

UNDER Section 10 of the Status of
Children Act 1969

BETWEEN: EYLES of
Wainui Road, Gisborne,
Beneficiary

Plaintiff

AND: THE PUBLIC TRUSTEE of the
Dominion of New Zealand, a
corporation whose principal
place for business is situated at
Lambton Quay, Wellington as
trustee of the Will and Codicil of
the late
CRESSWELL of Gisborne,
Shearing Contractor, Deceased

Defendant

Hearing: 18 May 1990

Counsel: N.M. Mackie for Plaintiff
No appearance for Defendant

Judgment: 18 May 1990

ORAL JUDGMENT OF TOMPKINS J

The plaintiff has applied pursuant to s10 of the Status of Children Act 1969 for a declaration of paternity in relation to Cresswell born on 16 January 1989 ("D"), the declaration being that Cresswell who died on 26 December 1988 ("the deceased") be declared the nature father of D. In accordance with an order for directions as to service the proceedings have been served on the defendant as executor and trustee of the will of the deceased. The solicitor for the defendant has filed a memorandum stating that the Public Trustee does not oppose the plaintiff's application for a declaration as to paternity, that the defendant has nothing helpful to provide and does not wish to appear.

The affidavit of the plaintiff in support of the application deposes that she lived in a stable de-facto relationship with the deceased between April 1987 and his death on 26 December 1988. She says there are two children of that relationship, namely, Kirwan born on 11 June 1987 and D . Kirwan's birth certificate shows the deceased as his father. Mrs Eyles deposes that in February 1988 the deceased discovered that he had cancer. Her affidavit refers to the course that the disease took; it finally being diagnosed as terminal in March 1988. She says that it was after this diagnosis that she and the deceased decided to have a further child. They also agreed that when the child was born it should have the same names as its father. In fact the deceased died on 26 December 1988, some three weeks before D was born. Her affidavit goes on to state that the deceased in his life acknowledged that he was the father of the child she was carrying at the time of his death. She further deposes that she did not have any sexual relationship with anyone other than the deceased in 1988, and indeed during the whole period of her relationship with the deceased.

A further affidavit in support has been filed by Mrs Cresswell, the mother of the deceased. She confirms that the plaintiff and the deceased were living together from April 1987 until his death, and that the deceased, in the ways described in her affidavit, acknowledged to her that he was the father of the child the plaintiff was carrying.

A further affidavit is filed by Ms Leov of the defendant's Gisborne office. She produces a will that was signed by the deceased on 20 December 1988. The instructions given by the deceased to Ms Leov in anticipation of the preparation of the will, those instructions being given on 20 December 1988, record that his "wife" has a second baby due in three weeks.

In order to obtain a declaration of paternity the applicant is required to prove the facts justifying that declaration on the balance of probability: *M v D* (1988) 5 NZFLR 61. The plaintiff is within the classes of persons who may apply to the court for a declaration of paternity; she being a woman who alleges that the deceased is the father of her child.

I am satisfied on the evidence before the court that the onus of proof has been discharged. There will be a declaration that the deceased is the nature father of D

A handwritten signature in cursive script, appearing to read "A. J. Humphreys".

Solicitors for Plaintiff:

Chrisp Caley & Co. (Gisborne)