IN THE SUPREME COURT OF NEW ZEALAND

SC62/2012
[2013] NZSC 153

	BETWEEN	ALYXE JOHN WOOD-LUXFORD Appellant
	AND	MARK JOHN WOOD Respondent

Hearing:	7 March 2013
Court:	Elias CJ, McGrath, William Young, Chambers* and Glazebrook JJ
Counsel:	G J Allan and J A Signal for Appellant R A Moodie for Respondent G P Mason and T R Vanderkolk for Logan Wood
Judgment:	19 December 2013

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The reasonable solicitor and client costs for all parties are to be met by the estate of the late John Williamson Luxford.

REASONS

* Chambers J died before this judgment was delivered. The remaining Judges have decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

ELIAS CJ, McGRATH AND WILLIAM YOUNG JJ

(Given by Elias CJ)

[1] Is a child who was conceived but not born at the date of the marriage of his mother to a man who is not his father eligible to make an application for provision out of the estate of his stepfather under s 3(1) of the Family Protection Act 1955? That is the question for determination on the appeal. It turns on whether the child is a "stepchild" within the meaning of the Act.

[2] Section 3(1) of the Family Protection Act sets out the family members who may claim provision out of the estate of a deceased person. Stepchildren are eligible if they meet the terms of s 3(1)(d):

> **3 Persons entitled to claim under Act**
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> …
>
> (d) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:

[3] "Stepchildren" are defined by s 2(1). In its current form it states:

> **2 Interpretation**
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> (1) In this Act, unless the context otherwise requires,—
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> …
>
> **stepchild**, in relation to any deceased person, means any person—
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> (a) who is not a child of the deceased, but is a child of—
>
> (i) the deceased's spouse or civil union partner; or
>
> (ii) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death and in whose favour the Court can make an order under this Act; and
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> (b) who was living at the date on which the deceased—
>
> (i) married that spouse; or
>
> (ii) entered into the civil union with that civil union partner; or

(iii) became a party to that de facto relationship.

[4] The claimant was born seven months after the date of his mother's marriage to the deceased. The High Court has held that he was not "living at the date on which the deceased … married" his mother and is not eligible to bring a claim against the estate despite the fact that he was living with the deceased as part of the family and was being maintained by the deceased at the date of the deceased's death.[1] The Court of Appeal dismissed an appeal from the High Court.[2]

[5] The result is hard for a number of reasons, as indeed the Court of Appeal acknowledged. The claimant, who appears by a guardian ad litem, has special needs because of intellectual disability and may be thought to have a strong claim to provision out of the estate. His elder brother, who was 10 years old at the date of his mother's marriage, was eligible to claim against the stepfather's estate because he had been born before the marriage of his mother to the deceased and is within the definition of stepchild. The elder brother however has no need to make a claim because he is the sole beneficiary under the stepfather's will, which was executed the day after his marriage to the mother and before the birth of the claimant. There is evidence that the stepfather gave instructions for a new will, in which the claimant would have benefited equally with his brother, but it was not drawn up by his solicitors before the stepfather's death, in April 2000, in a motor accident in which the mother also died.

[6] The mother had executed a will at the same time as her husband. In it, she left property and two thirds of the residue of her estate to her elder son but made no provision for the claimant, who was not yet born.

[7] The claimant lived with his mother and the deceased after his birth in 1995 until their deaths in 2000 and was treated by the deceased during his lifetime as a child of the family. After the deceased's death, the Family Court made a paternity order that the claimant was the son of another man (who had applied for the paternity order). Whether the deceased knew the paternity of the claimant is not clear on the

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1 *Wood-Luxford v Wood* HC Palmerston North CIV-2011-454-315, 14 October 2011 (Ronald Young J) [*Wood-Luxford* (HC)].

2 *Wood-Luxford v Wood* [2012] NZCA 377, [2013] 1 NZLR 31 (O'Regan P, Arnold and Randerson JJ) [*Wood-Luxford* (CA)].

material before the Court, although it seems from the notes prepared for the new will by his solicitor that the deceased's instructions treated the claimant as well as his brother as a stepchild.

[8] The claimant has a Family Protection Act claim against the estate of his mother (which is valued at $1,800,000). The effect of the decisions in the High Court and Court of Appeal is that he has no claim in respect of the estate left by the deceased (valued at $2,200,000). Further appeal to this Court is brought by leave.[3]

The decisions in the High Court and Court of Appeal

[9] In the High Court and in the Court of Appeal it was not suggested that the ordinary meaning of "living" at the date of the marriage included a child in utero at that time. Rather, it was argued that "living" should be interpreted purposively, as similar statutory references have been interpreted to include a child in utero in a number of English cases concerning succession to property under wills or settlements. The authorities were discussed by the House of Lords in *Elliot v Joicey*.[4] Such purposive interpretation secures for the child the benefits intended by the testator or settlor for a class to which the child belongs.

[10] In the High Court, Ronald Young J held that the English authorities did not assist in the interpretation of the Family Protection Act.[5] He considered that there was nothing in the text or purpose of the Act to suggest that "living" was used in other than its ordinary sense.[6] This conclusion he considered to be supported by the scheme of the legislation, which had excluded others who might ordinarily be thought to be "stepchildren". Inclusion within the categories eligible to claim had been the subject of particular attention in the drafting of the legislation.

[11] The Court of Appeal agreed with the High Court. It considered that the earlier authorities established that the natural and ordinary meaning of "living" in relation to a date does not include a child in utero.[7] A "fictional construction" may

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3 *Wood-Luxford v Wood* [2012] NZSC 110.
4 *Elliot v Joicey* [1935] AC 209 (HL).
5 *Wood-Luxford* (HC), above n 1, at [31]–[32].
6 At [54].
7 *Wood-Luxford* (CA), above n 2, at [30].

be adopted "only in restricted circumstances where the court is constrained by prior authority".[8] Those constraints were that the fictional construction must secure to the child a benefit to which it would have been entitled had it been born at the relevant date and that the terms of the disposition did not confer the benefit on someone else.[9] Since it considered that the English authorities were not in point, it decided the ordinary meaning must be applied. The Court was influenced in the view that the context of the Family Protection Act was "quite different" by its opinion that the Family Protection Act "has only a tangential bearing on the law of succession":[10]

> It is not concerned with the construction of testamentary instruments. Rather, the [Family Protection Act] enables prescribed classes of family members to apply to the court for a discretionary order for provision from an estate or upon an intestacy. In that respect, it is concerned with a challenge to the dispositions made under the will of the deceased or to the statutory dispositions applicable on an intestacy under the Administration Act 1969. The use of the expression "living" in the context of the definition of stepchild under the [Family Protection Act] is concerned solely with the determination of a claimant's eligibility to seek relief under the legislation.

[12] The Court considered that the common law artificial extension of the meaning of "living" to include a child in utero was not helpful in interpreting legislation which is not in substitution for the common law and where the words used do not have a settled legal meaning which Parliament may be presumed to have intended:[11]

> Here, for the reasons already given, we are satisfied that the context in which the fiction enunciated in *Elliot v Joicey* was developed is so different from that of the issue in this appeal, that Parliament cannot have had that rule in mind when, in 1955, the [Family Protection Act] was consolidated and the definition of stepchild was enacted. Indeed, as we later demonstrate, when Parliament wishes to include children or other issue en ventre sa mère it has done so in express terms.

[13] The Court of Appeal pointed out that under the scheme of the Family Protection Act, stepchildren are not treated on the same basis as the natural and adopted children of the deceased.[12] They are eligible only if they were being wholly or partially maintained by the deceased at the date of his death. Similarly, there is no

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8 At [30].
9 At [30].
10 At [33].
11 At [35].
12 At [44]–[45].

requirement in respect of natural or adopted children equivalent to the requirement that a stepchild be "living at the date on which the deceased … married [the child's parent]". The Court also considered it to be significant that a child of one spouse who is conceived and born after the date of the marriage is not within the definition, so that the extension by fiction of eligibility to include children in utero at the date of the marriage would not include children both conceived and born after the date of the marriage.[13] The Court agreed with Ronald Young J in the High Court that "Parliament did not intend all children who might, in ordinary language be regarded as a stepchild, to be eligible to claim under the [Family Protection Act]".[14]

[14] It was treated as being of significance too that in other legislation Parliament had identified "stepchildren" more expansively to impose responsibility for the maintenance of stepchildren, whether born before or after the marriage or commencement of another qualifying relationship.[15] Similarly, for the purposes of the Perpetuities Act 1964 and the Administration Act 1969, references to a child "in being" or to a child "living" at a particular date explicitly include a child conceived but not yet born at the relevant time.[16] Despite these legislative developments, and despite the policy of the Status of Children Act 1969 (which provides that the status of a child does not depend on whether his parents were married at the time of his birth), Parliament had "not seen fit [in the Family Protection Act] to address the existing definition of stepchildren, which has remained unchanged since the legislation was consolidated in 1955".[17] The Court concluded, in agreement with Ronald Young J, that "if the legislature had intended to include children en ventre sa mère in the definition of 'stepchild' for [Family Protection Act] purposes, it could (and in our view likely would) have done so".[18]

[15] Although the appeal had highlighted "some anomalies and inconsistencies" in the Act which the Court thought "may warrant the attention of Parliament", it concluded that it was necessary to dismiss the appeal.[19] The Court recorded that all

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13 At [46].
14 At [46].
15 At [48]–[55].
16 At [52]–[53].
17 At [51].
18 At [55].
19 At [62].

parties accepted that the claimant had a strong claim against his mother's estate and that "[a]n important factor in his claim will be his inability to claim against the respondent estate, in which his brother is the sole beneficiary".[20]

"A Fictional Construction"

[16] In this Court, counsel again argued that "living" at the date of the marriage should be interpreted to include a child conceived but not yet born at that date. It was urged that such interpretation is consistent with the remedial policy of the Family Protection Act. Reliance was placed on the United Kingdom case-law where similar expressions in wills or other family dispositions have been applied to enable a child in utero at the date specified to benefit. It is therefore necessary to start by considering whether the Court of Appeal was correct to hold that the different context of the Family Protection Act precludes the application of the authorities relied on.

[17] In *Elliot v Joicey* the House of Lords confirmed the approach taken in Scotland and in earlier English authority (prompted particularly out of concern for the position of posthumous children[21]) that references in testamentary dispositions or marriage settlements to children "born" or "living" at or "surviving" at a particular date extended to children in utero at the time and later born alive. Such children, by "fictitious legal interpretation",[22] were "deemed to be already born"[23] at the specified date, but only where the effect of such construction was "necessary for the benefit of the unborn child" by enabling the child to receive a benefit to which he or she would have been entitled if actually born at the relevant date.[24] The acknowledged extension of the natural meaning of the words was justified because the child was necessarily "within the reason and motive of the gift".[25] As had earlier been pointed out by Romer LJ in *Villar v Gilbey*,[26] the line of cases had been developed in relation

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20 At [61].

21 At 238 Lord Macmillan referred to the "special benevolence" shown by the law to "posthumous children".

22 As it was described by Lord Westbury in *Blasson v Blasson* (1864) 2 D J & S 665 at 670, 46 ER 534 (Ch) at 563.

23 *Elliot v Joicey*, above n 4, at 238 per Lord Macmillan.

24 A limitation referred to by Lord Tomlin at 215, Lord Russell at 222 and Lord Macmillan at 241.

25 As explained by Leach V-C, in *Trower v Butts* (1823) 1 Sim & St 181 at 184, 57 ER 72 (Ch) at 74, approved as representing English law by Lord Russell in *Elliot v Joicey*, above n 4, at 218.

26 *Villar v Gilbey* [1906] 1 Ch 583 (CA); rev'd [1907] AC 139 (HL).

to wills and other family property dispositions to prevent distinctions being drawn between children according to whether they were born at a particular time, "unless the context requires a distinction to be made".[27]

[18] The common law approach was described in the leading judgment given by Lord Russell in *Elliot v Joicey*:[28]

> The law as settled by *Villar v Gilbey* may (but subject to any special context in the documents to be construed) be summed up thus: 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 their ordinary or natural meaning include a child en ventre sa mère at the relevant date. Secondly, the ordinary or natural meaning of the words may be departed from, and a fictional construction applied to them so as to include therein a child en ventre sa mère at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had actually been born at the relevant date. Thirdly, the only reason and the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child en ventre sa mère must necessarily be within the reason and motive of the gift. Fourthly, that being the only reason and the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above mentioned, but confers the gift on someone else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit to which if born it would be entitled, or that the child en ventre sa mère must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.

[19] In *Elliot v Joicey* itself, the condition of securing direct benefit for the child was not met. The case concerned whether the father of a child born posthumously "left issue him surviving",[29] thus qualifying his estate to take under a power of appointment exercised by his mother in her will. The result of treating the condition of exercise of the power of appointment as having been met by a posthumous child would have augmented his father's estate but would not have benefited the child directly. As a result, it was not possible "except in the light of subsequent events", "to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit to which if born it would be entitled, or that the child en ventre sa

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27 At 592.

28 *Elliot v Joicey*, above n 4, at 233–234 (citations omitted).

29 At 212.

mère must necessarily be within the reason and motive of the gift made".[30] In such circumstances, the words used "must bear their natural or ordinary meaning".[31]

[20] *Elliot v Joicey* makes it clear that the rule of construction applied to wills and other dispositions of property in favour of children in utero is limited. It is available only where such interpretation (acknowledged to be not the "natural or ordinary meaning") will secure benefits to which the child in utero would have been entitled if born at the relevant date. It applies where the extended meaning fulfils the testamentary or gifting purpose. It does not support a principle of interpretation of more general application. Even in the context of construction of a gift, it does not stray far from securing the interests of a posthumous child, in which the origins of the policy behind the fiction are to be found.

[21] *Elliot v Joicey* and the cases it draws on are not therefore promising authority upon which to base a wider presumption or rule of statutory interpretation to include, for purposes other than fulfilment of testamentary or settlor intention in testamentary dispositions or settlements, children in utero as "living" or "surviving". At best, the cases indicate a common law approach to the interpretation of dispositions which is sympathetic to the interests of such children, which might be adopted by analogy in other circumstances if not inconsistent with the context.

The Family Protection Act 1955

[22] A "benevolent" interpretation to fulfil the intention of a testator or settlor to benefit all within a class (which underpins the departure from "ordinary meaning" to enable "living" to include children in utero) is not readily transferable to the circumstances of the Family Protection Act. That statute permits a claim against an estate on the basis of family connection, irrespective of the intentions or attitude of the deceased. The statutory liability of the estate is a matter of social policy and arises out of a legislative judgment that those within the categories identified may have moral claims to provision which should displace any testamentary intention.

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30 At 234.
31 At 234.

[23] As the Court of Appeal pointed out, there are other statutes in which Parliament has chosen to include children in utero. So, in the Perpetuities Act the term "In being" is defined to mean "living or *en ventre sa mère* ".[32] And under s 2(1) of the Administration Act, references to a child living at the death of any person "include a child … who is conceived but not born at the death but who is subsequently born alive". No such definition has been adopted in the Family Protection Act.

[24] As has already been indicated, expansion of the definition of stepchild to include a child in utero at the date of the marriage of the parents would create an anomaly within the legislation because it would still exclude other children who are not conceived at the relevant time. There is no basis for such discrimination in the legislation or the legislative policy. The result would be arbitrary.

[25] The Family Protection Act has been amended many times since it was first enacted (as the Testator's Family Maintenance Act 1900) in New Zealand as pioneering legislation. The amendments to change those eligible reflect changing legislative judgments about New Zealand society. So, for example, the Testator's Family Maintenance Act did not apply for the benefit of illegitimate children, adopted children, or step-children.[33] Nor did it recognise domestic relationships outside marriage. Changing social values have led to the additions of these categories by specific statutory amendment. Illegitimate children were added by amendment in 1936.[34] Adopted children were added in 1947.[35] Stepchildren were added as claimants in 1955, but only when the deceased was married to the mother of the child, the child was "living" at the date of the marriage, and the child was being supported by the deceased at the date of his death.[36] The requirement of marriage was dispensed with in 2001 with the extension of the definition to the children of the partner to a de facto relationship with the deceased.[37] Further extension was made in 2005 to cover the children of the partner to a civil union.[38]

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32 Section 2.
33 Section 2.
34 Statutes Amendment Act 1936, s 26.
35 Statutes Amendment Act 1947, s 15.
36 Family Protection Act 1955, ss 2(1) and 3(d).
37 Family Protection Amendment Act 2001, s 4(1).
38 Relationships (Statutory References) Act 2005, s 7.

Despite these specific and regular amendments to respond to changing social conditions, the requirement that the child be "living" at the date on which the deceased and the parent of the child married (or entered into the civil union, or became a party to the de facto relationship) has been retained in the legislation.

[26] It is not possible to interpret "living at the date on which the deceased … married that spouse" as referring to "living during the period of the marriage". The reference to "at the date on which" the deceased married is specific as to the particular date. And similar exactness is carried into the other categories. It is the date on which the deceased "entered into" the civil union, or "became a party to" a de facto relationship that establishes the qualification.

[27] It is not clear why children born after the date of the marriage or de facto relationship are excluded by the definition. It might be thought that children who are treated as part of the family and who are subject to the control imposed by s 3 that the deceased was supporting the child immediately before his death could be accommodated within the policy of the statute. The prescription of eligibility under the Family Protection Act is legislative responsibility. As was pointed out by the Court of Appeal in *Keelan v Peach*, throughout its history the legislation has identified "with precision" those eligible to claim, while "by contrast" giving the courts broad discretion to make provision for those who are eligible according to the statutory criteria.[39] This, the Court of Appeal thought, "virtually compels the conclusion that there is no room for a Court to read new content into any of the items in the list".[40]

[28] The statutory history of close legislative control of the conditions of eligibility points against judicial expansion of the categories of eligibility by construing "living" to include children conceived but not yet born at the date specified. Extension to children in utero would create anomalies with children later conceived. The common law authorities relied on are not persuasive in the very different context of the Family Protection Act. For these reasons, which are in

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39 *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [15].
40 At [27].

complete agreement with those given by the Court of Appeal, we would dismiss the appeal.

GLAZEBROOK J

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Introduction to the family

[29] Alyxe Wood-Luxford was born seven months after his mother, Wendy Luxford (née Wood), married John Luxford. Mr and Mrs Luxford were killed in a car accident in April 2000. Alyxe was not a named beneficiary of the wills of his mother or Mr Luxford.

[30] Mrs Luxford's other son, Logan Wood, is a named beneficiary in the wills of both Mr Luxford and his mother.[41] Logan was 10 years old at the time of his mother's marriage to Mr Luxford.

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[41] Logan is the sole beneficiary of Mr Luxford's estate and is entitled to two thirds of Mrs Luxford's estate.

[31] Alyxe has issued proceedings under the Family Protection Act 1955 with regard to both his mother's estate and that of Mr Luxford. Logan Wood's position is that Alyxe is not entitled to make a claim against Mr Luxford's estate, although he accepts that Alyxe has an entitlement to make a claim on his mother's estate.

[32] It is common ground that Alyxe had been conceived before his mother's marriage to Mr Luxford took place. It is also common ground that it was established about a year and a half after Mr Luxford's death that Mr Luxford was not Alyxe's father. It is unclear from the evidence before us whether or not Mr Luxford was aware of this.

What is at issue in the appeal?

[33] A stepchild of a deceased is eligible to claim under s 3(1)(d) of the Family Protection Act if he or she was being maintained wholly or partly by the deceased or was legally entitled to be maintained wholly or partly by the deceased immediately before the deceased's death. At the date of his death, Mr Luxford was supporting Alyxe. The maintenance requirement is therefore satisfied.

[34] The sole question for the appeal is whether Alyxe comes within the definition of stepchild. To do so, Alyxe must have been living at the date of his mother's marriage to Mr Luxford.[42]

[35] On behalf of Logan Wood, it is argued that Alyxe is not a stepchild as defined by s 3(1)(d) because he was not born at the time of their mother's marriage to Mr Luxford. He next argues that the interpretation of the word "living" as "born and still alive" is consistent with the word's use at common law. It also fits with the purpose of aligning Family Protection Act claimants with those able to claim for maintenance under the Destitute Persons Act 1910. The next submission is that, when Parliament wishes to include unborn children in legislative provisions, it does so explicitly. It is recognised by Logan Wood that the common law did modify the term "living" to include children in utero in certain circumstances. It is submitted, however, that this modification cannot be translated to the context of the Family

[42] See para (b) of the definition of stepchild in s 2(1) of the Family Protection Act 1955.

Protection Act. Finally, it is submitted that the inclusion of stepchildren in utero at the time of marriage would create an anomaly with those born and conceived after the marriage. I deal with each of these submissions in turn.

What is the natural and ordinary meaning of "living"?

[36] The first submission made on behalf of Logan Wood is that the natural and ordinary meaning of "living" excludes children in utero. The submission must therefore be that the natural and ordinary meaning of "living", as used in the definition of "stepchild" in s 2(1) of the Family Protection Act, is "born alive and not yet dead".

[37] I do not accept that submission. In my view, the most natural meaning of "living" in ordinary usage, when referring to humans or animals, is "not dead".[43] While the resort to dictionaries might be thought to be the province of an old fashioned approach to statutory interpretation narrowly focused only on the words of a provision, dictionaries are nevertheless useful to test assertions as to the ordinary and natural meaning of words.[44]

[38] In the Shorter Oxford English Dictionary none of the definitions given for "living" refer to "being born". The definition "not dead" is the first definition given for the adjective "living".[45] The first definition of living as a noun is "the fact of

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[43] In other contexts, the term "living" may, for example, be used to distinguish animate and inanimate objects or be used in the sense of "in actual existence or use", such as living languages.

[44] Burrows and Carter explain that the narrow, literal approach to statutory interpretation in the past often failed to recognise that the meaning of a document or statute was "more than a collection of the dictionary meaning of its words". However, they acknowledge that modern, contextual approaches to statutory interpretation must still focus on interpreting the text of the statute. As such, it is still helpful to refer to dictionary definitions to assess what might seem to be an obvious or ordinary meaning of a word: JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis NZ Ltd, Wellington, 2009) at 199 and 293. Burrows and Carter also say that it is important to be able to cite dictionary definitions because "people should be entitled to rely on what they regard as an indisputably obvious meaning": at 293. In seeking to ascertain Parliament's purpose, it is also important to recognise that legislation has continuing force and words can take on meanings in modern contexts which were not necessarily envisaged by the original lawmakers: at 185. See also Interpretation Act 1999, s 6.

[45] *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) vol 1, at 1622.

being alive".[46] "Live" as a verb has as its first meaning "[be] alive; have animal or vegetable life". None of the definitions of "live" as a verb refer to birth.[47]

[39] Turning to some of the words used in the definitions of "living" and "live", the first definition of "alive" is "living, in life; while still living". None of the definitions of "alive" refer to birth.[48] The third definition is "[i]n a sentient or susceptible condition; fully aware"[49] but at least some of these things are the case in utero.[50] The first definition of "life" is "[t]he condition, quality, or fact of being a living organism".[51] This is not confined to organisms that have been born.[52] It is only when you arrive at the eighth definition of "life" that there is any reference to birth: the eighth definition defines life as the "animate existence of an individual in respect of its duration; the period from birth to death, from birth to a particular time, or from a particular time to death".[53]

[40] Other dictionaries provide similar definitions of "live", "living" and "alive", which suggest that the ordinary meanings of these words do not necessarily connote birth. In the New Zealand Oxford Dictionary, for example, the first definition of "life" is "the condition which distinguishes active animals and plants from inorganic matter, including the capacity for growth, functional activity, and continual change preceding death".[54] It is only the third definition of "life" which refers to birth: "the period during which life lasts, or the period from birth to the present time or from the present time to death".[55] The third definition of "living" is given as "those who are alive" (the first two definitions of "living" refer to living in the sense of a livelihood). The first definition of "alive" is "living, not dead".[56]

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46 At 1622.
47 At 1621.
48 At 54.
49 At 54.
50 See Auckland District Health Board "Baby Development Week by Week" <http://nationalwomenshealth.adhb.govt.nz/services/maternity/pregnancy-advice/baby-development>.
51 *Shorter Oxford English Dictionary*, above n 45, at 1595.
52 Nicola Peart refers to a foetus as a "living organism" in New Zealand's standard text on medical law: Nicola Peart "The Legal Status of Life Before Birth" in PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers Ltd, Wellington, 2006) at [16.1].
53 *Shorter Oxford English Dictionary*, above n 45, at 1595.
54 *New Zealand Oxford Dictionary* (Oxford University Press, Victoria, 2005) at 641.
55 At 641.
56 At 650.

[41] While Alyxe, at the time of his mother's marriage to Mr Luxford, was not living independently of his mother and was not capable of living independently of his mother, he was not dead. On what I consider to be the most natural and ordinary meaning of the word "living", therefore, Alyxe was living at the date of his mother's marriage to Mr Luxford.

[42] This is not the end of the matter, however. It may be that in the definition of "stepchild" in the Family Protection Act, the word "living" is not used in its most natural sense of "not dead" but in the sense of a possible secondary meaning of "born and still alive".

Is "living" used in other than its most natural and ordinary sense?

[43] I acknowledge that, at common law, there is a legal fiction that the (only) natural and ordinary meaning of the word "living" is "born and still alive".[57] That legal fiction was, however, displaced in cases involving the interpretation of wills where this would be to the child's benefit.[58] I am conscious that the courts considered that inclusion of an unborn child in the term "living" was the "legal fiction". However, on my view of the term living, the natural and ordinary meaning of "living" would include an unborn child and so to say it does not is a legal fiction, rather than the other way round.

[44] The question is whether the word "living" in the definition of stepchildren in the Family Protection Act is used in its most natural and ordinary sense of "not dead" or whether the term is used in the common law (secondary) sense of "born and still

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57 In *Elliot v Joicey* [1935] AC 209 (HL) at 233, Lord Russell said that referring to children being "living" at a particular point of time or event would not in its ordinary and natural meaning include an unborn child ("a child en ventre sa mère") at the relevant date, citing *Villar v Gilbey* [1907] AC 139 (HL) at 145 per Lord Loreburn, who said that treating an unborn child as "living" involved "a straining of language".

58 In *Elliot v Joicey*, above n 57, at 233–234 (citing with approval *Villar v Gilbey*, above n 57; *Trower v Butts* (1823) 1 Sim & St 181, 57 ER 72 (Ch); and *Blasson v Blasson* (1864) 2 De GJ & S 665, 46 ER 534 (Ch)), Lord Russell said that the ordinary and natural meaning of "living" could be displaced by a "fictional" construction so as to include a child en ventre sa mère, who was subsequently born alive. This "fictional" construction could be used to secure the child a benefit that he or she would have been entitled to if he or she had been actually born at the relevant date. Lords Russell, Tomlin and Macmillan also cited with approval *Villar v Gilbey*, above n 57, and emphasised that this fictional construction must be used for the child's benefit: at 214–216 per Lord Tomlin, at 227 per Lord Russell and at 240–241 per Lord Macmillan. For further discussion of *Elliot v Joicey*, see [17]–[19] of the majority judgment.

alive," but without the common law modification applicable when that would be to a child's benefit. I consider this question in light of the legislative history.

Legislative history

[45] At its first reading, the Family Protection Act was said by the then Attorney-General, the Hon Jack Marshall MP, to be a consolidation of the family protection legislation.[59] The main change from the previous legislation was to extend the "group of the family" that may claim under the Family Protection Act.[60] Stepchildren were included as one group of those extended claimants.

The Family Protection Act 1955 as enacted

[46] As originally enacted, the definition of "stepchild" in s 2(1) of the Family Protection Act was as follows:

> "Stepchild", in relation to any deceased person, means any child by a former marriage of the deceased's husband or wife; and includes any illegitimate child of the deceased's husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

[47] As discussed in more detail below, the requirement that a child be living at the date of the marriage only applied to illegitimate children. Section 2(3) limited the situations when a child could be classed as an illegitimate child of his or her parent. It provided:

> For the purposes of this Act an illegitimate relationship between a parent and child shall not be recognized 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 child were living.

[48] Whether a child was an illegitimate child of a parent had implications not only for the definition of stepchild but also when it came to claims on a deceased's estate by a child of the deceased. Under s 3(b) of the Act, the children of a deceased, whether legitimate or illegitimate, had a right to claim. There was no definition of child in the Family Protection Act as originally enacted.

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[59] (29 September 1955) 307 NZPD 2724; and Family Protection Bill 1955 (90-1) (explanatory note) at 1.

[60] (29 September 1955) 307 NZPD 2724.

The Status of Children Act 1969

[49] The word "illegitimate" was removed from the definition of stepchild by s 12 of and the schedule to the Status of Children Act 1969. Section 2(3) was also repealed. The words "whether legitimate or illegitimate" were also removed from s 3(b).[61]

[50] The amendment to the definition of stepchild left the first part of the definition intact with the second part reading as follows:

> … and includes any child of the deceased's husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

[51] The focus of the definition of stepchild was therefore still on children of a former marriage. Those born out of wedlock were still included by way of the second part of the definition.

The Family Protection Amendment Act 2001

[52] In 2001, a reference to de facto relationships was added to the definition of stepchild, with the new definition taking effect from 1 February 2002.[62] The reference to the child of a former marriage was removed from the definition and the definition was split into two paragraphs:

> **stepchild**, in relation to any deceased person, means any child—
>
> (a) who is not a child of the deceased, but is a child of—
>
> (i) the deceased's husband or wife; or
>
> (ii) the de facto partner who was living in a de facto relationship with the deceased at the date of his or her death and who the Court can make an order under this Act in favour of; and
>
> (b) who was living at the date of the marriage of the husband or wife to the deceased or, as the case requires, when that de facto partner and the deceased started living in the de facto relationship.

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61 A new definition was also added: "child of a marriage". The term was said to "include any child whose parents marry each other subsequent to his birth". Both s 3(1)(e), which set out when parents could claim against an estate, and s 4(3), which concerned service requirements, were amended to include reference to this new term.

62 By the Family Protection Amendment Act 2001, ss 2 and 4. This definition did not apply in Alyxe's case, given Mr and Mrs Luxford died in 2000.

[53] Significantly, the word "includes" was deleted, with the effect that the requirement to be living at the date of the marriage to the deceased's spouse (or entry into a de facto relationship) became a part of the core definition of a stepchild. In other words, all would-be stepchildren under the amended definition had to be living at the time of the marriage or the beginning of the de facto relationship. If "living" means "born" then (unlike under the previous definition[63]) that would exclude all children in utero, even those from a former marriage.

The Relationships (Statutory References) Act 2005

[54] A reference to civil unions was added by the Relationships (Statutory References) Act 2005.[64] The reference to a child living at the date of the parents' marriage or the start of a de facto relationship remained, with the addition that the child could be living at the date on which the deceased entered into the civil union with the civil union partner.[65]

Evolution of the definition of stepchild

[55] In light of the legislative history canvassed above, I now return to the 1955 definition of "stepchild". The 1955 definition of stepchild included "any child by a former marriage of the deceased's husband or wife". Before the Status of Children Act, there was a presumption that, if a child was born to a married woman, that child was a legitimate child of his or her mother and her husband.[66] A child who was conceived during his or her parents' marriage was considered to be legitimate, even if the father died or the parents divorced before the child was born, so long as the child was born within the normal period of gestation after the husband's death[67] or the divorce.[68] The presumption of legitimacy (that is, that the mother's husband was the father of the child) could be displaced if it could be established that the husband

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63 See at [46] above and [56] below.

64 By s 7 and sch 1 of the Relationships (Statutory References) Act 2005. There was no transitional provision and so it is possible that this definition does apply to Alyxe.

65 Family Protection Act, s 2(1) definition of "stepchild", sub-para (b)(ii).

66 BD Inglis *Family Law* (2nd ed, Sweet & Maxwell (NZ) Ltd, Wellington, 1970) vol 2 at 403.

67 Inglis, above n 66, at 404, citing *Alsop v Bowtrell* (1619) Croke Jac 541, 79 ER 464 (KB). See also *In re Overbury* [1955] Ch 122 (Ch) at 126–127.

68 Inglis, above n 66, at 404, citing *Knowles v Knowles* [1962] P 161 (Ch) at 166–167.

could not have been the father of the child because sexual intercourse did not take place between the spouses at the estimated period of conception.[69]

[56] There is nothing in the first part of the 1955 definition of stepchild relating to children of a former marriage as originally enacted that requires the child to have been born, rather than being in utero, at that time the former marriage ended (whether by death or divorce) or indeed at the time the new marriage began. To include such a requirement would have been contrary to the presumptions applying to children born after marriage as outlined above.

[57] There is no reason why the position of an illegitimate child should be different. This may point to the word "living" being used in the second part of the definition in the sense of "not dead" rather than "born and still alive". That the word "living" is used in its most natural meaning (of "not dead") is strengthened when the changes made by the Status of Children Act are considered.

[58] Under those changes, the reference to an "illegitimate" child was removed while the reference to a child living at the date of the marriage was retained but only in the second part of the definition. It seems unlikely that this was intended to have the effect of requiring all children, including legitimate children from the deceased's spouse's former marriage, to be born at the date of the spouse's marriage to the deceased. As indicated, there was nothing in the 1955 definition of stepchild to suggest that a legitimate child had to be born at the time of the marriage.

[59] When the Status of Children Bill was committed for consideration by the Statutes Revision Committee, the then Minister for Justice, the Hon JR Hannan MP, said that the amendments in the Bill were to "equate the position of the illegitimate child with that of his [legitimate] brothers and sisters"[70] and to abolish the distinction between legitimate and illegitimate children.[71] If that were the case, then this would suggest there should be no additional hurdle for illegitimate children (that is, to be born) that did not exist for children of a marriage.

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69 Inglis, above n 66, at 403–404.
70 (3 June 1969) 360 NZPD 463.
71 (3 June 1969) 360 NZPD 464.

[60] As indicated above, the reference to "includes" was changed to "means" in the Family Protection Amendment Act 2001. If the word "living" is used in the sense of "born", then this for the first time imposed that requirement on children of a former marriage. One would not have expected such a change to be made by a side-wind when introducing a reference to de facto relationships. This therefore supports the view that "living" is used in its most natural meaning of "not dead".

[61] I do recognise that a child who died before the testator would not be eligible to be maintained and would not be maintained by the testator at the time of the testator's death as required by s 3(1)(d) but I do not consider this sufficient to compel a conclusion that the word "living" must mean born and still alive.

Section 2(3)

[62] Another strong indication of the word "living" being used in the sense of "not dead" in the Family Protection Act as originally enacted can be gleaned from s 2(3). In that subsection the word "living", in the case of the parent, must be used in the sense of "not dead" rather than born. It would be very strange if the same word "living" in that subsection had a different meaning for the child.

[63] If this were the case and the word "living" meant "born alive" in s 2(3), this would have the effect of excluding a child from being able to claim under s 3(b) as a deceased's child where the father had acknowledged that the child was his child while in utero but died before the child was born. It seems highly unlikely that this was the aim of the subsection, which appears to be designed to ensure that paternity had been acknowledged by or established against the parent while the parent was still alive.

[64] This points strongly to the conclusion that the word "living" in s 2(3) was intended to be used in the sense of "not dead" for the child as well as the parent. As this is the case, it would be peculiar if the very same word in another subsection of the same section (the definition of stepchild in s 2(1)) and in what is clearly an interlinked provision (given the relevance of illegitimacy to both provisions) was in 1955 intended to have a different meaning.

Destitute Persons Act 1910

[65] The next argument for Logan Wood is based on what was said to be the parliamentary intention when the Family Protection Act was first introduced to align the situation with that under the Destitute Persons Act.

[66] The Attorney-General said, when the Family Protection Bill was reported back from the Statutes Revision Committee on 25 October 1955, that:[72]

> Under the present law the classes of persons who may apply to the Court for provision are the husband or wife of the testator, the children of the testator, whether adopted, legitimate, or illegitimate, the children of a deceased child of the testator, and the parents of the testator if there are no persons living who belong to one of the other classes. The Government has recognized that there are other persons who may have a moral claim on the testator's bounty, and the Bill seeks, as far as possible, to provide that where members of such a class of persons who have a moral claim are present, they should be entitled to apply for an order. In substance, the new classes comprise stepchildren who were being maintained by the testator at the time of his death, parents who were 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 their children, specifically grandchildren whose parents cannot be found or who have deserted or failed to maintain their children, or who are undischarged bankrupts or of unsound mind. I think Members will agree, as Members of the Statutes Revision Committee have agreed, that the extension of the Act to those classes of persons does not go beyond what is fair and reasonable.

[67] It is clear, therefore, that the aim was to recognise and give rights to claim against an estate to an expanded range of persons who were seen as having moral claims on the testator. Stepchildren are mentioned merely as those who are being maintained at the time of death of the testator, this presumably being the fact that was thought to give rise to the moral duty. The Attorney-General does not spell out that it is only those stepchildren actually born at the time of the marriage that have a right to claim. One may have thought he would have done so if it was the purpose of the definition to exclude some stepchildren (namely, those in utero at the time of the marriage), whether they were being maintained at the time of the testator's death or not.

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[72] (25 October 1955) 307 NZPD 3292.

[68] It is true that the Attorney-General, after making it clear that none of the new classes of potential claimants had the right to provision but merely the right to make a claim under the Act, said that this aligned the claimants against an estate with those who could make a claim against a person while they were living:[73]

> I might mention in passing that all 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 while the testator is living. So we have brought those two groups together.

[69] Under s 5 of the Destitute Persons Act, a near relative could be required to provide maintenance for a destitute person. Section 4 of that Act defined "near relatives" for the purposes of maintenance of destitute persons. It included grandparents but not step parents.[74] Section 26, however, further provided for the maintenance of children under 16 years of age by parents. For that purpose, "parent" was defined in s 26(2) as:

> (2.) The term "parent" as used in this Act means the following persons in respect of any child other than a child which has been adopted[[75]] by any person under an adoption order which remains in force:—
>
> (a.) The father of a legitimate child:
>
> (b.) The mother of an illegitimate child:
>
> …
>
> (d.) The husband of the mother of any child, whether legitimate or illegitimate, if the child was born before the marriage of the mother with her said husband, and whether the mother is alive or dead.

[70] It is argued on behalf of Logan Wood that the use of "born" in s 26(2)(d) of the Destitute Persons Act and the expressed intention to align the Destitute Persons Act with the Family Protection Act is an indication that the word "living" in the definition of stepchild in the Family Protection Act also means "born".

[71] I do not agree. If the intention had been to limit stepchildren to those born then it would have been easy to say so by using the term "born" in the definition of

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73 (25 October 1955) 307 NZPD 3292–3293.

74 Destitute Persons Act 1910, s 4(1) and (2).

75 Adopted children were dealt with in the Destitute Persons Act, s 26(3).

stepchild as Parliament had in the Destitute Persons Act. The Attorney-General did mention the alignment of the Family Protection Act provisions with the Destitute Persons Act provisions but this was "in passing". Any such alignment cannot therefore be seen as the main aim of the new provisions so that it necessitates an alignment of the definition of stepchild with the Destitute Persons Act.

[72] In any event, the Family Protection Act provisions as enacted were not in fact aligned with the Destitute Persons Act. For example, unlike under s 26(1) of the Destitute Persons Act, there was no requirement in the Family Protection Act to be under the age of 16 in order to make a claim against the estate of a parent, including a stepparent. A stepchild of a deceased could make a claim under the Family Protection Act not only if there were a legal entitlement to claim maintenance but also if there was actual maintenance.[76] In addition, unlike under the Destitute Persons Act, there was no requirement to be destitute before making a claim under the Family Protection Act against the estate of grandparents. Nor were the added requirements in the proviso to s 3(c) of the Family Protection Act included in the Destitute Persons Act as prerequisites before destitute grandchildren could apply for maintenance.

Other legislation

[73] The next argument for Logan Wood is that, when Parliament wishes to include children in utero, it does so explicitly. It is pointed out that the definition of "in being" in s 2 of the Perpetuities Act 1964 is "living or *en ventre sa mere*".[77] Section 2(1) of the Administration Act 1969 provides that 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 but who is subsequently born alive". Finally reference is made to s 77(c) of the Life Insurance Act 1908 which also expressly includes "a child or children *en ventre sa mere*".

[74] While indications in other legislation may be relevant to the interpretation of the Family Protection Act, this must be approached with caution. Two of the statutory references were in legislation that was passed after the 1955 Act. The other

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[76] Family Protection Act, s 3(d).
[77] Emphasis in original.

was in a different context. In all cases the extra words may merely have been added for the avoidance of doubt.

Is the common law modification applicable?

[75] It is submitted on behalf of Logan Wood that what he maintains is the "fictional" interpretation of "living" in testamentary documents adopted by the common law (in restricted circumstances constrained by precedent) was based on the donor's presumed intention. It is submitted that Parliament cannot have had this common law modification in mind when it first enacted the definition of stepchild in 1955. The differences in context are, it is submitted, obvious: one involves testamentary documents, the other an Act of Parliament; one involves a testator, the other the legislature; and one involves gifts, the other a statutory claim.

[76] I do not accept this submission.[78] It seems to me that the context is very similar. The Family Protection Act is based on what the intention of the testator should have been, given his or her moral duty. Indeed, in this case it appears from the evidence that it would have been Mr Luxford's actual intention to provide for Alyxe.[79]

[77] So, even if I accepted the submission (which I do not) that the natural and ordinary meaning of the word "living" normally excludes children in utero, I would have held that the common law modification to that position applies.

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[78] WM Patterson comments that the Court of Appeal's rejection, in this case, of the legal fiction that a child is "living" if it is subsequently born alive for the purposes of the Family Protection Act was a narrow construction that was "contrary to what was intended by the [Family Protection Act]": WM Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis , Wellington, 2013) at [11.2].

[79] About four years after Mr Luxford executed his last will on 12 April 1995, Mr Luxford asked his solicitor to send him a copy of that will. Mr Luxford made some notes on the will proposing that Alyxe be added as a beneficiary. In the notes, Mr Luxford referred to Alyxe as one of "my" children. Mr Luxford did not, however, change his will before he died in the accident.

[78] Such an interpretation would be in line with New Zealand's obligations under the United Nations Convention on the Rights of the Child (Children's Convention),[80] including under arts 3(1), 23(1) (given Alyxe's disabilities) and 27:[81]

> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> …
>
> **Article 23**
>
> 1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. …
>
> **Article 27**
>
> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> …

Alleged anomaly

[79] The final argument is that the interpretation I favour of the word "living" means that there would be an anomaly in the legislation. Stepchildren conceived after the marriage would not be eligible to claim, even if they are being maintained at the date of the testator's death.

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[80] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [Children's Convention]. Alyxe was four years old when Mr and Mrs Luxford died in the accident.

[81] There is a well-established presumption of statutory interpretation that, so far as its wording allows, legislation should be read consistently with New Zealand's international obligations: *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

[80] The fact that there is one anomaly does not lead to the conclusion that the purpose of Parliament must have been to create another anomaly. The unfairness of Alyxe's position is highlighted in this case by the fact that his brother, Logan, if he had not been a named beneficiary of Mr Luxford's will, would have been able to claim against the estate just through the accident of the timing of birth. To conclude that Parliament must have intended such an unfair consequence because it did not provide for stepchildren born after the marriage to be able to claim is in my view not warranted. It would also not accord with New Zealand's obligations under the Children's Convention.

[81] In any event, it may be that Parliament in 1955 considered that children born after marriage would either be children born after the breakup of the marriage (and thus the stepparent would be exceedingly unlikely to be maintaining the child) or, if the marriage was subsisting at death, that a stepchild conceived during the currency of the marriage would be presumed to be a child of the marriage.[82]

[82] If the mother was married when the child was born, it was very difficult to prove that the mother's husband was not the father of the child. As Inglis explains, unless the circumstances were such that it was quite obvious that the husband could not be the child's father (for example, the father was never in physical contact with the mother at the time of conception), evidence of alleged illegitimacy was vague and unsatisfactory.[83] It is only in the last 25 years that DNA parentage testing has become the most effective way of establishing genetic parenthood.[84] Up until the mid-1980s, paternity testing was conducted mainly through blood tests. These tests could be a means of disproving paternity but could not actually prove paternity.[85]

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82 See discussion at [55] above.

83 Inglis, above n 66, at 402–403. Indeed, the evidence required to rebut a presumption of legitimacy had to be "strong, distinct, satisfactory and conclusive" for the presumption was "not to be broken in upon or shaken by a mere balance of probability": at 404–405, citing *Morris v Davies* (1837) 5 Cl & F 163, 7 ER 365 (Ch) at 404 per Lord Lyndhurst.

84 Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at [8.17]–[8.19]. See also discussion above at [55] about the presumptions of legitimacy (and paternity) that existed before the Status of Children Act 1969 came into force in 1970.

85 At [8.19] and Inglis, above n 66, at 416. In *Lambie v Lambie* [1942] NZLR 60 (SC) at 62–63, the Supreme Court (the equivalent of today's High Court) held that evidence of a blood test was admissible to determine the paternity of a child. The Domestic Proceedings Act 1968 (now repealed), s 50 empowered the court to order a person to take a genetic test (a blood test) as this was considered to be relevant evidence in proceedings for a paternity order.

[83] It would now of course be much easier to disprove paternity through DNA testing. It does not, however, seem likely that Parliament intended that children should be subjected to unnecessary paternity testing in order to attempt to exclude them as claimants.

A possible alternative argument

[84] Under the Status of Children Act, the presumption of paternity could be displaced on the balance of probabilities. Section 5 provides:

> **5 Presumptions as to parenthood**
>
> (1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.
>
> (2) Every question of fact that arises in applying subsection (1) shall be decided on a balance of probabilities.
>
> …

[85] With regard to the recognition of paternity, s 7(1) of the Status of Children Act provides:[86]

> **7 Recognition of paternity**
>
> (1) The relationship of father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, or for the purpose of any claim under the Family Protection Act 1955 be recognised only if—
>
> (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
>
> (b) subject to paragraph (c), paternity has been admitted (expressly or by implication) by or established against the father in his lifetime (whether before or after the birth of the child and whether by 1 or more of the types of evidence specified by section 8 or otherwise) and, if that purpose is for

[86] Section 7(1) of the Status of Children Act as it was enacted was in broadly similar terms to the current provision. However, s 7(1)(c) did not exist in the original statute; it was added by s 3(1)(c) of the Status of Children Amendment Act 1978. It appears that neither s 7 nor s 5 were amended to apply to de facto relationships or civil unions.

> the benefit of the father, paternity has been so admitted or established either before the birth of the child or in its lifetime; or
>
> (c) paternity has been established by means of a declaration of paternity made under section 10—
>
> (i) after the death of the father; or
>
> (ii) if that purpose is for the benefit of the father, after the death of the child.
>
> …

[86] It is notable that para (b) of s 7(1) is subject to para (c) but that para (a) is not. Section 7(1)(a) of the Status of Children Act is, however, presumably subject to s 5 of that Act. This may provide an alternative argument for Alyxe whereby he could be considered a child of Mr Luxford for the purposes of the Family Protection Act if (contrary to the view I take) he is not a stepchild.

[87] As pointed out on behalf of Alyxe, a further anomaly in this case is that, at the date of Mr Luxford's death, Alyxe would have come under s 7(1)(a), being presumed to be Mr Luxford's child by virtue of s 5(1) of the Status of Children Act. The paternity order made in favour of Alyxe's natural father was not made until some 18 months after Mr Luxford's death. At the time of Mr Luxford's death there was no evidence that Alyxe was other than Mr Luxford's child. The presumption that Mr Luxford was Alyxe's father therefore continued until Mr Kimura obtained the paternity order 18 months after Mr Luxford's death. In practical terms, if a claim had been made and determined by Alyxe just after Mr Luxford's death, he would have been able to claim as a child of Mr Luxford. I accept the submission that this further highlights the arbitrary nature of the interpretation contended for on behalf of Logan Wood.

[88] It may even be the case that the presumption in favour of paternity would have to have been disturbed as at the date of Mr Luxford's death and not subsequently. This means that if, even if contrary to my view Alyxe could not claim as Mr Luxford's stepchild, he may be able to claim as Mr Luxford's child. While that would raise the possibility of Alyxe having more than one father for Family Protection Act purposes, this does not seem anomalous in terms of recognising the

moral duty to provide for stepchildren, as well as interpreting legislation in the best interests of the child.[87] Such an approach would also remove, to a degree, the anomaly with regard to stepchildren born after marriage in cases where the presumed paternity or maternity of the stepchild had not been disproved at the time of the death of the stepparent.

The result I would have reached

[89] For all the above reasons, I would have held that Alyxe was a stepchild of Mr Luxford and thus is eligible to make a claim under the Family Protection Act. I would have allowed the appeal.

Solicitors:
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Moodie & Co, Feilding for Respondent
Powell Lyall, Palmerston North for Logan Wood

[87] Art 3 of the Children's Convention, set out above at [78].