IN THE MATTER of an Application for a Declaration of Paternity by "K" and IN THE MATTER of the Estate of Edward Grant Smith deceased
[2002] NTSC 63

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	Nos. 55 of 2001 & 33 of 1984
DELIVERED:	29 NOVEMBER 2002
HEARING DATES:	29 OCTOBER 2002
JUDGMENT OF:	ANGEL J

CATCHWORDS:

SUCCESSION – Intestacy – claim by an illegitimate child against an estate – question as to what law should apply to the claim – Status of Children Act NT does not apply to intestates before its commencement – intestate died 5 years before Act commenced – law in relation to illegitimate children and intestacy provided for by the Administration and Probate Ordinance 1969 – father must be adjudged father during his lifetime – intestate had not so been adjudged – it was not possible to adjudge intestate the father of the child

SUCCESSION – Intestacy – claim by an illegitimate child against an estate – question what constitutes a claim – time in which claim must be duly prosecuted – whether child had made valid claim against the estate – proceedings brought seeking a declaration of paternity – proceedings brought under the Status of Children Act not the Administration and Probate Act – proceedings were not in accordance with the Administration and Probate Act – action not being duly prosecuted and out of time

SUCCESSION – Intestacy – claim by an illegitimate child against an estate – proceedings brought out of time – extension of time to prosecute claim requested – circumstances in which extension will be granted discussed – extension refused – further action against the estate was time barred

Legislation:

Administration and Probate Act (NT), s 97
Status of Children Act (NT), s 6(3), 8, 19
Administration and Probate Ordinance 1969 (NT), s 71
Supreme Court Act (NT), s 18
Supreme Court Rules (NT), R 9.08
Family Provision Ordinance 1970 (NT), s 7

Wills, Administration and Probate Act 1898 (NSW)
Children (Equality of Status) Act 1976 (NSW)
Testator's Family Maintenance Act 1916 (NSW)

Cases:

Hogan v Hogan [1981] 2 NSWLR 76, considered
Hogan v Hogan [1983] 2 NSWLR 561, considered
Re Application for Declaration of Paternity (2001) 163 FLR 26, considered
Re Application under the Status of Children Act (2002) 167 FLR 298, considered
Knowles v Attorney-General [1951] P 54, considered

Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218, referred to
Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, referred to
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, referred to
Re F (Mental Patient: Sterilisation) (1990) 2 AC 1, referred to
Federal Commissioner of Taxation v Citibank (1989) 85 ALR 588, referred to
In re Barber [1924] VLR 123, referred to
In the Will of Walker [1943] 43 SR (NWS) 305, referred to
Newton v Sherry (1876) 1 CPD 246, referred to
In Re Long [1951] NZLR 661, referred to
Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand [1942] AC 115, referred to
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, referred to

Everingham v Friedrichs (1976) 13 ALR 521, not followed

Texts:

Civil Procedure in Victoria, Volume 1, [I 9.08.10], p 2667
Halsbury's Laws of Australia, para 395-5520

REPRESENTATION:

Counsel:

Plaintiff:	J Reeves QC
First Defendant:	J Wilkinson
Second Defendant:	S Roder

Solicitors:

Plaintiff:	John G McBride
First Defendant:	Ward Keller
Second Defendant:	Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 29 November 2002)

[1] These consolidated proceedings arise from a series of misfortunes. In February 1974 Edward Maxwell Smith and his wife Elizabeth June Smith went missing after taking off in a light aircraft from Gladstone in Queensland. The wreckage of the plane was only recently discovered. The Smiths' bodies were never found. In March 1975, the Smiths were presumed dead and probate was granted of their wills. They were survived by a son, Edward Grant Smith (Young Ted) and a daughter, Victoria Elizabeth Sharpe who took as beneficiaries in equal shares under their parents' wills.

[2] In November 1975 Young Ted was killed in a motorcycle accident. He died intestate and it was believed without issue. In February 1985 letters of administration were granted to his sister Victoria who, pursuant to the

intestacy rules, in the absence of issue, was entitled to the whole estate. In 1988 Victoria died leaving a number of beneficiaries under her will, probate whereof was granted in 1990. Prior to Victoria's death, in 1986, further assets of the Smiths were discovered (assets of the parents and therefore of Young Ted) which were unadministered. These assets remained unadministered at the time of Victoria's death. In 1999 the assets were comprised of approximately $2.7 million cash and some 4817 shares in Southcorp Ltd. Some distribution has been made from those assets. At the present time approximately $1.4 million cash and the shares remain.

[3] In January 1999 the plaintiff, K, wrote to Messrs Knox & Hargrave solicitors for the executors of Victoria's estate, claiming to be the daughter of Young Ted. In October 2000 she wrote again making a claim to Young Ted's unadministered estate, pursuant to the provisions of the *Administration and Probate Act*. She has since filed an application in this court (Action 55/2001) for a declaration of paternity pursuant to s 11(1)(b) *Status of Children Ac*t (NT). It is primarily that application and its consequences with which this present matter is concerned.

[4] The matter now comes before this Court upon two summons. The first summons was filed in July 2001 by the first defendant, the administrator of Young Ted's estate, against the plaintiff K and the second defendant, the executor of Victoria's estate. That summons seeks the following orders from this Court:

(1) That whether or not the Respondent K succeeds in her application in action 55 of 2001 for a declaration of paternity she has no right to claim an interest in the Estate.

(2) That the Respondent be barred from claiming an interest in the Estate by virtue of her failure to serve upon the Administrator a Notice pursuant to Sections 96 of the *Administration and Probate Act* within a period of 6 months of the service of a Notice calling upon her to do so and to duly prosecute her claim of an interest in the Estate.

[5] The second summons filed by the second defendant, the executor of Victoria's estate, on 28 August 2002 against the plaintiff K and first defendant, the administrator of Young Ted's estate, seeks, inter alia, the following orders:

(1) If K's claim is based on the *Status of Children Act* 1978, it cannot succeed, by reason of the provisions of s 6(3) of that Act;

(2) If K's claim is for a declaration that she is the illegitimate daughter of Young Ted and that she is therefore entitled to his estate by reason of s 71 of the repealed *Administration and Probate Ordin*ance, a declaration of paternity should be refused because it has no utility in that:

(e) as a matter of law, a declaration of paternity made after the death of the alleged father of a person did not satisfy section 71(5) of the repealed Ordinance; and/or

(f) s 71 of the repealed Ordinance can not be invoked by a person claiming to be the child of a person who died before:

(i) the repeal of the Ordinance; and

(ii) the making of the claim.

[6] Declarations of paternity or maternity are presently governed by the *Status of Children Act 1978* (NT), which commenced on 21 September 1979. The

broad objective of this Act is to abolish the common law distinction between legitimate and illegitimate children. The Act contains numerous provisions in relation to presumptions of parentage and methods for establishing parentage. Relevantly, for present purposes, the Act also contains a Part III entitled Disposition of Property, and in particular s 6(3) which provides:

> "(3) The estate of a person who dies intestate as to the whole or any part of his estate before the commencement of this Act shall be distributed in accordance with the enactments and rules of law which would have applied to the estate if this Act had not been passed."

[7] The intestate in question in these proceedings, Young Ted, died in 1975 some four years prior to the commencement of the Act. Accordingly, his estate was to be distributed in accordance with the enactments and rules of law in force at the time of his death. The law in 1975 as to distribution of an estate on an intestacy was the *Administration and Probate Ordinance 1969*, and in particular Part III, Division 4 of that Ordinance entitled Distribution on Intestacy. Relevantly s 71 of that Ordinance provides:

> " 71. (1) Where an intestate is survived by an illegitimate child, the child is entitled to take the interest in the intestate estate that the child would be entitled to take if the child were the legitimate child of the intestate.
>
> …
>
> (4) For the purposes of this Division and the Sixth Schedule in their application to and in relation to an intestate, relationship may, to such an extent only as is necessary to enable effect to be given to the preceding sub-sections of this section, be traced through or to an illegitimate person as if the person were the legitimate child of his mother and, subject to the next succeeding sub-section, of his father.

(4) For the purposes of this section, a person shall not be taken to be the father of an illegitimate child unless he has acknowledged, in writing, that he is the father of the child or has been adjudged by a court to be the father of the child, and, in the case where the child died before that person, the person so acknowledged the child, or has been so adjudged, before the death of the child.

(5) For the purposes of the last preceding sub-section, a person shall be taken to have been adjudged by a court to be the father of a child –

(g) if the court has made an order in such circumstances that it was not entitled to make the order unless it found as a fact that the person was the father of the child; or

(h) if, at any time within six months before the birth of a child, the court has made an order in such circumstances that it was not entitled to make the order unless it found as a fact that the child's mother was at that time with child by that person.

[8] Section 71 was repealed by s 19 of the *Status of Children Act*. It is the defendants' submission that although s 71 has been repealed, it was in force at the time of intestate's death and through the operation of s 6(3) *Status of Children Act* it applies to these proceedings. It is submitted that the *Status of Children Act* has no other operation in respect of these proceedings.

[9] Counsel for K submitted that the combined effect of s 6(3) and the repeal of s 71 was to repeal only those procedural provisions of the section, namely subsections 71(5) and (6). Counsel submitted that the substantive subsections of the Ordinance namely s 71(1) – (4), which abolished the common law rules in regard to illegitimate children taking on intestacy, were preserved and continue to apply along with a retroactive application of

the *Status of Children Act* to these proceedings. I reject this argument, such as I understand it, for the following reasons.

[10] First, the provisions of s 8 *Status of Children Act*, restate in broader but similar terms the provisions of s 71 *Administration and Probate Ordinance*. Section 8, contained as it is within Part III - Disposition of Property, provides:

> "8. (1) The relationship of father and child and any other relationship traced in any degree through that relationship shall –
>
> (a) for any purpose related to succession to property;
>
> (b) for any purpose related to the construction of any will or other testamentary disposition or of any instrument creating trust; or
>
> (c) for the purpose of an application under the Family Provision Act,
>
> be recognised only if –
>
> (d) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time;
>
> (i) paternity has been admitted (expressly or by implication) by the father and if that purpose is for the benefit of the father, paternity has been admitted while the child was living; or
>
> (j) paternity has been established by or against the father."

[11] It is clear that this section introduces a new regime which replaces the previous preconditions to intestate succession found in s 71 *Administration and Probate Ordinance*. In my opinion s 8, specifically in its application to succession to property, replaced the repealed s 71.

[12] Secondly, it is manifestly clear that the intent of s 6(3), in relation to intestacies (and for that matter its counterpart in s 6(1) relating to executed instruments), is to exclude the operation of the Act from intestates who have died before the commencement of the Act. Its purpose is clearly to bring some certainty in relation to the disposition of property at the time of death. I have reached this conclusion independently of *Hogan v Hogan* [1981] 2 NSWLR 768, to which I was not referred by counsel. That case dealt with the application of the *Children (Equality of Status) Act 1976* (NSW) and its alleged retroactive application to the *Testator's Family Maintenance Act 1916* (NSW). In *Hogan*, it was argued that the *Children (Equality of Status) Act* (NSW) applied retrospectively to a will and to a testator who had died before the commencement of the Act. An action was brought by the testator's illegitimate children for maintenance under the NSW *Testator's Family Maintenance Act*. Although the testator had died immediately prior to the commencement of the NSW Act, probate had been granted shortly after its commencement. On a construction of similar wording to s 6(3) of the Northern Territory Act, the NSW Court of Appeal recognised that although the legislation was remedial in nature, it would not extend interpretation of the Act beyond the obvious intention of the legislature, the Court finding that a literal construction of the legislation was enough to evince the legislature's intention. The decision of the Court of Appeal was affirmed on appeal by the Privy Council in *Hogan v Hogan* [1983] 2

NSWLR 561, where Lord Templeman, delivering the judgment of their Lordships, said at 562:

> "The scheme of the 1976 Act read as a whole is only consistent with the view that the equality of status obtained on 1st July, 1977, by a child born out of wedlock does not entitle that child to be treated as though he had attained that status on 30th April, 1977, for the purposes of the 1916 Act. Sections 8 and 9 of the 1976 Act provide that dispositions inter vivos made before commencement of the 1976 Act, testamentary dispositions of testators who die before the Act and the devolution of estates of intestates who die before the Act shall not be affected by the Act. It is inconceivable that the legislature intended that the appellants should be treated as strangers for the purposes of dispositions contained in the will of the testator and for the purposes of the devolution of the estate upon intestacy but should be treated as children of the testator for the purposes of enabling the court to make dispositions under the 1916 Act which would take effect as if they had been made by a codicil executed immediately before the death of the testator."

[13] Although in the Northern Territory, through the operation of s 71 *Administration and Probate Ordinance*, illegitimate children were not strangers for the purpose of devolution of an estate upon intestacy, I am of the view the same principles apply to the present case. It is, I think, clear that the legislature did not intend the *Status of Children Act* to have any effect on the distribution of intestate estates prior to the commencement of that Act. Any distribution of an intestate estate is to made in accordance with the law at the time of death, which in this case means s 71 *Administration and Probate Ordinance* 1969. This is confirmed, if confirmation is necessary, by the parliamentary debates concerning the introduction of the *Status of Children Bill*, where the Minister for

Community Development in debate said (Northern Territory Legislative Assembly Record, Volume VII, 23/11/1978, p 456):

> "I would take some issue with the Leader of the Opposition that the law should be changed to automatically entitle a child who was previously illegitimate to share in a will made before the commencement of this act. A person may have been fully conscious of the existing law that an illegitimate child would not be eligible to participate in the will unless specially named. He may have made his will consciously in that belief. The same person may also have consciously excluded other children of the marriage from the will and, on legal advice, not named an illegitimate child for exclusion because it was not necessary under law. That person could have died last week or he could die next week and the complete intent of his will would be negated."

And further, the Chief Minister concluded (at page 458):

> "We pass on to clause 6(1) regarding the disposition of property. It does seem to be rather unfair to legislate to affect wills or trusts that may have already gone into execution. If these instruments have not yet gone into execution, then it is possible for the persons to have made the instruments to amend them if they wish to do so. It would seem to be unfair to catch all in a situation where the people who made the instruments are deceased and we are arbitrarily setting aside their wishes. I understand that in NSW, a hundred submissions have been received relating to a catch all clause there. However, as the Leader of the Opposition said, only two were against. I can understand why 98 were for it; the 98, I would imagine would have been interested parties who stood to gain by such a clause."

[14] As illustrated by the legislative debates the legislature clearly addressed the effect of s 6 *Status of Children Act* and its application to exclude testamentary instruments, and by implication intestacies, that preceded the commencement of the Act. A person who died intestate prior to the commencement of the Act, may well have known or expected his estate to be distributed in accordance with the intestacy law at that time, and as such

would have expected that his estate not be distributed to an illegitimate child unless the criteria of s 71 *Administration and Probate Ordinance* had been complied with. It is for these reasons I find that s 71 *Administration and Probate Ordinance* is the relevant provision to apply in this case, and the *Status of Children Act* has no operation in respect of disposition of property upon the intestacy of Young Ted.

[15] Section 71 of the *Administration and Probate Ordinance* provides that an illegitimate child may take under that child's father's intestacy if one of two preconditions are met. Section 71(5) specifies these preconditions, namely that either the father has acknowledged in writing that he is the father of the child, or he has been adjudged by the court to be the father of the child. It is the latter precondition with which I am concerned here, there being no evidence or suggestion of the former before the Court.

[16] Counsel for K submitted that the Court had an inherent jurisdiction to declare paternity. Counsel for K further submitted that given that jurisdiction the Court had power to make such an order against the father even if he was deceased. Reliance was placed on *Everingham v Friedrichs* (1976) 13 ALR 521. In that case Forster J, as he then was, in construing s 71(5), held that the court could make such orders against a deceased man, and further that although there was no express power in s 71 to make a declaration of paternity, the Court had power to make a declaratory judgment (under former O 29 r 5 Supreme Court Rules, now s 18 Supreme Court Act) via the *parens patriae* jurisdiction. I agree that there is no

express power to make a declaration under s 71. However, I am, with respect, unable to agree that the jurisdiction to make such an order is founded upon *parens patriae* jurisdiction. That jurisdiction is historically limited to the exercise of parental powers usually for the welfare and protection of a child or infant. It does not extend to the making of declarations of paternity or legitimacy against a father (see *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218), nor does it extend to children who are now adults. Although I note it may be invoked to uphold independent views asserted by an infant, here there is no infant (cf. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 200).

[17] In relation to the inherent jurisdiction of this Court to make a declaration of paternity I was referred to my decision in *Re Application for Declaration of Paternity* (2001) 163 FLR 26 and the Court of Appeal's decision in *Re Application under the Status of Children Act* (2002) 167 FLR 298. In *Re Application for Declaration of Paternity* I said at 30:

> "However, I agree with counsel for the defendant's submission that the Court has no general power to make declarations of fact, at least in the absence of some real legal consequence. The plaintiff has not demonstrated any legal consequence that would follow upon a declaration that at one time, in the eyes of the law, she was – although she is no longer – the daughter of the deceased. Broad, though the power to make declarations is, and fully recognising that courts' refusal to grant declaratory relief are mostly adverse exercises of a discretion within jurisdiction rather than a denial of jurisdiction, in the present case I have no jurisdiction (statute apart) to grant a declaration that the plaintiff was the daughter of the deceased until the date of the adoption order. This conclusion accords with the law as stated in *Halsbury's Laws of Australia*, vol

13, Family Law, paras 205-1500 and 205-1525, viz: "No court has inherent jurisdiction to make a declaration of paternity."

[18] The plaintiff in support also relied on the decision of the Northern Territory Court of Appeal in *Re Application under the Status of Children Act* (supra). In that case Mildren J stated at 307:

> "I turn now to consider whether the Court has inherent jurisdiction to grant declaratory relief. S18(1) of the *Supreme Court Act* enables the Court to make "binding declarations of right, whether or not any consequential relief is or could be sought … as Mr Downes QC points out, although the respondents would wish to dispute the allegation of paternity, there are no legal consequence to them even if the declaration if made, because there is no controversy, existing or in realistic prospect, to which it is addressed."

[19] In respect of the jurisdiction to grant declaratory relief, the High Court in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, agreed with the statement of Lord Goff of Chieveley in *Re F (Mental Patient: Sterilisation)* (1990) 2 AC 1 at 82, that –

> "…a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument. eg. in default of defence or on admissions or by consent."

[20] Section 18 of the *Supreme Court Act* NT states:

> " 18. Declaration of Right
>
> (1) The Court may, in relation to any matter in which it has jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A proceeding is not open to objection on the ground that a declaratory order only is sought."

[21] Counsel for K submitted that the Court has jurisdiction because there are legal consequences flowing from a declaration of paternity, namely that K would have a valid claim to the estate under the provisions of the *Administration and Probate Ordinance*. However, it is to be emphasised that the power of the Court to make a declaration pursuant to s 18 must be "in relation to any matter in which it has jurisdiction". Although a Court may have jurisdiction to make declarations in any number of matters, it is well established that at common law the Court has no such jurisdiction to make a declaration of legitimacy (statute apart) without something more. I was referred to the case of *Knowles v Attorney-General* [1951] P 54. In that case the Court was asked to make a declaratory judgement of legitimacy under its inherent powers as regulated by Ord 25 r 5. In *Knowles*, Willmer J held that he could not make a declaration under that rule, but qualified his statement by saying at page 63:

> "It has been pointed out that the court will not shrink from deciding a question of legitimacy inter partes where that was necessary for the proper disposal or determination of some question arising in an action. That, of course, would only be a judgment inter partes, but it is clear, and there is good authority for the proposition, that the court will not lightly embark upon making a declaration binding *in rem* except where it is specifically authorised by statute."

[22] The administrators of Young Ted's and Victoria's estates are parties to the present actions. It could be necessary for the proper disposal of a claim against one or the other of the estates, that the Court decide a question of

paternity or legitimacy. Such a judgment would need only be a judgment inter parties if the claim sought only the remaining undistributed estate in the hands of the administrators. There would be no need for a general declaration *in rem* to bind all other persons. If such a general declaration were to be required the *Status of Children Act* presently provides it, but not in relation to distribution on an intestacy before its commencement.

[23] The difficulty I have with counsel for K's submissions is that they are hypothetical and assume a proceeding has been taken to enforce a claim against the estate of Young Ted seeking an order for distribution in accordance with the intestacy rules. No such proceeding is presently being prosecuted before this Court, and any claim hereafter would be time barred, a matter I discuss below. K's only proceeding before this Court is her application by originating motion seeking a declaration of paternity pursuant to s 11 of the *Status of Children Act*.

[24] Counsel for the defendants submitted that if such an inherent jurisdiction existed it could only be exercised, that is a declaration made, whilst the putative father was still alive, contrary to Forster J's conclusions in *Everingham v Friedrichs*. Counsel for the defendants urged that *Everingham* should be revisited in this regard. It was submitted that at common law a man could never be found to be the father of an illegitimate child for the purposes of succession or intestacy. Section 71 *Administration and Probate Ordinance*, it was submitted, changed the common law position, but only to the extent clearly shown to be the intention of the

legislature. It was further submitted, that if the legislature had intended to infringe upon a man's rights by allowing a declaration of paternity after death it would have expressly said so (cf *Federal Commissioner of Taxation v Citibank* (1989) 85 ALR 588 at 613-615). In support of this submission counsel referred to similar legislation which specifically states how far such rights were to be infringed, some allowing declarations during life and some during life or after death (see, eg. *Family Provision Ordinance 1970* NT, s 7(5), (6)).

[25] It was also put to me that the word "adjudged" in s 71(5) had significant meaning. It was submitted that Courts do not give judgment against dead men, except where statute allows (see r 9.08 Supreme Court Rules). Rule 9.08 provides that if a proceeding is commenced naming a dead person, and the cause of action survives, the proceeding is taken to have commenced against the personal representative of the deceased (see Williams, *Civil Procedure in Victoria,* Volume 1, [I 9.08.10], p 2667). There is no proceeding which has been commenced against the deceased, but the question remains whether an application for a declaration of paternity would survive as against a personal representative. First is it necessary to ask whether a declaratory judgment of paternity is a recognised cause of action and secondly whether it would survive the death of the putative father. In the circumstances of this case, I doubt whether the right for a declaration of paternity is a recognised cause of action, but even if so it is generally settled "that a cause of action which is personal to a particular person, in the sense

that assessing and deciding the claim involves consideration of matters wholly personal to the person, is not transmissible and therefore does not survive the death of the holder of that right" (see *Halsbury's Laws of Australia*, para 395-5520). Although this passage refers to a deceased plaintiff the same principle holds true for a deceased defendant. A declaration of paternity is personal to a particular person and (express statutory provisions apart) does not survive the death of a person and is not transmissible to a personal representative.

[26] Further, it was submitted, it is "adjudgment" against the father, not the child, to which s 71(5) refers. Counsel submitted that Forster J was wrong when he said at 523 in *Everingham*, "The subsection seems to me to mean simply that an illegitimate child, who has not been acknowledged in writing so to be, must be adjudged so to be before he can be treated as a beneficiary in accordance with sub-s (1).". I agree with counsel's submissions, it is the father not the child in respect of whom a judgment is to be made.

[27] I find that in the circumstances of this case that s 6(3) *Status of Children Act* operates to make the *Administration and Probate Ordinance*, and in particular s 71 of that Ordinance, the relevant law in relation to the distribution of Young Ted's intestate estate. There is nothing in s 71 to give this Court jurisdiction to make a declaration of paternity against a person. If a Court has inherent jurisdiction to make such an order, as necessary for the proper disposal or determination of some question arising in the prosecution of an action, such as in a proceeding seeking a claim against the

estate, no such proceeding has been instituted. Further, the provisions of s 71(5) *Administration and Probate Ordinance* relating to paternity are preconditions which must be met prior to distribution. One of those preconditions necessarily requires that in order to be taken as a father of an illegitimate child a person must be adjudged the father of the child. In my opinion, for the reasons already given, that must be done during that person's lifetime. *Everingham v Friedrichs* was wrongly decided and should not be followed. As there is no evidence before me that either precondition was satisfied prior to the deceased's death, there is no way that the deceased can be taken to be the father of K for the purposes of distribution on intestacy. K would therefore necessarily fail in any claim pursuant to s 71 *Administration and Probate Ordinance*.

[28] If I am wrong in that regard, and it is possible for such an order to be made after death, it is desirable to examine the current status of K's claim against the estate.

[29] The procedures for the distribution of an estate, the making of claims thereto and the mechanisms for resolving claims are contained in sections 96 and 97 *Administration and Probate Act*. Under those sections before an administrator distributes an estate he is to give certain notice to potential claimants on the estate. If he receives such a claim he may decide to accept it or dispute it. If he decides to dispute it he is to serve a further notice on the claimant calling on the claimant to take proceedings to enforce the claim and to duly prosecute the claim. If after a period of six months the claimant

does not satisfy the court that he is duly prosecuting his claim a court may, on the application of the administrator, make an order barring the claim. The administrator in the present action seeks such an order. The policy behind such law is clear. It was stated by Stanton J in *In Re Long* [1951] NZLR 661 at 672:

> "Section 3 provides a special procedure for the benefit of administrators, a procedure which is not available to ordinary persons. Presumably administrators were given this advantage because of the special difficulties of their position; uncertain claims might make it impossible for them to ascertain the amount of the estate assets so as to have duty assessed and paid, and might also prevent beneficiaries from obtaining payment of moneys or transfer of properties to which they would otherwise be entitled."

[30] The law strikes a balance between timely distribution to rightful beneficiaries and the determination of substantial and duly prosecuted claims.

[31] In the present case, the administrator received notice from K that she wished to make a claim to the estate of Young Ted (letter dated 13 October 2000). An extract reads:

> "I hereby give notice in writing on behalf of (K), that she is the daughter of the late E M Smith and in that capacity *she makes claim to the whole or his estate pursuant to s 66 and Schedule 6 Administration and Probate Act NT*." [emphasis added]

[32] The claim is clearly a claim against the estate pursuant to the *Administration and Probate Act* (*see In re Barber* [1924] VLR 123, *In re Long* [1951] NZLR 661). The administrator replied to the claim disputing that claim and

served a notice to that effect calling upon the plaintiff to take proceedings to enforce the claim and to duly prosecute the claim (letter and notice dated 20 December 2000). K, through her solicitor, replied to the administrator some 6 months and 8 days later (letter dated 28 June 2001) acknowledging that they were out of time and requesting that the proceedings issued on that same date, an originating motion seeking a declaration of paternity pursuant to the *Status of Children Act*, be considered sufficient compliance with the notice. Part of that letter states:

> "Note that these proceedings have not been issued as an application under the *Administration and Probate Act* in the estate proceedings because the underlying issue is paternity. It therefore seems to us that the proper course is for that to be dealt with by way of separate application for a declaration under *the Status of Children Act*".

[33] It seems to me, in the light of what I have said above, K's solicitors misconceived the correct procedure. The underlying issue was not whether K could or should first seek a declaration of paternity pursuant to the *Status of Children Act*. Her paternity pursuant to that Act is an entirely separate issue to the distribution on intestacy of a deceased who died prior to the commencement of that Act. The Act requires her to "take proceedings to enforce her claim" and "to duly prosecute the claim" in relation to the estate, not to take proceedings to enforce or duly prosecute the issue of her paternity. Although a claim was made, no proceedings have yet been commenced to enforce the claim against the estate. I turn to the issue of whether such proceedings are now time barred by s 97(2).

[34] Section 97(1) concludes with the words "a notice calling upon him or her to take proceedings to enforce his or her claim within a period of 6 months, and to duly prosecute the claim." Subsection (1) must be read in conjunction with s 97(2) which provides:

> "(2) If, after that period of 6 months has expired, that person does not satisfy the Court that he or she is duly prosecuting his or her claim, the Court may, on application by the executor or administrator, make an order barring the claim against the executor or administrator, subject to such conditions as appear just, or make such other order as the Court thinks fit."

[35] The second defendant submitted that s 97(2) only applied to the prosecution of a claim once a proceeding had begun. It was submitted that if a proceeding had not been brought at all the claim would be barred and a court order could still be sought barring the claim. The first defendant alternatively submitted that "duly prosecuting" included all those steps necessary, including commencing a proceeding, to ensure that a claim was expeditiously and effectively concluded. The plaintiff submitted that as long as the administrator had not distributed the assets after the 6 month period, proceedings could be taken and that it was only necessary to show that the claim was being duly prosecuted. I am in agreement with the first defendant.

[36] For the purposes of s 97(2), if within the 6 month period no proceeding has been taken to enforce the claim then it is clear that that claim is not being duly prosecuted. As Nicholas CJ in Eq. said *In the Will of Walker* [1943]

43 SR (NWS) 305 at 307 in relation to interpretation of the equivalent section of the *Wills, Administration and Probate Act 1898* (NSW):

> "If there are disputable claims, then it appears to me that the executor had the right under s 93 to call upon a claimant to prosecute his claim and, if he fails to do so, the executor is entitled to apply to the Court for an order barring the claim."

[37] See also see *Newton v Sherry* (1876) 1 CPD 246, *Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115.

[38] As there are no proceedings on foot to enforce the claim against the estate as required by the Act, any new proceeding brought would be some 14 months out of time. K has requested an exercise of the Court's discretion to extend time to enable her to commence proceedings.

[39] Pursuant to s 97(2) I have a discretion to bar the claim if I am satisfied that the claim has not been duly prosecuted. There has been at least one reported case where an extension of time was granted, *In re Barber (decd)* [1924] VLR 123. Cussen ACJ said (at 126):

> "On the whole, I have come to the conclusion that it is best for all parties that the respondent, who knows the facts better than anyone else, should bring the matter to finality by taking proceedings. The administrator is under a duty to bring matters to a conclusion for the purpose of distributing the estate; and, as I have said, I think that the matter can best be dealt with in proceedings initiated by the respondent, in which he can claim a declaration that he is the beneficial owner of the property, or that he has a charge or other right in respect of some portion of the moneys to be realized by a sale of the land, or can make such other claim as he may be advised. The matter is, however, not free from difficulty, and I think I should

make an order that the time for taking proceedings be extended."

[40] In considering whether I should exercise my discretion to extend time I was referred to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. In that case Toohey and Gummow JJ made it clear that the exercise of such a discretion, in relation to the extension of a statutory limitation period, is more than simply weighing respective prejudices between parties. At 549–550 they said:

> "In this regard we have difficulty with the notion of weighing prejudice to an applicant against prejudice to the respondent. In one obvious sense the prejudice to the respondent is absolute if her application is refused. She can never litigate her claim. But that cannot be enough of itself to warrant an extension of time; in truth there would be no discretion to be exercised … . The real question is whether the delay has made the chances of a fair trial unlikely. If it has not there is no reason why the discretion should not be exercised in favour of the respondent."

[41] In the same case, McHugh J said at 552–553:

> "The effect of delay on the quality of justice is no doubt one of the most important influence motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them…The final rationale for limitation periods is that the public interest required that disputed be settled as quickly as possible.
>
> In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being

> litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated."

And further at page 554:

> "It follows that an applicant for extension must show that justice will be best served by excepting the particular proceedings from the general prohibition which s 11 imposes. In this context, justice includes all relevant circumstances relating to the application including the various rationales for the enactment of the limitation period involved. That the applicant has a good cause of action and was unaware of a "material fact of a decisive character relating to the right of action" does not alter the burden on the applicant to show that the justice of the case favours the grant of an extension of time. Those facts enliven the exercise of the discretion, but they do not compel its exercise in favour of the applicant… The object of the discretion, to use the words of Dixon CJ (*Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473) in a similar context, "is to leave scope for the judicial officer or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case". In determining what the justice of the case required, the judge is entitled to look at every relevant fact and circumstance that does not travel beyond the scope and purpose of the enactment authorising an extension of the limitation period."

[42] Looking then at the relevant facts and circumstances of this case, including the issue that a proceeding would be some 14 months out of time, it is necessary to examine whether justice would be served by an action against the estate. Any action against the estate would require a determination of the issue of paternity, a determination which in my opinion above is doomed to fail. To this must be added the circumstance that the putative father has been deceased for some 27 years and his closest relative, his sister, is also deceased. Any proof as to paternity would require witnesses, such as may be still alive, to give evidence in respect of a period of almost 30 years ago,

and further any DNA testing, if possible, may require exhumation of the deceased's remains. Coupled with these difficulties are the circumstances that the estate is sitting dormant, waiting for the resolution of this matter, that beneficiaries who presently are entitled to the estate are being prevented from receiving their entitlements and are suffering hardship, and that the administrator is prevented from completing his duty in distributing the estate. Taking all of these relevant facts and circumstances into consideration, I am of the view that the interests of justice are not served by an exercise of my discretion allowing an extension of time in favour of K.

[43] There will be an order barring any further claim by K against the first and second defendants. I will hear counsel as to the appropriate orders and as to costs.