

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2021-009-001696
[2023] NZFC 3382**

IN THE MATTER OF	THE STATUS OF CHILDREN ACT 1969
BETWEEN	[PIERCE SULLIVAN] Applicant
AND	[PRUE MORGAN] Respondent

Hearing: 29 March 2023

Appearances: L Malin for the Applicant
T Cook for the Respondent

Judgment: 6 April 2023

RESERVED JUDGMENT OF JUDGE T MCKENZIE

[1] This is an application for a declaration of non-paternity, and it comes to me along with a complex relationship property file which I am case managing due to the level of acrimony between the parties, the multiple applications that have been filed and the inordinate delays in progress being achieved.

[2] The matter of the declaration for non-paternity was set down and unfortunately, as can happen for time-to-time, counsel for Ms [Morgan], Mrs Cook, mis-scheduled the hearing date. She advised when she came to court that her client was also unwell

and could not attend. I have taken the unusual step of proceeding in the face of those circumstances because I am concerned at the delays and the effect upon the children who are the subject of this application if the matter were to be further postponed.

[3] I heard from Mrs Cook who spoke to the submissions made by counsel for the applicant and I granted leave for her to file written submissions within two days which she confirmed had already been approved in draft. I accept that this is an extraordinary step but this an extraordinary file and further delays in determining this straightforward application will only increase the acrimony and continue the disastrous effect upon the children.

[4] The children need to know the outcome as do the parties and I do not accept that there is any prejudice in my decision to proceed. I accept that the parties were not cross-examined however the matter was only allocated a 30 minute to 1 hour time slot and it was not my intention for cross-examination to occur. In any event the evidence is largely uncontested.

Background

[5] The applicant and respondent were married in 1993. At the time of marriage Mr [Sullivan] had three children to a former wife and had undergone a vasectomy some 12 years prior to his marriage to the respondent. In 1992 Mr [Sullivan] underwent a vasectomy reversal which proved to be unsuccessful. In 1996 and 1998 the couple adopted two children through a formal adoption process. In 2005 the parties became pregnant and the girls who are the subject of this application were born.

[6] Mr [Sullivan] filed an application in November 2021 seeking this declaration of non-paternity. He relied upon his evidence of the conception and his subsequent views of his relationship with the children to support that. Ms [Morgan] ultimately responded in January 2022 taking no position in regard to the application. A recommendation was made for the parties to undertake paternity testing but neither Ms [Morgan] nor the girls made themselves available. Some 18 months after the proceedings were filed the matter came to hearing.

Evidence

[7] Both parties accept that Mr [Sullivan] had a vasectomy at the time their relationship commenced. They accept as well that the reversal proved unsuccessful. The parties went on to adopt two other children and attempts to become pregnant failed. IVF and donor insemination all were undertaken without success.

[8] Eventually the parties commenced a relationship with [Darren Ashley]. The motivation for that relationship was varied but it is acknowledged by Ms [Morgan] that for her at least it was primarily to become pregnant. She describes this as her “longing to give birth”. The twins were born on [details deleted] 2006. Mr [Sullivan] claims that he was aghast at the possibility of the mother’s pregnancy. He says that he did not want any more children. He recognised that their marriage was already in trouble and he wanted Ms [Morgan] to discontinue her pregnancy. He began counselling with a psychiatrist and the couple started joint counselling. Up to this point it seems that the parties’ evidence is relatively in accord. They engaged in sexual threesomes with [Darren Ashley] on a routine basis and that continued up to 2020. Whether this was for pleasure or to conceive a child remains a point of disagreement but the fact is that the parties were in this arrangement at the time of conception. Once the parties separated the relationships soured and this application was made.

Issues

[9] Is there a biological relationship between the girls and Mr [Sullivan]? I conclude that there is not. This is based upon the following:

- (a) Ms [Morgan] has declined the opportunity to participate in paternity testing which would almost certainly determine paternity. I am entitled to take inference from that refusal to engage.
- (b) Mr [Sullivan] had already at the time Ms [Morgan] became pregnant had a vasectomy and it was common ground that the reversal was unsuccessful.

- (c) The parties had already undergone significant fertility treatment and sperm donation which proved unsuccessful.
- (d) Ms [Morgan] acknowledged that the purpose of the threesome was for her to conceive another child.
- (e) Ms [Morgan] acknowledged the possibility in her affidavit that even if Mr [Sullivan] was not the twins biological father it was a fact that was not discussed for 15 years.
- (f) Ms [Morgan] accepts in her affidavit that there is “a possibility if not a probability that he is not their father”.

[10] Having considered all of the above I am drawn to the inevitable conclusion that there is no biological connection between the children and Mr [Sullivan].

Legislation

[11] Section 10 of the Status of Children Act is as follows:

10 Declaration as to paternity

- (1) In this section, eligible person means a person—
 - (a) who is a woman and who alleges that a named person is the father of her child; or
 - (b) who alleges that the relationship of father and child exists between the person and another named person; or
 - (c) who wishes to have it determined whether the relationship of father and child exists between 2 named persons, and has a proper interest in the result.
- (2) The Family Court or the High Court may make a declaration of paternity (whether the alleged father or the alleged child or both of them are living or dead) if—
 - (a) an eligible person applies to the court for the declaration; and
 - (b) it is proved to the court’s satisfaction that the relationship exists.
- (3) A court considering an application under subsection (2) may, either on its own initiative or on an application for the purpose by a party to the proceedings, make a declaration of non-paternity (whether the alleged father or the alleged child or both of them are living or dead) if it is proved to the court’s satisfaction that the relationship does not exist.

[12] Having determined that Mr [Sullivan] is not the biological father of the girls Ms [Morgan] has asked me to step back from making a declaration of non-paternity because pursuant to s 10(1)(b) there exists a relationship of father and child with the girls notwithstanding the earlier concluded facts.

Mother's position

[13] Ms [Morgan] alleges:

- (a) Mr [Sullivan] treated the girls as his own. He supported their passion for horses and was involved in school and other activities.
- (b) The parties and children holidayed together.
- (c) The children referred to him as "dad".
- (d) He would take them out from time to time.
- (e) He would buy them presents.
- (f) He participated in registering their births and choosing their names, permitting them to have his surname.
- (g) He included them in his will in 2020 as residuary beneficiaries referring to them as "my children".

[14] She acknowledges:

- (a) He was not a hands-on father.
- (b) His energy levels were different.
- (c) She urges me to question his motivation.

- (d) It is her counsel's submission that Mr [Sullivan] is motivated to remove the children due to child support obligations and any right the children might have to bring a family protection claim.

[15] She comments that since separation he has disconnected completely with the children sending them no presents or acknowledgement of special events, disengaging from all guardian responsibility including communication from school and telling them that they were not his children.

[16] I was urged by Ms Cook to consider delaying a decision or postponing the commencement of any decision that I make. As I have outlined in the introduction to this judgment I have long been concerned at the delays on this file.

Father's position

[17] He does not accept much of Ms [Morgan]'s description of the relationship between him and the children:

- (a) [Melanie] was not a name chosen by him, rather it was Ms [Morgan]'s favourite name after a good friend of hers.
- (b) The children rarely referred to him as Dad, in fact referring to him as [Pierce].
- (c) That they holidayed on one occasion by way of a two-day trip to the West Coast.
- (d) Special events were celebrated separately from him and he did not celebrate Christmas or birthdays.
- (e) He has distanced himself from the children immediately upon separation.
- (f) His view that the opposition to the declaration is motivated by financial motives is partially correct.

Consideration

[18] The wording of s 10(3) is difficult. It enables me to make a declaration of non-paternity if I am satisfied a relationship does not exist between the father and child. It is not clear whether, having established that the girls are not the biological children of Mr [Sullivan], they can still be considered as having a relationship between them that precludes a declaration from being made.

[19] It is my view that the lack of a biological relationship is but one factor that I need to consider although it is a major consideration.

[20] It is my view that I may take into account other circumstances:

- (a) Mr [Sullivan]'s steadfast refusal to have even the most minimal contact with the girls and his rejection almost from the moment of separation of any form of relationship with them.
- (b) He has sought no contact with them and significantly they have not sought any with him. Although they have on one occasion acknowledged Father's Day post-separation that was an isolated incident and their motive for that must be questioned.
- (c) I accept that in 2020 while the parties were still together, he provided in his will for the children to be included as discretionary beneficiaries.
- (d) I must take into account Mr [Sullivan]'s rigid, consistent and immovable views from the date of separation that he rejected any form of relationship with the girls or that the girls were his own biological children. He has made it clear from the outset that he wants no relationship with them.

[21] It is my view that the girls were part of a family by virtue of their mother but that their relationship with Mr [Sullivan] was not as father and daughter. They have not given evidence. There was no evidence in any detail of the nature of that relationship. No evidence of any expression of love or affection between them that

would have been expected between a father and his daughter. There were no photos of shared experiences between them, holidays, special events and special moments.

[22] They are 17. They have not, as independent young women, sought any contact with him post-separation which would have been consistent in my view with at least a satisfactory familial relationship. They were children who lived in his house.

[23] Even though the applicant told the girls upon separation he was not their biological father, that would not have prevented them from pursuing a relationship with him, had they felt he was their psychological father. Significantly, neither them, nor indeed the applicant, sought contact.

[24] They did not persist with the paternity tests and again as adults that was to be their decision. Their mother supported their decision and said so by way of affidavit.

[25] Although I am bound to consider their interests it is my view that their interests are not focussed or recognised by the perpetuation of a lie. They are not the biological children of the applicant and there no longer exists, if indeed there ever did exist, a relationship between them as father and child. Were he their father and if he regarded himself as their father, he would not have made this application.

[26] I was asked to postpone the enforcement of this declaration or to delay its nature to enable Ms [Morgan] to continue with her child support entitlement. I am not prepared to do that. That is not the purpose of this legislation. Although I was asked to consider the motivation of the applicant in bringing this application, I remind myself that this is clearly a matter of law and motivation is not relevant to my determination.

[27] Having determined that there is no biological relationship between the applicant and the children, and that there is no relationship as father and child, the application is therefore successful and a declaration of non-paternity is made.