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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2022-044-000259
[2023] NZFC 8215

IN THE MATTER OF	THE STATUS OF CHILDREN ACT 1969
AND IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	COLLEEN PATRICIA TARR Applicant
AND	PETER ROGERS (ADMINISTRATOR OF ESTATE OF FRANCIS GEORGE ROGERS) Respondent
AND	FRANCES COTTER (Deceased) through her representative DEBRA WHITE Interested party
AND	PENELOPE WAKELIN Interested Party
AND	ROBERT (AKA MICK) MICHAEL ROGERS Interested party

Hearing: 1 and 2 August 2023

Appearances: R Gregory for the Applicant
H Gladwell for the Respondent
N Woods and T Faymi for F Cotter, D White and P Wakelin
A Needham and S Stretton for R Rogers

Judgment: 10 August 2023

RESERVED JUDGMENT OF JUDGE B R PIDWELL

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[1] Francis George Rogers (Frank) died on 16 October 2020 intestate. He did not have a spouse or any children. His father, Daniel James Rogers died in 1972. His mother, Ethel Rogers (nee Shaw) has also died. Therefore, his estate defaults to his siblings, both full and half.[1]

[2] Colleen Tarr says she is Frank's half-sister. She seeks a declaration that Daniel James Rogers (Daniel) was her father.[2]

[3] Peter Rogers, Frank's full sibling and the administrator of his estate does not oppose the declaration. He has provided a sample of his DNA which establishes it is highly probable that he and Colleen are half-siblings.

[4] Daniel was born in 1889 and married twice in his lifetime. His first wife, Dorothy, gave birth to seven children, five of whom survived infancy. Stephen, Mavis and Maurice are now deceased. Of the remaining two, Robert (Mick) the youngest, is not opposed to the declaration. He too has provided a sample of his DNA which establishes it is highly probably that he and Colleen are half-siblings.

[5] The remaining child of Daniel and Dorothy is Frances Cotter. She sadly died two months before the hearing, but opposed the declaration and had filed evidence. Her position is now advanced by her daughter, Debra White.

[6] Daniel married his second wife, Ethel Shaw in 1938, six years after Dorothy died giving birth to Mick. During the years in between, Daniel employed a

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[1] Administration Act, s 77.
[2] Status of Children Act 1969, ss 6, 6C and 10.

housekeeper, Elizabeth Clarkin.[3] She gave birth to Colleen Tarr (nee Clarkin) in 1936.[4]

[7] The issue for the Court is whether I am satisfied on a balance of probabilities that Daniel Rogers was Colleen's father.

The law

[8] The overall purpose of the Status of Children Act 1969 (SOCA) is to remove the legal disadvantages of children born out of wedlock.[5] Those legal disadvantages are foreign concepts in our current society in Aotearoa/New Zealand, but were entrenched in our laws and values before the SOCA was passed. The United Nations Convention on the Rights of the Child now confirms the widespread acknowledgement that children should not be discriminated against because of the status, activities, expressed opinions or beliefs of their parents or family members.[6]

[9] An administrator of an estate is required to make reasonable enquiries whether any person may have a claim by reason of the SOCA before distributing it.[7] When a potential claimant is identified, and the familial relationship is in issue, the administrator is required to serve a notice on that claimant advising of their right to establish the relationship in question by asking the court for a declaration.[8]

[10] Under the SOCA, the High Court and Family Court have concurrent jurisdiction.[9] Section 10 provides

> **10 Declaration as to paternity**
> …
> (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.

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[3] Elizabeth died in 1981.
[4] BOD p 9.
[5] Status of Children Act 1969, ss 2A, 3 and 4.
[6] UNCROC, article 2; *In the matter of Linda Boon* [2017] NZHC 1509, at [5(c)] per Whata J.
[7] Section 6(1).
[8] Section 6C(1), S10;
[9] Section 6C(1)(b), s 10(2) and (3).

(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.

[11] If the application for a declaration is filed in the Family Court, the provisions of the Family Proceedings Act 1980 apply.[10] The relevant provisions of that Act provide:

> **50 Power of Family Court to make paternity orders**
> (1) Every application for a paternity order in respect of a child shall be heard and determined in the Family Court.
>
> (2) Nothing in subsection (1) or in sections 47, 48, 49, 51, or 52 shall limit the jurisdiction of the High Court to determine the paternity of a child under any other enactment or rule of law.
>
> **51 Paternity orders**
> (1) On hearing an application for a paternity order made under section 47 in respect of a child, the Family Court—
> (a) ***must,*** if it is satisfied that the respondent is the father of the child, make an order declaring that the respondent is the father of the child; and
> (b) may, if it is satisfied (either on its own initiative or on an application for the purpose by a party to the proceedings) that the respondent is not the father of the child, make an order declaring that the respondent is not the father of the child.
>
> (2) For the purposes of proceedings under section 74, a paternity order in respect of a child shall be conclusive evidence that the person against whom it is made is the father of the child.

[12] The difference between a paternity declaration and a paternity order is the scope of the remedy. A declaration is a remedy *in rem* (ie against the world), whereas an order is an *in personam* remedy (ie relating to a specific person).[11]

[13] Unlike the High Court which determines these applications under the Declaratory Judgments Act 1908,[12] the Family Court does not have a residual discretion due to the mandatory wording of s 51(1)(a) (as emphasised above). If the Court is satisfied that the relationship of father and child exists, it must make an order

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[10] Section 10(5) SOCA; SS 47-50 of the Family Proceedings Act 1980 do not apply. These provisions contain time limits.
[11] *D v H* FC Auckland, FAM2003-004-1811, 20 June 2006 per Burns FCJ at [28]; *BR v RL* HC Nelson CIV 2007-442-514, 12 March 2008 at [23] and [24] per Wild J.
[12] Section 10(5)(b) SOCA; Part 18 High Court Rules 2016, r 18.1(b)(v).

declaring the same. Pursuant to s 10(2) of the SOCA, a declaration of paternity must be proved "*to the court's satisfaction"* that the relationship exists.

[14] The standard of proof is a balance of probabilities.[13]

[15] Some cases discuss the need for the Court to take a cautious approach, given the gravity of the implications of making a declaration of paternity.[14] It is axiomatic however that the Court applies the required standard of proof appropriately in all its work. There is no heightened test. In *Re I* Justice Gendall observed:[15]

> I think the matter is quite clear that any questions of fact are to be determined or decided on a balance of probabilities so that once the facts are determined an appropriate conclusion can be reached or drawn from the facts. The drawing of an inference or conclusion as to paternity can only be from established facts which are proven to be probable, and the inference to be drawn should be on the basis that it is more probable than not.

[16] The Supreme Court in *Hemmes v Young,* when considering an application for paternity against a background of an adoption order, noted that the object of the enquiry under s 10(2) is not confined to biological paternity, but rather a more holistic assessment of paternity, ie the legal relationship.[16] It did state, however, that:

> Proof of that fact [namely the biological relationship] will in most cases justify a declaration that the legal relationship of father and child exists.[17]

[17] The absence of DNA evidence is not fatal to an application. However, where the biological relationship is proved (outside of an adoption context), it is likely the standard of proof is met for the declaration.

[18] The legal relationships acknowledged by law are (*inter alia*) those set out in s 7 of the Administration Act. Hence the obligation on administrators in Part 1 of that Act to make reasonable inquiries to identify all relevant legal relationships.

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[13] Section 10(6) SOCA*; In the matter of Linda Boon* (supra) at [10] citing *Re I* (1997) 15 FRNZ 525 per Gendall J.
[14] For example *[M] v [W]* CIV2010-485-1588 HC per S France J.
[15] *Re I* at 533.
[16] *Hemmes v Young* [2005] NZSC 47, [2006] 2 NZLR 1 at [8] - [18].
[17] Above n 14 at [16].

Pre-trial rulings

[19] Before the commencement of the hearing, I issued five rulings. Due to time constraints, I did not give full reasons. I provide them now.

Were the proceedings served appropriately?

[20] Mr Woods, on behalf of the late Frances Cotter, challenges whether the proceedings have been served effectively in accordance with the Family Court Rules.

[21] He submits that no judgment can be made if the proceedings have not been proven to be served, citing *J v Family Court at Auckland.*[18] That case, however, related to a protection order, an *in personam* remedy. In this case, the application is for an *in rem* remedy.

[22] Mr Woods relies on rule 105, which states that applications under three specific Acts must be served personally, namely applications under the Family Violence Act 2018, the Family Proceedings Act 1980, and the Care of Children Act 2004. He says the Court's direction for service via email on the 25 potential beneficiaries of the estate was in breach of this rule, and essentially ultra vires. The court order was sealed. It was not appealed or reviewed.

[23] The Court had directed an application for directions as to service to be filed as the Family Court Rules are silent on how applications under the SOCA are to be specifically served.[19] The application filed was pursuant to r 380, which only applies to applications under the Family Protection Act (FPA) or the Testamentary Promises Act (TPA). However, it is logical that where there is an estate issue, the same people who have an interest in a SOCA declaration would be those with interest in FPA or TPA proceedings.

[24] Rule 102 is the default rule. It provides:

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[18] *J v Family Court at Auckland* [2020] NZFLR 870 (HC).
[19] Minute of Judge McHardy, 23 June 2022 FAM-2022-044-00259.

102 How documents to be served

(1) A document required by a family law Act or these rules to be served on a person in a particular manner must be served on the person in that manner, regardless of rules 105 to 125.

(2) A document not required by a family law Act or these rules to be served on a person in a particular manner may be served on the person—

(a) by personal service on the person (*see* rules 105 to 113); or

(ab) by transmitting a copy to the person's electronic address for service (*see* rule 113A); or

(b) by service on a lawyer on behalf of the person (*see* rule 114); or

(c) by service at the person's address for service (*see* rules 115 to 121); or

(ca) if a defendant has been served in Australia under section 13 of the Trans-Tasman Proceedings Act 2010 with an initiating document for the proceeding, by sending the document to an address for service of the person to be served; or

(d) by service on the person in the manner specified in an agreement (*see* rule 122); or

(e) if a representative or manager has been appointed or is acting for the person, by service on the person's representative or manager (*see* rule 123); or

(f)if the person to be served is an incapacitated person, by service in the manner directed by the court or a Registrar (*see* rule 124); or

(g) by service in a manner and at a place the court or Registrar directs.

(3) If all reasonable efforts have been made to serve documents in a manner required or (as the case requires) a manner permitted by these rules, but the documents have not been served in that manner, in certain circumstances the court or a Registrar may, under rule 126, make an order for substituted service (that is, an order dispensing with, or changing, the service required by these rules).

[25] Rule 105 stipulates that applications under the Family Proceedings Act 1980 must be served by personal service. However, this application is filed under s 10 of the Status of Children Act. The Family Proceedings Act simply provides the operative provisions to enable the Family Court to make a declaration under s 10 of SOCA.

[26] It is logical that an application is seeking an *in personam* remedy against an individual, eg a dissolution order, a parenting order, or a protection order would require personal service, due to the personal effect of such an order on a respondent individually. However, a s 10 SOCA declaration is an in rem result, and personal service is not required under rule 105.

[27] In this case, the Court specifically turned its mind to the issue of service, to ensure that all interested parties were aware of the proceedings and had an opportunity to be heard. It made an order directing service on the named beneficiaries of the estate in issue via email.[20] That order was sealed. The executors of the Estate of Frances Rogers were directed to serve the beneficiaries by email. As submitted by Mr Gladwell for the estate, that was a "belt and braces approach". They duly followed the Court's direction.[21]

[28] It is common practice in this Court and particularly through the COVID-19 years when the Epidemic Notice was in force for the Court to direct service via email.[22] This practice has now been confirmed in the new r 113A inserted into the Family Court Rules in December 2022.[23]

[29] The supplementary affidavit of Cynthia Fletcher clarifies that of the 25 named beneficiaries, 22 of them have provided confirmation of service and have taken no steps. Each signed an acknowledgement. Two others emailed confirming they have received the documents but had no means to scan the acknowledgement back. The remaining beneficiary is Ms Wakelin who filed a notice of intention to appear and is taking part in the proceedings.

[30] It is clear that application and supporting documents which are required to be served, namely the documents filed by the applicant have been served in accordance

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[20] A s 6C SOCA warning notice had been issued to the Applicant by the administrator of the estate of Frank Rogers.Minute of Judge McHardy 18 August 2022.

[21] Affidavit of Sharon Lee Mitchell dated 21 July 2022, Affidavit of Cynthia Fletcher 16 November 2022 and Supplementary Affidavit of service dated 31 July 2023.

[22]The Epidemic notice issued under the Epidemic (Preparedness) Act 2006 expired on 20 October 2022.

[23] Rule 10 of the Family Court Amendment Rules 2022.

with the Court order. I am not able to overturn or look behind that order. Mr Woods appropriately conceded that.

[31] I am satisfied that service has been legally effected as directed.

Has the correct respondent been identified?

[32] The second preliminary issue that Mr Woods raised was to challenge whether the proceedings have been brought against the correct respondent.

[33] The applicant in the proceedings is Colleen Tarr. She is an eligible person pursuant to s 10(1)(b) of SOCA.

[34] The named respondent is Peter Rogers as the administrator of the estate of the late Francis George Rogers. The estate issued a s 6C warning notice to Ms Tarr.

[35] The issue taken by Mr Woods is that the named respondent should be the putative father himself, Daniel James Rogers. He is long deceased, and his estate has been wound up. The Court was advised that his son Maurice was the executor or administrator and Maurice, as well, is deceased.

[36] There is no rule as to who the respondent should be. When an application is filed against a person personally seeking an order (*in personam*), then it is clear who the respondent should be, namely the person affected by the order. That would be the situation if this were an application for paternity under s 47 of the Family Proceedings Act 1980 because individual rights flow from that.

[37] But where a person is deceased, the application can only come in the form of a declaration under the Status of Children Act. It can either be an ex parte application or against an interested party. In this case the interested party is the estate which is requiring Colleen Tarr to provide evidence of her alleged relationship or status with Daniel Rogers for the purpose of the administration of the estate of Francis Rogers.

[38] She was given notice to do that under s 6C SOCA which has triggered her application under s 10. That is entirely appropriate. In my view it is entirely

appropriate for the estate as the interested party, which is essentially frozen and stayed from completing its duty to distribute the estate, to be named as the respondent party.

[39] All the other persons who have potential interest in the case have been served including the executors of Maurice's estate.[24] They have taken no steps. I am satisfied that the most appropriate entity has been named as the respondent, and all interested parties have been given an opportunity to engage with the Court.

Should the proceedings be struck out?

[40] Mr Woods on behalf of his clients, the estate of Frances Cotter and Ms Wakelin applied to strike out the application pursuant to Rule 193 of the Family Court Rules, or alternatively s 163 of the Family Proceedings Act 1980.[25]

[41] The Court has jurisdiction to order that an application or pleading be struck out if, amongst other things, it is likely to cause prejudice, embarrassment or delay in the proceedings or it is otherwise an abuse of the Court's process.

[42] Rule 193 provides:

> **193 Striking out pleading**
>
> (1) The court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
>
> > (a) discloses no reasonable basis for the application or defence or other pleading; or
> >
> > (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
> >
> > (c) is otherwise an abuse of the court's process.
>
> (2) An order under subclause (1) may be made by the court—
>
> > (a) on its own initiative or on an interlocutory application for the purpose:
> >
> > (b) at any stage of the proceedings:

[24] Counsel submitted that Maurice's executors would have been his children.
[25] Application to strike out dated 13 June 2022; application to strike out and/or stay filed on 28 July 2023.

(c) on any terms it thinks fit.

[43] Section 163 provides:

> **163 Vexatious proceedings**
>
> (1) The District Court or the Family Court may dismiss any proceedings before it under this Act if it is satisfied that they are frivolous or vexatious or an abuse of the procedure of the court.
>
> (2) The District Court or the Family Court may, if it is satisfied that a person has persistently instituted vexatious proceedings under this Act or any former Act (whether against the same person or against different persons), after giving the first-mentioned person an opportunity of being heard, order that no proceedings under this Act, or no such proceedings of any specified kind or against any specified person, shall be commenced by the first-mentioned person without the leave of the court.

[44] Mr Woods does not submit that the proceedings are vexatious or frivolous. Rather, he says that due to the inordinate delay in bringing the issue of paternity before the Court, that constitutes an abuse of process, and has resulted in prejudice, as Mrs Cotter died before the Court heard the application. He submits that a fair and just hearing cannot be held in those circumstances.

[45] It is a significant step for the Court to strike out an application without allowing a party to fully present its case. It is not a step the Court takes lightly.

[46] Initially Mr Woods advanced an argument that if Daniel Rogers died before the Status of Children Act came into force on 1 January 1970, the application must fail. However, Mr Rogers died in 1972.

[47] The Status of Children Act 1969 does not contain any time limits restricting applications under s 10, in contrast to other pieces of legislation.[26] It is very clear that Parliament specifically left the jurisdictional door open to ensure that applications and presumptions under Part 1 apply to "every person born before or after the commencement of the Act".[27] The declaration can be made whether the alleged father or the alleged child or both of them are living or dead.

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[26] *McGrath v Dalgety* [2022] NZHC 2180, [2022] NZFLR 414 per van Bohemen, at [81]; *Re application by Tamasese* HC Wellington M.166/98, 28 April 1998 per Gendall J.

[27] SOCA, s 3(4)

[48] The triggering event for the application filed by Colleen Tarr was the death of her purported half-brother Frank and the intestacy of his estate. The administrator has issued a s 6C warning notice requiring her to prove that she has a half-sibling relationship with him for the purpose of the Administration Act. There has been no delay in her taking that step. Despite the length of time that preceded the application I am not satisfied that her application is an abuse of process. There is an important question to be tried. Frank's estate is in abeyance. The Court is required to make a determination to enable the estate to be distributed.

[49] I do not consider the 52 years between Daniels Roger's death, and the application being filed, changes that determination. This is not a case based on extrinsic evidence which is no longer available. Colleen was naturally curious all her life, but felt unable to take any legal steps due to the constraints of the times.[28] It is accepted that Daniel Rogers never met Colleen, nor acknowledged her as his daughter. She was raised by her mother, at a time when that would have been a very difficult experience for them both. Colleen spoke of the shame of not having a father, and having to use an alternative surname so her school did not immediately identify her as being illegitimate.[29] It is accepted that there is no DNA evidence available from Daniel Rogers. However, DNA samples were supplied by Colleen, Mick and Peter, which provides a clear evidential basis for the application. There is a case to answer.

[50] The strike out applications are therefore declined.

Should leave to granted for the late filing of evidence?

[51] The last procedural issue is whether I should grant leave for the affidavit of Ms Wu dated 15 May 2023 to be filed four days out of time. The direction was made at the pre-hearing conference on 9 March 2023 by Judge Muir. He made an exception to the standard direction that no further steps can be taken in proceedings after a pre-hearing conference. He directed evidence to be filed by the interested party in terms of an expert, represented by Mr Woods, to be filed by 11 April and any evidence in response to be filed by 11 May.

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[28] NOE p10-11.
[29] NOE p 9.

[52] Ms Wu's evidence was filed four days late on 15 May. A draft, unsigned copy was served on counsel on 11 May. It was not amended between then and the time it was signed.

[53] Mr Woods takes issue with the lateness of the filing and also the contents, saying it is essentially evidence-in-chief, not evidence in reply.

[54] Ms Gregory has filed a medical certificate to explain the four-day delay, which I accept. There is no identifiable prejudice arising from the four-delay delay.

[55] The affidavit in reply answers challenges to the chain of custody and accreditation of the DNA Diagnostics laboratory. It is not uncommon for this Court to receive documentary evidence from DNA Diagnostics in the form of a report only. When the respondent filed expert evidence to challenge the DNA results, it was quite proper for that to be addressed in evidence in reply, as directed.

[56] I therefore grant leave for the evidence of Ms Wu to be filed.

Agreed pretrial matters

[57] Ms Gregory conceded that the evidence filed by Colleen covering information obtained from www.ancestry.com (essentially a do-it-yourself genealogy test) together with a hearsay statement of Angela Sinclair should not be admitted.[30]

Substantive issue: Is Colleen Tarr the daughter of the late Daniel Rogers?

Colleen's evidence

[58] Colleen was born on 16 December 1936, at Saint Marys Home, Otahuhu, a home for unwed mothers.[31] Her birth certificate mis-spells both her and her mother's last name, Clarken (states Clarksen). Her mother, Elizabeth Mary was 38 years old at the time. Her father's name is not recorded.

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[30] Evidence Act, s 17, s 7(3).
[31] BOD p9 Birth certificate, and p4 at [2] and [9].

[59] She lived in Paeroa as a child, and says the Rogers family was well known to her family. Her uncle had a farm in Patetonga. She says Daniel Rogers was a teacher and owned farmland in Patetonga.[32] She would visit her uncle and aunt during holidays and overhear adult conversations which confirmed in her mind that Daniel Rogers was her father.[33]

[60] She recalled her aunt telling her that very fact, when she turned 18 in 1954.[34]

[61] However, she had no relationship with him during his lifetime. Her mother never spoke of her parentage.

[62] As an adult, she knew where Peter Rogers lived after she found his name in the telephone book, but never had the courage to connect with him or anyone else in the family. She watched Stephen Roger's funeral from afar.[35]

[63] After a friend did some genealogy testing, she and her daughter were invited to a family gathering at Mick's home in 2021. She describes it as a very successful day.

[64] She says she did not know that Frank had died intestate, until Peter visited her in June 2021. They have become close. When the issue of their sibling relationship required proof for the purpose of distributing Frank's estate, she, Peter and Mick gave consent for DNA relationship testing.

DNA evidence

[65] This Court regularly relies on DNA Diagnostics relationship testing for the purpose of establishing paternity under the Family Proceedings Act.[36] The accreditation of DNA Diagnostics has specifically been tested and satisfied.[37] Ms Wu's evidence confirms the accreditation and chain of custody of the samples.[38]

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[32] BOD p4 at [5].
[33] BOD p 5 [15] and [16]; NOE p 8.
[34] BOD p 5 [16].
[35] BOD p 6 [20] and NOE p10-11.
[36] *Fletcher v Blackburn [Guardianship]* [2009] NZFLR 354 (HC).
[37] See for example *Prouse v Grieve* [2016] NZFC 4970.
[38] BOD p 31 and exhibits A and B.

[66] The DNA report is dated 12 October 2021. It states:

> The DNA samples received from Colleen Tarr, Peter Rogers and Robert Rogers were compared and a statistical analysis was performed. The calculated value of 245,000 indicates that Peter and Roger Rogers are 245,000 times more likely to be half siblings of Colleen Tarr than unrelated.
>
> These results very strongly support Peter Rogers and Robert Rogers are half siblings of Colleen Tarr.[39]

[67] A likelihood ratio index value of more than 1000 provides very strong support, the highest probability match.

[68] Both Peter and Mick (Robert) have filed their birth certificates which establish that Daniel James Rogers was their father, and they had different mothers.[40]

[69] DNA evidence of this kind offers a high level of certainty. In *Pearce v Pearce,* the Court of Appeal was satisfied that the DNA evidence of siblings was probative enough to establish the paternity link to their shared (deceased) father.[41]

[70] The only logical and reasonable inference to be drawn from the DNA relationship testing and the birth certificates is that Daniel James Rogers was also Colleen's father. The genetic testing establishes the biological link between Peter and Mick and Colleen as half-siblings. They have different mothers. Therefore, they must share their father, Daniel Rogers.

[71] However, that conclusion is strenuously opposed by Mr Woods, on behalf of the late Frances Cotter through her daughter, and Penelope Wakelin. I will address their objections in turn.

Inaction / delay by Colleen

[72] Mr Woods is critical of the fact that Colleen took no steps to advance an application for paternity until this point in time. He says the delay is "unparalleled",

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[39] BOD p 18.
[40] BOD p 59 and 134.
[41] *Pearce v Pearce* [2012] NZCA 378, [2012] NZFLR 863 (CA).

coming some 52 years after the death of the putative father. He can cite no other case where there has been such delay.

[73] At the date of filing the application, Colleen was 85 years old. Inevitably, a number of putative relatives have passed away, including her alleged half sister Frances Cotter who is opposing the declaration. He submits, therefore, that a significant amount of evidence is absent due to her inaction in bringing her claim, such as the more conventional evidence to establish the sexual relationship between the alleged parents at the material time, admissions made, expressions of physical likeness, and parentage testing using DNA from the putative father.

[74] The lack of such evidence is not fatal to the application, however. The Court is able to consider what evidence it does have, to establish whether the burden of proof has been met.

[75] There is no requirement for an applicant to explain any delay in filing such an application. The SOCA has no time limit, as discussed above. Declarations of paternity are emotional and pierce the very core of a person's identity, their sense of belonging, their whakapapa. The SOCA was enacted to eliminate all sense of social and legal stigma surrounding children being born out of wedlock. Colleen gave poignant evidence of how she felt living her life with the social stigma *"... I had a desire all my life. What would you have done? Your pride and rejection. You're frightened of both of them. Which is proven now by rejection, what's happening now; rejection."*[42]

[76] To now require her to justify her inaction affronts the overriding principles of the SOCA to eliminate the stigma and prejudice.

[77] The SOCA was passed into law when Colleen was 34 years old. Up until then, she had no legal redress, as a child born out of wedlock. DNA testing was not available to establish familial relationships until decades later in the 1980s. It is inappropriate to characterise Colleen's inaction as "acquiescence to the fact that she is not in a

[42] NOE p 11 lines 17-20.

[parent and child] relationship".[43] How can a child acquiesce? How can an adult be criticized for inaction when there is no legal recourse for half of her lifetime? I reject Mr Woods submission on this point entirely.

[78] The application was triggered by the s 6C warning notice, and Colleen's need to establish her identity and whakapapa in her twilight years. She asked science and her putative half brothers to assist her in solving her lifelong mystery. No adverse comment can be made about that. Whether that establishes an inheritance claim is not relevant to the Court's assessment of the evidence.

DNA conclusion

[79] Mr Woods appropriately concedes that in the context of genetic analysis, a DNA test can provide valuable insights of shared familial relationships such as half-siblings.[44]

[80] He is critical, however, that there was no genetic testing in this case directly between the half-brothers, Peter and Mick. He is also critical that the Court and DNA Diagnostics merely rely on their birth certificates. He concedes the birth certificate establishes a legal relationships, but says it does not establish a biological one.[45] However, a birth certificate is *prima facie* evidence of the truth of the information it contains.[46] There is no evidence to challenge the birth certificates of Peter and Mick. Therefore, the Court is satisfied that the birth certificates establish that Daniel Rogers was Peter and Mick's father, as stated therein. Peter, at the age of 84, also gave credible and surprisingly very clear evidence of his memories of his father, Daniel, whom he lived with for 30 years.[47]

[81] Ms Wu, the senior scientist who conducted the DNA test, accepted that she had been informed that the two were half-brothers, so proceeded on that hypothesis when

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[43] Closing submissions on behalf of the Late Frances Cotter and Penelope Wakelin dated 4 August 2023 at [1] – [6] and [47].
[44] *Kirton v Herbison* [2022] NZHC 3208; and *McGrath v Dalgety* [2022] NZHC 2180, [2022] NZFLR 414.
[45] Referencing *Hemmes v Young.*
[46] Births, Deaths, Marriage, and Relationships Registration Act 1995, s 71.
[47] NOE pp 38-42.

trying to establish the probability of them sharing the same father as Colleen.[48] Ms Cotter's expert (who was not cross examined) was critical of how Ms Wu worded the probability conclusion, stating "It may be more correct to state that the results were found to be 245,000 times more likely if these individuals are related as half siblings rather than being unrelated".[49] However the probability conclusion is worded, the DNA results place the conclusion of a half-sibling relationship in the "very strong" and notably highest category. That is enough evidence to satisfy me, on a balance of probabilities, that Daniel Rogers was Colleen's father.

Informed Consent

[82] There is no issue that Colleen, Peter and Mick each gave their consent for their individual DNA to be tested, to establish their relationship.[50]

[83] Mr Woods argues that under s 19 of the Human Tissue Act 2008, (HTA) the consent of Daniel Rogers was required. As he died over 50 years ago, he has not given informed consent, nor have his executors or other family members been approached for their consent on his behalf. He purports to lodge an objection pursuant to s 40 by Mrs Cotter.

[84] However, no human tissue or DNA was extracted or used from Daniel Rogers. Section 31 of the HTA states that informed consent must be given by the individual whose body is the tissue, or from whose body the tissue is concerned. A person's nominee or family member/ relative can give the requisite consent after death.

[85] The DNA analysis was conducted using the buccal samples from three consenting adults – Colleen, Mick and Peter. I reject Mr Woods' submission that because their DNA results are being used to establish a biological connection to Daniel Rogers, (by judicial inference) that brings into play ss 19 and 31 of the HTA requiring consent from Daniel or his immediate family. He cites no authority for that proposition, and it is incompatible with the objectives of the HTA and the SOCA.

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[48] NOE p 24.
[49] BOD p 121 [28].
[50] Closing submissions of interested party – Robert Rogers at [5].

No parent/ child relationship

[86] The Court is being asked to make a declaration of paternity, namely, to be satisfied that the relationship of father and child existed between Colleen and Daniel Rogers.[51]

[87] Mr Woods submits that because there was no actual relationship, in the form of love, affection, acknowledgment, maintenance or any social or moral connection whatsoever, the Court cannot find that a relationship exists in law, despite the biology. He supplements this argument saying that Colleen herself acknowledged under oath that she never knew her father, and therefore the Court should not recognise the relationship in those circumstances.

[88] The term "relationship" is not defined in the legislation. The word itself covers all manner of sins, and captures all manner of connections, both good and bad.

[89] There is no requirement to prove any positive connection or bond. Mr Wood's purported modern interpretation of s 10 is quite the opposite – a draconian and judgmental interpretation of legislation, which is designed, at its core, to eliminate societal stigma and prejudice. If a child seeking to establish paternity had to establish a connection or bond with the putative father to succeed, irrespective of a biological link, then fathers could defend such applications by simply walking away from their offspring. Such an interpretation is not compatible with the purpose of the Act. In this case, the science has established the legal relationship, in any event.

Conclusion

[90] None of Mr Woods arguments dissuade me from the conclusion of the DNA evidence, and the only inference that can be drawn from it.

[91] I am satisfied, on a balance of probabilities, that Daniel Rogers was the father of Colleen Tarr. I make a declaration accordingly pursuant to s 10(2).

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[51] SOCA s 10(2).

[92] Colleen, Peter and Mick are entitled to costs. Memoranda are to be filed by them within 14 days setting out their respective claims. Mr Woods is to file a response 14 days thereafter. The memoranda are to be sent to me in chambers for consideration.

Signed at Auckland this 10th day of August 2023 at 10.00am.

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Judge BR Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 10/08/2023