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Supreme Court of New Zealand

19 December 2013

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

WOOD-LUXFORD v WOOD

(SC 62/2012) [2013] NZSC 153

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The appeal concerns a child who was conceived but not born at the date of the marriage of his mother to a man who was not his father. The child was born seven months after his mother's marriage and lived with his mother and her husband as part of the family which included his half-brother, the son of his mother from a previous relationship who was ten years old at the time of his mother's marriage. The mother and stepfather died in a car accident when the younger child was 4 years old. The mother and stepfather had made wills at the time of their marriage which had made provision for the brother but not the wife's younger son, who was not yet then born. The child, who has special needs, has a claim under the Family Protection Act for provision out of his mother's estate. The question for determination on the appeal was whether he is able to make a similar claim for provision out of the estate of the

stepfather. That turns on whether he is within the class of "stepchildren" eligible to claim under s 3(1) of the Family Protection Act 1955.

The child fulfilled the eligibility requirement specified in the Act that he was being supported by the stepfather at the date of his death. In the High Court and in the Court of Appeal it was held that he did not however come within the definition of "stepchild" in s 2 of the Act because he was not "living at the date on which the deceased married" his mother.

On further appeal to the Supreme Court, it was argued that a fictional construction adopted by the common law to extend the benefit of a will or the exercise of a power of appointment to an unborn child, if otherwise within a class the will or exercise of power intended to benefit, should be applied in the interpretation of "living" in the Family Protection Act.

The Supreme Court, by a majority (the Chief Justice and Justices McGrath and William Young, with Justice Glazebrook dissenting) has held that the common law construction cannot be applied in the interpretation of the Family Protection Act. That is because the statutory liability of the estate under the Act does not give effect to the wishes of the person conferring the benefit, but is imposed as a matter of social judgment. The statute has always identified with precision those eligible to make a claim. The Act has been amended many times over its history to respond to changing social views of those who should be eligible to claim, but without altering the requirement that the stepchild be "living" at the date of the mother's marriage. Judicial expansion of the legislative classes is not appropriate. Any such extension of eligibility to children not yet born would create anomalies with the treatment of children conceived after the date of the marriage.

The Court has accordingly held, affirming the decisions in the High Court and Court of Appeal, that the definition excludes children conceived but not yet born at the date of the marriage of a parent. Justice Glazebrook, dissenting, would have held that an unborn child is "living" at the specified date on the

basis that “born” is not the natural sense of “living”. The appeal has been dismissed in accordance with the opinion of the majority.

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