out? There has to be a pathway for him and I'm saying that the pathway is the stepchild pathway and the principle but there may be other pathways. How is it can that sit comfortably with what we know Mr Luxford wanted to happen and that's why I'm saying that yes it does, with respect to Justice Chambers' point, it does have a morale content but it also has a justice content and if there is a principled, my opening submission, more fair outcome that can achieved in a principled way because I appreciate that in terms of section 5 it has to be principled, purpose and text, then why wouldn't one do it?

Those I think, coupled with my written submissions and there may be other things that I haven't covered yet in respect of my learned friend's submissions but I think that's as far as I can take it at this point Your Honours. If Your Honours please.

ELIAS CJ:
Yes. Thank you Mr Allan. Yes Mr Mason.

MR MASON:
May it please Your Honours. I wonder whether perhaps the most interesting, if not perhaps the most logically powerful place to start, would be this question of Parliamentary intent because, as Your Honours will have read in my submissions, I think there are some indications in the *Hansard* material relating to the Family Protection Act 1955 that's before the Court, that there was a Parliamentary intent, that is quite useful in this situation.

The *Hansard* materials are under tab 11 of my learned friend's bundle of authorities and the Attorney-General Mr Marshall, was speaking to the committal of the Family Protection Bill and at page 3292 which I think is the third page in he says, he's speaking of the remedial aspects, he says, "In substance, the new classes comprise stepchildren who are being maintained by the testator at the time of his death. Parents who are being maintained by the testator at the time of his death, whether or not he leaves a wife and grandchildren whose parents, for several reasons that are mentioned in the Bill, are not able to support, or interested in supporting, the claim of the children," and he provides some details.

Mr Marshall goes on to say, "I think members will agree, as members of the statute revision committee have agreed, that the extension of the Act to those classes does

not go beyond what's fair and reasonable," and then perhaps the useful part is at the bottom of that column, "I might mention in passing that all of the classes of persons who are now given the right to apply for provision out of the estate of a testator, or on an intestacy, also have the right to apply for maintenance under the Destitute Persons Act 1910 while the testator is living, so we've brought those two groups together."

ELIAS CJ:
Do we have the, the then provisions of the Destitute Persons Act?

WILLIAM YOUNG J:
You're missing a bit of the Destitute Persons Act, aren't you?

MR MASON:
I haven't provided the whole of the Destitute Persons Act, I've, as perhaps one does, cherry picked what I thought were the relevant sections –

WILLIAM YOUNG J:
Well you could make – an affiliation order could be made in respect of an unborn child but not maintenance, is that the point you're making?

MR MASON:
Sir, I'm – under tabs 9 and 10 of the blue bundle, are the relevant provisions – well what I thought were the relevant provisions of the Destitute Persons Act. I included it as –

GLAZEBROOK J:
What tab, sorry?

MR MASON:
Tabs 9 and 10.

GLAZEBROOK J:
Thank you.

MR MASON:

Tab 9 is as enacted which is perhaps unnecessary because tab 10 was as applying in 1955.

WILLIAM YOUNG J:
I see, okay.

MR MASON:
There was a duty of obligation on – a duty of maintenance on a near relative by section 4, nothing about stepparents there but in respect of children, under section 26, there were further – there was a further provision made for the maintenance of children and I draw the Court's attention to 26(2)(d) and –

CHAMBERS J:
I see, so there we do have the phrase, "If the child was born before the marriage"?

MR MASON:
Yes.

CHAMBERS J:
So if one was trying to align the two groups – yes, I see your argument on that.

MR MASON:
That's my submission. It comes with the sort of Delphic quality that all arguments from *Hansard* do but if that was the Parliamentary intent, to bring together the two groups of people, then under the Destitute Persons Act, the obligation to maintain was to stepchildren who were born before the marriage.

ELIAS CJ:
Well indeed, you don't really need the *Hansard* link, although it helps because these clusters of Acts obviously should be read sideways, it's a legitimate aid to the interpretation of each.

MR MASON:
And in my submission, that gives perhaps an insight into the climate of the 1950s, that these where the people in Parliament, thought it was very clear that there was a moral duty owed. Mr Marshall's confidence that members of Parliament would see that the legislation did not go beyond what was fair and reasonable, perhaps can be

measured against the linking, or the alignment, of the Destitute Persons Act categories with the Family Protection Act categories.

McGRATH J:

Meaning fair and reasonable, looked at from the point of view of moral obligations of the deceased persons, is it?

MR MASON:

As viewed at the time, yes.

GLAZEBROOK J:

Well wouldn't there have been an assumption again because we come back to the assumption that a child born during marriage is a child of both parents, don't we? So wouldn't the assumption be that the child – I'm not sure which way that goes for you, it might just – it might actually support your view that the assumption was it would that the child otherwise would be clearly a child of both parents because that was the presumption –

MR MASON:

Indeed and –

GLAZEBROOK J:

– and so it's only if the child was clearly not born during the marriage that it couldn't – that that presumption doesn't arise.

MR MASON:

My understanding of the common law position at this time, derives from Justice Vautier's decision in *K v F* (1983) 2 NZFLR 1 (HC), which in terms of its substantive outcome was overruled by this Court in, I think it's *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1, but in that decision Justice Vautier refers to, or quotes from cases that say that to prove the illegitimacy of a child born in wedlock evidence at common law was required to the standard of beyond reasonable doubt. That case, I think, is reported in the first volume, in 1983, first volume of the New Zealand Family Law Reports –

ELIAS CJ:

Not as substantial a hurdle by any means today as it was formerly so, you know, as indeed the paternity order in this case indicates.

MR MASON:
Yes. Nevertheless, it was possible to dispute the paternity of a child born during the course of a marriage and the common laws presumption was not absolute, I think is my point.

CHAMBERS J:
So was, prior to the Status of Children Act 1969, was the topic of paternity common law, or was there a statute that preceded this that covered paternity?

WILLIAM YOUNG J:
Well there were statutes, there was the Destitute Persons Act and the Domestic Proceedings Act 1968 to provide for paternity orders but there was a presumption that came out of *Russell v Russell* that may have been limited but it did make it – certainly made it difficult to challenge paternity of a child, apparently born within a marriage.

ELIAS CJ:
Because of the standard of proof –

McGRATH J:
Well it was really a rule of evidence, wasn't it –

ELIAS CJ:
Yes.

McGRATH J:
– that precludes you giving evidence –

WILLIAM YOUNG J:
It precluded either parent, didn't it? I think it precluded either parent giving evidence to say that that child can't have been mine, or presumably to preclude it.

McGRATH J:
But it wasn't a broad sort of presumption of law –

WILLIAM YOUNG J:
I'm sorry, I don't know.

McGRATH J:
– that couldn't be rebutted?

GLAZEBROOK J:
Yes, all I'm saying is I think that possibly explains the dichotomy, whether it supports your position or the other position because you position would be well, that's what Parliament assumed, if they happen to be wrong and are proved to be well, then unfortunately the child in that situation misses out.

MR MASON:
On these facts we have proof of paternity and as the law in 1955 applied if there was, satisfactory to the standards applicable at that time proof, then in my submission, the same result would follow. The issue is perhaps made a lot easier by scientific advances and changes in the law but in terms of, at the principles of the thing, in my submission, the Destitute Persons Act does show some strong indication of Parliamentary intent being to recognise moral obligations only where the child was living as at the date of marriage, between the parent and the stepparent, using "stepparent" obviously in a loose sense.

Dictionary definitions are occasionally helpful. I've provided one from the *Shorter Oxford Dictionary* from 1952 which is at the last tab of the green bundle, where stepchild is defined as stepson and stepdaughter, "Stepson, a son by a former marriage of one's husband or wife." So it may well be that the popular understanding of stepchild has certainly broadened over the intervening 60 years but again, perhaps that shows something of the background of people's thinking in the 1950s.

Skipping perhaps from there to a more logical starting point. I just want to touch on the applicable definition. The 2001 amendment which put the definition into its format and introduced references to de facto relationships came with transitional provisions. Plainly there were de facto relationships before it applied and the law needed to cover that. The introduction to the reference to civil unions was contemporaneous with the statutory creation of that concept and didn't come with transitional provisions. The Status of Children Act which just removed the word

"illegitimate", didn't come with transitional provisions but the 1967 provision about grandchildren, 1967 amendment act did.

Drawing those four points of reference together with the 1955 Act which again, contained a comprehensive transitional provision, it might be argued that where Parliament makes a substantive change to the Act it includes transitional provisions but where it's more in the nature of housekeeping the law is changed with immediate effect.

So in my submission, the relevant definition is the one that applied at the date of death which would be the one as amended by the Status of Children Act, on the basis that Parliament did not intend in 2005, when they introduced the reference to civil unions, to make any substantive change. The difficulty with that argument is by section 2(2) of the Act it applies immediately, that's the 1955 transitional provision and of course, an amendment is part of the Act. So it might be said that there's a loop there and it's six of one and half a dozen of the other but on the basis that Parliament didn't intend to make any substantive change in 2005, it would be my submission that the pre-2001 definition should apply.

My friend's absolutely right, we do battle over the body of the common law in this case in terms of the *Elliott v Joicey* decision. I say that he is flat wrong about what that case says –

CHAMBERS J:
Can I just take you back one moment to the statutory amendments. At what date do you say we look at who is entitled to claim? Does that get looked at in terms of the law, as at the date of the deceased's death?

MR MASON:
The 2001 amendment says it doesn't apply to the estate persons who died before the commencement date. So that one can't apply. The 2005 amendment which just introduced the reference to civil unions but was a comprehensive definition of course, containing the other facts, contained no transitional provisions and –

CHAMBERS J:
But what about the provisions in the Interpretation Act about amendments not affecting existing rights and immunities and that sort of thing?

MR MASON:

Yes and the general principle, I think it's section 6 or 7, that legislation is not retrospective.

CHAMBERS J:

Well there's that. It's more the one, just let me – it's more the one for instance, section – there's one about effective repeal generally, section 17, does not affect existing rights, interests, duties, immunities, or duties. Wouldn't that mean that these later amendments couldn't affect any argument about what duty Mr Luxford had been under?

MR MASON:

On the face of it, yes Sir and that confirms, that's my submission –

CHAMBERS J:

And perhaps if he had an immunity from suit from somebody, it couldn't be created by a later amendment? I don't know the answer to this, that's why I'm asking you but –

MR MASON:

In my submission, that confirms the intention of Parliament not to retrospectively affect rights under the Family Protection Act, except where they specifically so say, as they did in 1955.

CHAMBERS J:

Well that's why it seemed to me that the correct law we might be having to apply, in terms of who can claim, is the law as it stood at the date of his death which is in 2000, isn't it?

MR MASON:

Yes. Yes, my understanding is that there is the, essentially the 1955 definition of stepchild, shorn of the reference to illegitimacy.

CHAMBERS J:

Yes.

GLAZEBROOK J:

Then the argument might be whether you apply the later – well it's really Mr Allan's argument, in terms of whether Alyxe was a child of the marriage at the date of death, a child of Mr Luxford's at the date of death, as against a stepchild but I think the Chief Justice is probably saying that –

ELIAS CJ:

Well sorry, it would be convenient probably to take the adjournment at this stage, if that suits you?

MR MASON:

It certainly does Ma'am.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.52 AM

MR MASON:

Before the adjournment I was proposing to review the *Elliot v Joicey* decision and if I could take Your Honours to that. It's under tab 5 of the white bundle of authorities. It was a decision of three Judges, three members of the House of Lords. Lord Russell wrote what was probably fairly the leading decision on the common law. Lord MacMillan had picked up that the will in question was one that the law of Scotland applied to and so he dealt with that in some detail. Lord Tomlin provided a relatively brief concurring opinion. Lord Russell sets out the law twice.

Firstly at page 231, from the top of that page he notes that *Villar v Gilbey*, a 1907 decision of the House of Lords, approved two other cases and that one of those cases, "Abolished the idea that as a matter of ordinary construction the words "born" or "living" could be applied to a child en ventre sa mere." That's the first point, "Secondly, declared that it was fully settled, in regard to gifts to children "living" at the death of a testator, that a child en ventre sa mere is included solely because the potential existence of such a child places it plainly within the reason and motive of the gift and, thirdly, applied the same exceptional construction to a gift to children "born" at the death of a testator."

He goes on to say the cases in the, the Vice Chancellor who gave that judgment mind, were cases where there were gifts of a class to children living or born at some specified time. It's referred to as an "exceptional construction" and also as a "fictional legal interpretation" that exists to allow an unborn child to take a benefit they would be entitled to if born under the document that the fictional legal interpretation has been applied to. Then he goes on to say, "It's not to be applied unless this Court was constrained by authority to do so." So in my submission that adds up to a very restrictive doctrine to be applied to testamentary documents. The first point is that "living" has its ordinary meaning, its ordinary meaning in 1907 and 1935, is the same as today and requires that one had been born and still be alive.

GLAZEBROOK J:
When you say restricted it does also apply and still applies to actions for negligence if you're born alive, doesn't it? So it's not as restricted just to testamentary documents?

MR MASON:
That is a point that was referred to in the *Villar v Gilbey* [1907] 1 AC 139 (HL) decision which is under tab 17 of the blue bundle and there the Lord Chancellor, Lord Loreburn at page 144 talks about how a child en ventre sa mere is protected by the law and may even be a party to an action but in terms of the construction, the interpretative device, in my submission it is restricted as set out at first page 231 and then 233 and 234 of Lord Russell's judgment. The Court of Appeal's judgment quotes the chunk from page 233 beginning, "The law as settled by *Villar v Gilbey*," the paragraph above that may be relevant as well. The issue in *Villar v Gilbey* had been that the testator, one George W Bush, had left quite a complicated will that as it turned out his brother's third son, if treated as a child en ventre sa mere, received a life interest only. But if treated as a child born after the relevant date received the entire estate and in that decision the House of Lords said that the principle only applies where it operates for the benefit of the child so it didn't apply there. The Court of Appeal had seen it as a principle of general application.

So where at page 233 Lord Russell is talking about the Master of the Roll's view of *Villar v Gilbey*, he's referring to a paragraph at page 146 of *Villar v Gilbey* where Lord Loreburn says that the, he uses the memorable phrase that the court's shouldn't do violence to the English language except where constrained by authority which is

something that Lord Russell picked up on. So it's a nice turn of phrase but for Lord Russell not strikingly original and that comes, Lord Russell's usage of it is at the end of the 233, 234 passage that I've referred too. Lord Russell's statement of the law again first, words referring to children or issue born before or living at or, as I think we must add, surviving a particular point of time or event, will not in the ordinary or natural meaning include a child en ventre sa mere at the relevant date. That's the first thing –

McGRATH J:
Sorry, where is, that's the fact that we've heard already is it?

MR MASON:
This is page 233, the paragraph –

McGRATH J:
Thank you, got it, yes.

MR MASON:
There is the – my friend in his submission quotes is the statement of the principle the second point there so that's where the ordinary rule maybe departed from. Again it's, in my submission, although it's expressed quite broadly, it's in the context of testamentary documents.

McGRATH J:
And where a particular circumstance –

MR MASON:
Indeed.

McGRATH J:
– of benefit arises as a result of the testamentary document –

MR MASON:
And that was the whole issue.

McGRATH J:
– which is thereby derived, yes.

MR MASON:

In *Elliot v Joicey* the benefit went to the father's estate, the father of the child concerned had left an intestate estate. Under the power of appointment in *Elliot v Joicey* the benefit went to the intestate estate of the father of the child and that was sufficient grounds for the House of Lords to determine that this fell outside of the fiction of construction, the en ventre sa mere construction, because the benefit did not go directly to the child but rather to his father's estate. On the facts, in my submission, that shows a very restrictive approach to the rule, or to the, its rule is putting it to high to the device and then the conclusion that Lord Russell reaches he says it's inevitable in view of the previous cases, I'm looking at about the middle of page 234, *Trower v Butts*, *Blasson v Blasson*, and again, and of Their Lordships, "Refusal to do violence to language unless constrained by authority to do so."

So it was, in my submission, a really restrictive principle that applied to benefit unborn children, where there are gifts to a class of children in certain testamentary documents and even once those conditions were met there were still the hoops of the child benefitting directly rather than the benefit being indirect through perhaps the estate of the parent. In my submission that's the antithesis of a common law rule. It's a highway and byway. It's not a main road of the law. It's a diversion from it. It's part of perhaps the charm of the law that gives an exception to every rule. Well this is the small exception to the general rule that "living" requires you to have been born.

In my submission that's entirely consistent with the 1907 decision of the House of Lords which, if anything, makes it clearer that what was under consideration there was testamentary documents and as such in my submission if my friend is saying his case stands or falls on there being this general rule of the common law that an unborn child is treated as being born, then in my submission his case must fall.

My friend relies on some quotes from Lord MacMillan to formulate the general rule and –

WILLIAM YOUNG J:

I noticed that but Lord MacMillan does go into this civil law at some length but then he concludes at 240, "It is satisfactory for the purposes of the present case to find

that the law of England in this matter is to all intents and purposes the same as the law of Scotland."

MR MASON:
I –

WILLIAM YOUNG J:
Although he does then go on, "the same fiction, derived from the same source... and qualified by the same condition, is common to both systems."

MR MASON:
I took that to be, in terms of the specific facts of the case, the reference to the need for there to be a benefit to the child directly. The quotes that my friend makes in his submissions from the judgment of Lord MacMillan are all plainly, on the face of it, references to the civil law. For instance the first of them my friend omits the words "The doctrine of the civil law, which has long been received in our system of jurisprudence." He's talking, in my submission, about Scottish law in that case because that's what Lord MacMillan was giving a judgment over.

WILLIAM YOUNG J:
But he does later sort of say it's the same as English law. 240.

MR MASON:
Yes, yes –

WILLIAM YOUNG J:
What I'm sort of struggling with though is whether, amongst the Latin, is whether the fiction of the law which he refers to at 239 is confined to instruments by which a person confers a benefit on a child, conditional on that child being born or surviving a certain event. Being born on a certain date or surviving a certain event or whether it's a general fiction that is applicable whenever it's a good thing for the child which – because it might be a good thing for some children but a bad thing for others.

MR MASON:
If he's talk, if Lord MacMillan was talking about it as being general principle then in the course of joining in a result where one judgment is saying the ordinary meaning

of "living" means having been born and not having died, he's saying that the law of Scotland is the same as the law of England and if he's intending to refer to there being a general principle at work, then the result would be, overall, a confusing one for the reader. In my submission it would make sense if he's talking about the English law being as set out by Lord Russell, restricted to testamentary documents.

Now my friend has referred to the case in Quebec where in my submission again it's clear that what's under consideration there is the civil law. I've referred to a quote as being from that judgment as being at page 463 in my footnotes, but it's actually at page 465, and this is under tab 6, where Lamont J says, "For these reasons I'm of the opinion that the fiction of the civil law must be held to be a general application." Again the Court there was dealing with civil law rather than common law.

GLAZEBROOK J:
They weren't in the 1907 case, they were dealing with common law. I'm just, I'm sorry, I'm just having difficulty understanding your point because this is the point that it might have been a fiction of the civil law but it's equally applied to the common law?

MR MASON:
In my submission it's not equally applied and in my submission in the common law it's very restrictively applied and the leading authorities are saying it should go no further than applying to testamentary documents where an unborn child directly takes a benefit. So it, certainly it applies in the common law –

GLAZEBROOK J:
Well it doesn't because it does apply more broadly in the sense of being able to be parties to actions et cetera.

WILLIAM YOUNG J:
That's a question of whether your rights are recognised by the law, it's not necessarily a question as to whether you are within the expression "born" or "living".

MR MASON:
Yes.

WILLIAM YOUNG J:

I mean there are other respects. It's an unborn child counts as a life in being for the purposes of the Perpetuities Rules.

MR MASON:
Yes the –

GLAZEBROOK J:
But isn't the point, well what you're saying, what you say is that the cases say that it's only a rule of construction applied to testamentary documents and that's as far as it goes. Is that, that's the submission?

MR MASON:
In my submission I'd got a bit further than that. It only applies to testamentary documents where the child necessarily takes a benefit under –

GLAZEBROOK J:
No, no, sorry –

WILLIAM YOUNG J:
It could apply it to a settlement too though couldn't it, to a trust, where a trust provides for benefits on children of the settlor who are born or who are living at the date of his death.

MR MASON:
Elliot v Joicey is just such a case.

WILLIAM YOUNG J:
Yes, yes. So it doesn't have to be by testamentary?

MR MASON:
I was using that phrase I suppose broadly to cover trusts and wills.

WILLIAM YOUNG J:
Right.

MR MASON:

But yes it, in my submission, it doesn't apply to, it's not a general rule of interpretation and to be repetitive the authorities are keen to keep it within those strict confines. At page 7 of my submissions I –

GLAZEBROOK J:

Well isn't, aren't those cases mostly dealing with whether the child has a benefit and keeping it only within those confines if you're looking at the 19907 case and the, and *Elliot v Joicey*. I'm just no, I know they say we're keeping it within strict confines but both of those cases were merely concerned with whether there was a benefit obtained by the child, weren't they?

MR MASON:

That was the particular aspect of the rule that was under review in those decisions, yes, but –

GLAZEBROOK J:

And if you look at the 1907 case they're very keen on the benefit prospects and saying it's not, if there's not a benefit.

MR MASON:

Yes.

GLAZEBROOK J:

Yes, I mean you might be right but I'm not sure that they are talking about a general idea of constraining apart from constraining it to where there is a benefit.

MR MASON:

In my submission the answer to that is to come back to the first point. When Lord Russell summarises the law the first thing he says is, "The words living, born or surviving do not apply generally to unborn children." Everything else is an exception to that general proposition. My friend's claiming that there is a general proposition. I'm saying that's flat contrary to the text of the decision in *Elliot v Joicey*. It's, perhaps I'm focusing on that as being what the case stands for primarily. My friend wants the exception to swallow the rule.

GLAZEBROOK J:

Well he would say the exception is only where it is to the benefit of the child, could it be interpreted that way?

MR MASON:

Well as, I don't wish to be unfair to my friend, but as I read his submissions he's really saying that the exception is the rule, that there is –

GLAZEBROOK J:

Well only if there's a benefit to the child.

MR MASON:

Yes. My friend doesn't try and apply *Elliot v Joicey* to the facts. He, as he says, looks at it at a meta level for the principle. I say that if one tried to apply it to the facts it would fail with the issue of necessity of benefit that for, in the case of an unborn child under a will it's relatively straightforward to see whether the child would benefit under the will. For the unborn Alyxe a number of things had to happen before the definition of stepchild could be of any use to him. His stepfather, first of all, would have to die. His mother would need to still be married to his stepfather at death. Alyxe himself would have to survive that death. All of these things would need to occur before there could be a benefit to him. It's far from clear that the application of this rule, viewed at from the time of the unborn child, would necessarily benefit Alyxe.

One could also say that when John Luxford died he would have to leave a will that failed to make any provision, or proper moral provision for Alyxe and then perhaps as well you'd have to say that there would need to be something in the estate which would make a claim against it worthwhile. This is not a situation where there's any necessity of benefit is my point and that distinguishes it from, it puts it outside the rule and into the area of *Elliot v Joicey* where the rule didn't apply because of the lack of necessary benefit. Part of what –

ELIAS CJ:

Is it necessary to look to this as the application of a rule? Is not *Elliot v Joicey* part of the common law context in which the statute operates so that it gives some assistance in terms of interpreting the provisions of the Act?

MR MASON:

That's certainly my point Ma'am but my friend probably views that in a different way than I. I say that in 1955 we had an authoritative decision from the House of Lords that "living" did not mean, did not include an unborn child, and that one can presume that Parliament was aware of that and therefore if Parliament used the word "living" the obvious assumption to make is that Parliament included it to carry its ordinary meaning recognised by a decision that at that time was binding on our Courts. To say otherwise in my submission is to say that Parliament intended that Courts would grapple with this very deeply and would come to the conclusion that rather than using the main interpretation recognised by *Elliot v Joicey*, they intended to find their way to the en ventre sa mere rule. In my submission that's an unlikely proposition. Justice Ronald Young referred to it in his judgment as a clumsy way of going about things. It's just, in my submission, very much less likely than the more obvious alternative which is that Parliament meant "living" to have its natural meaning.

Now there are the two examples that post-date the 1955 Act. The Perpetuities Act and the Administration Act and both of which Parliament did make their meaning clear and did clarify that children en ventre sa mere were to be included. My friend argues against reference to –

WILLIAM YOUNG J:

That reflected the common law provision in relation to perpetuities?

MR MASON:

Perpetuities, yes. But nevertheless Parliament, perhaps it's useful to go to the definition –

ELIAS CJ:

What Act is it?

MR MASON:

It's the Perpetuities Act Ma'am and it's in the blue bundle, tab 13. In the definition "in being" Parliament says, "Inbeing means living or en ventre sa mere." Naturally I fasten upon the distinction there recognised between living and en ventre sa mere. That recognised the pre-existing common law but also lends support to the argument that Parliament was aware of the general definition of living from *Elliot v Joicey* and where they intended to include unborn children did so specifically. The other

example of that is the Administration Act which is at the tab before where at the foot of section 2(1) it says, "References to a child or issue living at the death of any person include a child or issue who is conceived but not born at the death who is subsequently born alive." Again if Parliament intends to include unborn children they specifically do so.

The other example I, legislative example that I've got there is, it pre-dates *Elliot v Joicey*, it's from the Life Insurance Act 1908, section 77(c), and that's under tab 14. In my submission those –

ELIAS CJ:
That's interesting because unlike the Perpetuities Act which contrasts living with en ventre sa mere, this is inclusive. It says that en ventre sa mere is included in living at the time.

WILLIAM YOUNG J:
That's in a sort of quasi-testamentary sense –

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
– where the benefits are by way of gift under intestacy.

MR MASON:
Parliament specifically includes it so recognises the difference.

ELIAS CJ:
Yes.

MR MASON:
And the other point I make obviously is that it pre-dates this 1935 decision which really settled the meaning of "living" in my submission for the common law. Again it shows a pattern of Parliamentary recognition of this issue and perhaps undermines the, in fact it definitely undermines the argument that Parliament didn't think of this. In my submission between those points of reference, and the Hansard and Destitute Persons Act 1910 point that I've made, I think it can be fairly submitted that

Parliament had thought of this issue and had reached a decision about it that reflected the morality of the time that they were working in.

My friend makes a, just moving to the heading that I have at page 9, "Conserving the common law," my friend makes a throwaway point about the desirability of maintaining the common law, talking about keeping the meaning of the word "living" and I just make the general point that the bigger common law concept in play here is testamentary freedom. People don't like it when they're on the wrong end of it but that's the bigger concept, that if we conserve anything, in my submission, should be what we're conserving. It probably is the time to make the obvious point that this whole Act is advanced inroad into testamentary freedom and because of that should be read with some care. That, in terms of the recognition, the precise specification of the definitions within it, which is obviously –

GLAZEBROOK J:
Why would they exclude grandchildren then who were not born at the date of death of the testator?

WILLIAM YOUNG J:
Moral duty. They say, probably seen as being, this is a 67 amendment, because the 55 class of grandchildren is quite restricted, 67 is extended to all children who were living at the date of the testator or the deceased.

MR MASON:
It operates as a class closing rule at that point.

WILLIAM YOUNG J:
Yes, yes. So if they're not en ventre sa mere at the date of the deceased death then they're out anyway and, I mean it maybe they are saying well these are children who the testator never knew and don't owe a moral duty too. I mean it's a –

GLAZEBROOK J:
Well born after, the day after the death of a testator, it becomes a difficult argument. There's no morality argument in that I was just pointing out. There maybe a morality, reflect in the morality in terms of stepchildren but for myself I can't see any morality in the case of grandchildren. Nor logic as to why one might exclude apart from a child

the person never knows, but in the case of a child that's born the day after that might be strictly true but it's obviously going to be in contemplation of the grandparent.

MR MASON:
Yes and I make the point in my submissions that there's quite a rapid evolution of the Act and its predecessors over the period 1947 to 1968 in relation to grandchildren. Although Parliament has obviously made amendments since then in terms of the substantive classes, except for the addition of de facto relationships, there seems to have been less legislative attention to it over more recent decades.

But the legislative history was reviewed by the Court of Appeal in *Keelan v Peach*, in my submission, carefully and the conclusion was reached that Parliament had – the scheme of the Act was that Parliament specified tightly and carefully who could claim, while giving the Courts a broad jurisdiction to make provision for people who could claim.

In my submission, the review of the Act in that judgment is hard to gain, say. I look at the position as grandchildren and say well, that's a further point which perhaps confirms it and –

GLAZEBROOK J:
But what was the basis for saying just because a child isn't born as a grandchildren, that there's no moral duty, I mean, why would Parliament have done that?

MR MASON:
As a matter of practicality. People needed to be able to distribute estates. Sometimes estates are just quite useful commercial vehicles and remain undistributed for some time. If people who could –

GLAZEBROOK J:
Well there's a limit because isn't there, how – what's the time limit for claiming, a year is it?

MR MASON:
It's 12 – for an infant grandchild it would be two years but you can bring a claim so long as the estate is undistributed. In the *Re Gibb* [1984] 1 NZLR 708 (HCC) decision –

GLAZEBROOK J:

No, all I'm saying is, the child was definitely going to have been born if it was en ventre sa mère at the time, it's going to have been born within that timeframe, isn't it, so it's not a distribution issue, is it?

MR MASON:

Well it may be and the law is replete with examples where estates aren't distributed for lengthy periods and *Gibb*, it was 28 years, here we are 13 years on and it's undistributed. That's – in terms of the morality of the issue –

GLAZEBROOK J:

No, no, I thought you were suggesting that maybe they cut it off because there was going to be difficulties in distributing estates. Maybe I misunderstood the point you were making.

MR MASON:

Dealing with the grandchildren issue, I'm accepting Your Honour's point that there doesn't seem to be a firm moral basis, although one could say that your duty to child that you know is different to one that you don't know but I'm accepting that but saying there may be a practical reason why Parliament went for children living, grandchildren living, as part of the definition of grandchildren, or the duty owed to the class of grandchildren.

GLAZEBROOK J:

I just didn't understand the practical difficulty, given they're going to be born quite quickly.

MR MASON:

Well I – the practical difficulty was the point that Your Honour didn't accept about – it would have an impact on how estates are managed, in terms of if –

GLAZEBROOK J:

Well I just couldn't understand how that could be just because a child is going to be born quite quickly, that's all.

MR MASON:

If it included – it would be – it would make a difference, I take Your Honour's point, to only nine months but if you're going to draw a firm line then that's as good a one to draw as the other, in my submission, really, it makes little different.

Just returning to my point on *Keelan v Peach*, Justice Keith –

CHAMBERS J:

It's interesting, I hadn't really concentrated on grandchildren before. There's no restriction initially on having to be living. That's then introduced in 1967. It would be interesting to know what led to –

WILLIAM YOUNG J:

Well would be generous, it was very tight in 1955 –

CHAMBERS J:

Well it was tight in one –

WILLIAM YOUNG J:

– the ability of the grandchildren –

CHAMBERS J:

– but not in another.

McGRATH J:

Mmm.

WILLIAM YOUNG J:

Section 3 –

CHAMBERS J:

No but if you look at 3(c) initially, certainly they had to jump through one of the hurdles at 1 to 4 but they didn't actually have to be living there, whereas they now decide they do have to be living at the date of death, in 1967. It's quite interesting as to why that restriction may have been introduced.

GLAZEBROOK J:

Well wasn't there a situation where you had to have a dead parent before?

WILLIAM YOUNG J:
One of them, or deserted.

GLAZEBROOK J:
Yes.

CHAMBERS J:
Or deserted or –

WILLIAM YOUNG J:
Or unknown, or discharged bankrupt.

GLAZEBROOK J:
So you were really just slotting into the place of the child which may be – of the actual child rather than your parent which may have been the distinction they were drawing.

CHAMBERS J:
Yes, I haven't thought this through. It may be, in order to come within one of those four categories, initially you had to have been living in any event, I don't know but anyway.

MR MASON:
Yes. My *Keelan v Peach* point is simply that the decision recognises the specificity of the definitions within the Act and sees it as part of a scheme and measured whether or not a whāngai child could be included as a child of the deceased against that statutory history.

I point to grandchildren as an example of that specificity. One could turn to in fact the Status of Children Act and section 7 of that which wasn't referred to the Court in either the High Court or the Court of Appeal in *Keelan v Peach* but that's a further example of the specificity of the requirements before one can claim. Section 7 is about recognition of paternity and says that, "There can only be recognition of the relationship between a father and child in certain circumstances." I don't know why that wasn't referred to the Court in *Keelan v Peach* but it's a further example of the

broader point being made in that judgment, that Parliament has consistently been very careful in doling out to the Court the jurisdiction that they can exercise but recognising that that jurisdiction is a broad one and, in my submission, again that shows that Parliament probably, in fact certainly, intended that living have its natural and ordinary meaning. One could say that if Parliament didn't intend that, then they've acting amazingly out of keeping with the legislative history otherwise.

I make the point at paragraph 63 that, if it is otherwise, despite the fact that we're dealing with a definition section where Parliament has tried to be as careful as you would hope, in a definition section, we've ended up with a judgment that's got four superior Court Judges completely wrong – oh sorry, with a definition that four superior Court Judges just couldn't follow. In my submission again, that's far less likely than that Parliament intended the natural meaning of the word.

My friend's argument is based, it seems to me, largely around a suggested purpose. At paragraph 18 of his submissions, he talks about the purpose of the Family Protection Act and, in my submission, gets it right, "The purpose of the Family Protection Act 1955 was to enable particular members to whom a deceased was thought to owe a moral duty, to maintain and support, to see provision, or greater provision, from a deceased's estate where no adequate provision had been made for such family members."

I don't, in my submission, it couldn't be put more narrowly than that, that in relation to particular family members the Courts were given jurisdiction to make provision from estates. To fasten on to the fact that one of those groups included stepchildren and then to try and define the definition in terms of that group, in my submission, is an argument that works only if you really want it to.

Just before I leave this point, perhaps I could – there's an issue about the meaning of statutes changing over time, that I just want to touch on briefly. In the House of Lords judgment in *R v G and Another* [2003] UKHL 50, [2004] AC 1034, Lord Bingham touches on this. This is under tab 23 – sorry, paragraph 29, where Lord Bingham says, "Since a statute is always –

CHAMBERS J:
What page?

MR MASON:

Sorry, tab –

CHAMBERS J:

Yes we've got the tab but which page?

MR MASON:

Page 784 is the page we're concerned with. In my submission the tightness of this definition is such that it's not one that can evolve over time. The classic example of a definition evolving over time is, of course, the *Fitzpatrick v Sterling Housing Association Ltd* [1999] UKHL 42 case where the House of Lords decided that family could include same sex partners. In that case the word at issue was "family" which was an abstract concept, it's a collective noun so it's going to have contents. That word was not defined in the Rent Act 1977 in the United Kingdom and so the Courts were forced to define it and chose to define it saying that its meaning moves to some extent. Its content can move. Here the word that's at issue is the adjective "living". It's a specific word which has the same ordinary meaning now that it had in 1955 and in my submission there's just not the legislative room for that definition to evolve over time in the way that my friend is trying to have it.

My friend referred to my paragraph 81 at page 23 of my submissions and I'm bound to observe that the word "arbitrary" cropped up frequently in his argument. Arbitrary is random or based on personal whim. The decision in the Court below, in my submission, was no wise – wasn't otherwise arbitrary. It wasn't random, it wasn't based on personal whim –

ELIAS CJ:

Well I don't think it's been suggested that the decision is arbitrary, it's the effect of the legislation as construed by the Court creates a result which is arbitrary as between different classes of potential claimants.

MR MASON:

The provision is a limitation provision. It's going to cut some people out. The issue is who it cuts out. In my submission it should be given its natural and ordinary meaning with the result that the appellant is not included within it.

Perhaps turning to the argument about whether Alyxe Luxford is a child of the deceased. In my submission this can be dealt with relatively quickly. Section 7 of the Status of Children Act there's a code about when a relationship between father and child can be recognised. One of the grounds upon which that recognition can occur is – perhaps it's best –

GLAZEBROOK J:
At most instances at the date of death you're not going to have paternity orders where a child is born of marriage and has been accepted as marriage though, are you?

MR MASON:
No.

GLAZEBROOK J:
Or deeds or declarations.

MR MASON:
No.

GLAZEBROOK J:
Because paternity is accepted by both parties so in most instances you're not going to have that code, are you? I mean the question is when do you – so if three years later, so if a claim had been made on time and an award made and then three years later it was found that the child wasn't a child of the deceased, what do you say happens then?

MR MASON:
Distributions made are protected under section 7 so if there had been distributions promptly, before the paternity order was made a year or so after death, they would have been protected.

CHAMBERS J:
But that's because of another principle cutting in but in theory at least, had Alyxe applied, or a litigations guardian for him, applied immediately, it still would've been open to Logan or the executors or some other person with an interest, to have challenged his ability to claim, even though there wasn't a paternity decision at that

stage, under section 5(1) because the presumption always only applies in the absence of evidence to the contrary.

MR MASON:

Yes. The *Gibb* decision is an example where paternity was established in the course of a family protection claim and so that is, would have been open to Logan to have pursued.

GLAZEBROOK J:

I think it was – what I was challenging though was that paternity can only be established in those ways. In most cases there wouldn't be any question of it, was the only thing I was putting to you.

MR MASON:

Almost invariably Your Honour would be right that it's a very rare case where there is an issue over paternity. This is an example where there was one –

GLAZEBROOK J:

Yes, exactly.

MR MASON:

And where the law provides for it. In my submission section 7(1)(a), one the grounds for paternity is the father and them other of the child were married to each other at the time of conception or at some subsequent time. That doesn't answer the question because we still need to know who the father was. Section 5 provides the presumptions as to parenthood. Every question is resolved on a balance of probabilities by section 5(2). In terms of evidence and proof of paternity section 8(3) says that, "A paternity order within the meaning of the Domestic Proceedings Act 1968 ... is prima facie evidence of paternity." The Domestic Proceedings Act 1968 disappeared as long ago as 1980 but the Family Proceedings Act reproduces it without, with very little variation and in my submission under the relevant principle under the Interpretation Act, the order that we have is to be treated within section 8(3) with the result that Alyxe cannot be regarded as John Luxford's child for the purposes of section 7 and so cannot have a claim as a child of the deceased. In my submission that ties that issue up.

Unless Your Honours have any further questions, those are my submissions.

ELIAS CJ:

No, thank you Mr Mason. Yes do you want to be heard in reply?

MR ALLAN:

Very briefly if I may.

ELIAS CJ:

Yes.

MR ALLAN:

Just this question of grandchildren living which in section 3 which has cropped up and I actually I canvassed it in my submissions at page 12 in paragraph 26. Your Honour Justice Glazebrook raised with my learned friend exploring as it were the rationale for treating those children differently than the word "living" in respect of grandchildren. Can I just say by way of aside that I've practiced now for about 20 years in the Wairarapa and arguably there's a special jurisprudence that operates in the Wairarapa in its own unique way, sometimes exhibited in billboards that one sees about the place as to what the answer to a particular question is, and there's an element of that sort of thinking in dealing with grandchildren because if one, to use my off-course principle, were to apply and say, well, would a grandchild living at the date of death of the deceased be included in the class and I respectfully submit that the answer would be to say well of course there is a way for that child to be included in the class and if that is so, if that is so using the principle that I'm going to discuss in a moment again because my friend has raised it, then one could hardly allow the principle for those children and not allow it for stepchildren.

That brings me to where my friend started in submitting to you that I'm mistaken in the submission that I make in respect of *Elliot v Joicey* and I respectfully submit I'm not and I'm not going to go all the way through it but there is something in Lord Russell's summary and I'm looking at my own bundle at tab 5 where *Elliot v Joicey* is, at page 234 which is the end of the summary that His Honour went through in terms of four points and there, under the fourth point, what intrigued me about that particular summary, is it has an either/or at the end of it. It has, "Either that the fictional construction will secure to the child en ventre sa mère a benefit to which it would be entitled, or that the child en ventre sa mère must necessarily be within the reason, the motive of the gift." So –

GLAZEBROOK J:
Sorry, I'm not sure where you are, I think I've lost you?

MR ALLAN:
I'm sorry Ma'am, page 234 of tab 5 of the appellant's bundle which is *Elliot v Joicey*.

GLAZEBROOK J:
I see it, I've found it, thank you.

MR ALLAN:
In my submission, that does give some guidance in terms of the point that's been raised in the course of the day about there being a benefit. Just coming to the question of benefit. My learned friend suggested to Your Honours that well, there's lots of hurdles in front of Alyxe from the date of his birth and living, et cetera. My answer is, the assessment of benefit to Alyxe must necessarily be at the date of death of Mr Luxford, that must be the date where one says well, is there a benefit here for this child and if the answer to that is yes, he would be entitled if he falls within the class to make a claim, then I think that's the answer to that.

In terms of the general application point that my friend says and I might be responsible for this, there was discussion about general rules and general application. I think I'm talking about a principle with general application and the reason I say that is that in the *Tramway* decision which is at tab 6 of the bundle for the appellant and I'm looking at page 462, down the bottom of that page, a discussion commences with the words, "In determining the generality of the application of the fiction reference," and that then runs through to page 463 and there's a sentence there, about halfway down, "In many of the English cases in which effect was given, the rule of the civil law was applied simply as a rule of construction." Remembering that this is in the context of a discussion by Their Honours about general application which concludes, a little further down, with a general statement of the principle saying, "I know of no argument, founded on law and natural justice, in favour of the child who was born during his father's life that does not apply, that does not equally extend to a posthumous child," obviously a slightly different fact situation but the same principle and then, "These learned Judges undoubtedly considered the fiction to be a general application."

So what I'm saying is that there's a rule, not one swallowed by the main rule I hasten to add but a rule where, in effect, it is a general application, I think the application in terms of negligence cases. I'm trying to think of other situations, I'm sure there must be some, which extend just beyond the discussion or the interpretation a testamentary instruments, it's a broader principle of that and, in terms of the Roman law statement of it, it clearly was a broader statement than that and that's as far as I'll take my answer in respect of that matter.

I'll just check if there's anything else that I feel Your Honours, that I need to briefly comment on. A few minor points but I don't think they're worth making, so I'll end my submissions there. May it please Your Honours.

ELIAS CJ:

Yes, thank you Mr Allan. Thank you counsel. Thank you for your submissions. We will reserve our decision in this matter.

COURT ADJOURNS:12.44 PM