KOTT GUNNING
LAWYERS

Recognising Parent and Child Relationships Part 1

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This is part one of a two part article on the various parent and child relationships recognised in Western Australia in contested deceased estates, which will necessarily involve an analysis of:

(a) the *Family Provision Act 1974* (WA) (**FPA**), the *Administration Act 1903* (WA) (**Administration Act**) and the *Wills Act 1970* (WA) (**Wills Act**);

(b) relevant case authority; and

(c) the utility of DNA evidence.

This part of the article will deal with items (a) and (b). Part two of this article, which will be released shortly, will deal with (c).

THE IMPORTANCE OF THIS TOPIC

The obvious stating point is this. In order to claim against a deceased person's estate you need to be related to that deceased person in one of the ways outlined in either the *Administration Act 1903* (WA) (**Administration Act**) or the *Family Provision Act 1974* (WA) (**FPA**).

In the context of a child making a claim against a deceased parent's estate, how would you go about proving deceased Person A is Person B's father when Person B's birth certificate is silent on paternity?

How do you go about proving deceased Person A is the father of deceased person B when Person B's birth certificate lists Person C and D as their parent?

In today's society of step families, adopted families, blended families, single parent families and same-sex families, these questions elicit some interesting legal debate about who can claim against a deceased estate.

At the conclusion of this two stage article I would like readers to have a clearer understanding of the approach the court takes and the evidence that should be presented when faced with the myriad of factual circumstances that arise in succession disputes, particularly on the issue of parentage.

Firstly, it may help to understand why this is important.

The question of whether or not a party is related to the deceased is a gateway, or jurisdictional, question. In other words, it opens the door to relief under the FPA or Administration Act.

Most people reading this article will know that over 90% of contested estates tend to settle at mediation, sometimes irrespective of whether or not the originating process and supporting material discloses a compelling case for passing the jurisdictional test. We often do not get to a point where we can see the evidence rigorously tested in court.

Similarly, we know that the overwhelming majority of disputes in this area involve emotional responses from the parties. The particular type of dispute that this article deals with has the highest of stakes – the very identification of one's relatives; one's family unit.

Picture yourself in this situation. A client comes to see you with an extremely interesting story:

(a) His mum and dad were married for most of his life, certainly before his birth.

(b) He has 2 older brothers.

(c) His childhood was relatively normal. He had a close relationship with his parents and lived with them until he turned 19, at which stage he went overseas to do some backpacking. He had to get his birth certificate in order to obtain a passport and all the information on that birth certificate reflected his family unit – it listed his father and mother's names.

(d) When he hit 30 (and at this stage he had a wife and children) his parents got divorced.

(e) Eventually his mother introduced him to her new partner.

(f) Your client got along with him great. So did your client's kids.

(g) Over the next 3 years your client went on holidays with his mother and her new partner, including overseas trips.

(h) Your client still maintained a very close relationship with his father, and caught up with him just as often.

(i) Then his mother's partner passed away.

(j) Before the funeral your client's mother drops a bombshell, telling him that the deceased was his biological father. She tells him that he was the product of an extra-marital relationship, but that she did not tell his father (at least, who your client thought was his father) because the deceased wasn't able to support your client's two siblings and, instead, he had suggested that she pass you off as her husband's child.

(k) She tells you the extra-marital relationship continued (after a short break) and that when she and her husband finally split, it was only natural that she make her relationship with the deceased public.

(l) She even told your client that the deceased had attended all of his sporting events. Whilst your client was growing up, his mother regularly sent photos of him to the deceased, and these photos were found amongst the deceased's possessions along with a newspaper clipping of your client's marriage.

(m) In the space of a week your client has discovered that his brothers are only his half-brothers and, more importantly, that the man he always thought was his biological father was not. He was deprived of a full appreciation of why he found the deceased's company so engaging… and why the deceased was so keenly interested in his and his children's lives.

(n) Your client is faced with the fact that he has a claim against the deceased's estate.

(o) When all the documents suggest otherwise, how would you go about convincing a court that your client was, in fact, the child of the deceased?

The court is regularly faced with making decisions which govern a family's status, sometimes on scant or conflicting evidence. The fallout of such decisions is significant, particularly if the paternity of an infant child is in issue.

Master Bredmeyer (in a 2007 judgment that will be discussed later in this article) outlined the possible ramifications in the context of whether or not to order a DNA test in an FPA claim:

> *It was argued for [the claimant mother] that [a DNA] test could produce a trauma for [her infant son]. [The son] has grown up believing that [the deceased] was his father and that belief may be exploded. I think that argument is specious….If the DNA tests show that*

> *the deceased was not his father, [the claimant mother] may then attempt to take up a relationship with the true father, or she may not. If she does, [the son] may get a live father out of that, or he may not. [The claimant mother] may be able to get some child maintenance out of the true father. If the DNA tests show that the deceased is the father, [the son] may enjoy some love and support from the [living] grandparents.*

Irrespective of the type of evidence used to get to the answer, these types of decisions have the potential to reshape lives in a significant way. Of course it's always important to prepare a case as carefully as possible, but it seems all the more onerous to be responsible for leading evidence which may change the family relationships a child has for the rest of its life.

Family lawyers obviously deal with this all the time. However it is increasingly likely that estate practitioners will deal with this on a more regular basis. This is mainly because the nature of family life in Australia has changed markedly over the last 40 years.

THE COMPLEXITY OF THE MODERN FAMILY

Up until the mid-1900s, and even beyond, there was a social stigma associated with having a child out of wedlock. In the most extreme of cases that stigma created an incentive for the mother of such a child to keep the true paternity from the child and her husband. Single mothers in such circumstances were encouraged to put their children up for adoption.

Now, cohabiting and one-parent families are far more common. As the December 2013 Family Law Council Report on "*Parentage and the Family Court Act*" confirms, the number of one-parent families continues to rise (after doubling in number between 1966 and 1986).[1] The number of children being born out of wedlock and without registration of paternity also continues to increase. According to the Australian Bureau of Statistics, of the 33,500 births in WA in 2013, 1200 were ex-nuptial without the father filling out and signing the Birth Registration form. This is up from 800 in 2002.[2]

There are also more types of couple families in existence than ever before, including traditional families, step-families, blended families and same sex families.[3]

According to the Fertility Society of Australia website, "*one in six couples in Australia and New Zealand suffer infertility*".[4] The obvious result is that the use of reproductive technologies continues to be on the rise, not just for infertile couples, but same-sex couples. This has challenged the *traditional* definition of a parent and child in the 1980s.

Thus social and technological developments have driven changes to the legal definition of a parent. For example, in the 1970s they led to the abolition of the difference in the legal rights of legitimate and illegitimate children. This was largely achieved by expanding the legal definition of a parent.

THE CHANGES FROM THE 70S ONWARDS

The changes were not uniform across this nation.

Western Australia stands apart from the other States and Territories and this impacts on the tools we can use to establish (or contest) whether or not a parent and child relationship exists.

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[1] See the Family Law Council Report on Parentage and the Family Court Act, December 2013, page 2.
[2] See Australian Bureau of Statistics 3301.0 – Births, Australia, 2013 released 11:30am 23 October 2014 (http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3301.0Explanatory%20Notes12013?OpenDocument)
[3] See the Family Law Council Report on Parentage and the Family Court Act, December 2013.
[4] The Fertility Society of Australia, www.fertilitysociety.com.au.

Western Australia is the only State that has not enacted separate legislation dealing with the status of children. The balance of Australia has the following Acts:

(a) *Status of Children Act 1974* (Vic),

(b) *Status of Children Act 1978* (Qld),

(c) *Status of Children Act 1974* (Tas),

(d) *Status of Children Act 1996* (NSW),

(e) *Parentage Act 2004* (ACT),

(f) *Family Relationships Act 1975* (SA), and

(g) *Status of Children Act 1978* (NT),

(collectively "Status of Children Legislation").

Each of these Acts specifically abolishes the legal distinction between legitimate and illegitimate children.[5] In addition, most of them outline a number of presumptions that parties may avail themselves of (in contested estates matters) when determining parentage. A summary table is provided:

Presumption or Evidence (paraphrased)	**State or Territory**
Presumptions arising from marriage	
A child born to a woman while she is married is presumed to be a child of the woman and her spouse.	ACT; NSW; NT; QLD; SA; TAS; VIC
A child born to a woman within 44 weeks after the death of her spouse is presumed to be the child of the woman and her spouse who died.	ACT; NSW; NT; QLD; SA & Vic (although specifies 10 months); TAS
A child born to a woman within 44 weeks after the annulment of her purported marriage is presumed to be the child of the woman and her purported spouse.	ACT; NSW; NT; QLD; SA (although specifies 10 months); TAS
A child born to a woman after the end of her marriage but within 44 weeks after she last separated from her spouse is presumed to be the child of the woman and her spouse.	ACT; NSW; NT; QLD; TAS
If the parties to a marriage separated at any time, and after the separation, resumed cohabitation on one occasion, and within 3 months after the resumption of cohabitation, they separated again and lived separately and apart, and a child is born to the woman within 44 weeks after the end of the cohabitation, but after the dissolution of the marriage, the child is presumed to be	NSW; NT; QLD; TAS

[5] Section 3 of the *Status of Children Act 1974* (Vic); section 6 of the *Status of Children Act 1978* (Qld); section 3 of the *Status of Children Act 1974* (Tas); section 5 of the *Status of Children Act 1996* (NSW); section 38 of the *Parentage Act 2004* (ACT); section 6 of the *Family Relationships Act 1975* (SA) and section 4 of the *Status of Children Act 1978* (NT)

Presumption or Evidence (paraphrased)	State or Territory
the child of the woman and her former husband.	
Presumptions arising from cohabitation	
A person is presumed to be a parent of a child if the person cohabited with the woman who gave birth to the child at any time during the period beginning not earlier than 44 weeks, and ending not later than 20 weeks, before the birth of the child.	ACT; NSW; NT; QLD; SA (although 3 years for domestic partners); TAS
Presumptions arising from register, court proceedings or acknowledgments	
A person whose name is entered in a register as the name of a parent of a child is presumed to be a parent of the child.	ACT; NSW; NT; QLD; SA; TAS; VIC
A person is conclusively presumed to be a parent of a child if during the person's life, a court of the Territory, the Commonwealth, a State or another Territory has found expressly that the person is a parent of the child, or made a finding that it could not have made unless the person was a parent of the child.	ACT; NSW; QLD; SA; TAS
A person is presumed to have been a parent of a child if after the death of the person, a court of the Territory, the Commonwealth, a State or another Territory has found expressly that the person was a parent of the child, or made a finding that it could not have made unless the person was a parent of the child.	ACT; NSW; NT; QLD; TAS
A man is presumed to be a child's father if under this Act or other law of the State or a law of the Commonwealth, another State or a Territory or a prescribed overseas jurisdiction, the man executes a document acknowledging that he is the child's father.	NSW; NT; QLD; TAS; VIC
Presumptions arising from reproductive technologies	
If a woman undergoes artificial insemination, embryo transfer or any other procedure whereby the woman becomes pregnant without sexual intercourse, that woman is conclusively presumed to be the mother of any child born as a result of the pregnancy, irrespective of who produced the ovum and irrespective of marriage (or de facto or same-sex partner), however if married (or de facto or same-sex partner), her consenting husband/partner is presumed to be the Father/parent irrespective of who produced the semen.	ACT; NSW; NT; QLD; SA; TAS (although *Relationships Act 2003* (Tas) affects this); VIC

Western Australia, by contrast, has made individual amendments to its legislation to abolish the distinction between legitimate and illegitimate children and alter the definition of parent, most relevantly:

(a) Section 31 of the Wills Act;

(b) Section 12A of the Administration Act; and

(c) Section 4(4) of the FPA.

So where are the above presumptions found in WA law?

The *Family Court Act 1997* (WA) (**WA Family Court Act**) contains similar presumptions to the Status of Children Legislation, however those presumptions cannot be used to apply to questions of parentage for the purpose of contentious estate disputes in the Supreme Court.[6]

As we will see, there are some presumptions under the various reproductive technology and adoption statutes.

Also, section 57 of the *Births, Deaths and Marriages Registration Act 1998* (WA) provides some assistance. It says that entries in the Register are admissible in legal proceedings as evidence of the facts actually recorded in the Register. This may not be as strong as a presumption, but it is certainly a starting point.

Further, if someone is paying child support pursuant to the *Child Support (Assessment) Act 1989* (Cth), the Registrar would likely have reached a conclusion about parentage based on the provisions of section 29 of that Act. That conclusion is rebuttable on the balance of probabilities by an application to the court and where the applicant provides evidence contrary to the presumption.

COMMON LAW PRESUMPTION OF PARENTAGE?

Is there a common law presumption of parentage if a child is born into a marriage?

There may be.

Master Sanderson referred to it in a 2004 case, which we will deal with later, however he does not state an authority from where that presumption arises.[7]

The 1947 High Court case of *Cocks v Juncken*[8] is authority for the proposition that, where a child is conceived by, or born to, a woman during marriage, the woman is presumed to be the mother of the child and her husband is presumed to be the father of the child.

After the Status of Children Legislation came into effect, the High Court in *Magill v Magill*[9] stated that the presumption of legitimacy no longer existed, as statute (in this case section 3 of the *Status of Children Act* (Vic)) had intervened. Of course this is not universally the case, as in Western Australia it is only the WA Family Court Act that has 'intervened'. Thus it seems possible to argue that the common law presumption arising out of *Cocks v Juncken* can still be relied upon. However there are currently no Supreme Court cases that have applied it.

[6] See discussion by His Honour Simmonds J in *Hallet v Cottam* [2007] WASC 147 at [126].
[7] *The Public Trustee v Gulvin & Ors* [2004] WASC 140 per Master Sanderson at [16].
[8] (1947) 74 CLR 277.
[9] [2006] HCA 51 at [54]-[55].

SO WHAT IS THE DEFINITION OF PARENTAGE?

The starting point, therefore, must be the definition of 'parentage', 'parent' or 'child' that could apply in the context of contested estates.

There are various legislative definitions of parentage in WA.

The first Act to consider is the *Interpretation Act 1984* (WA) ("the Interpretation Act"). Section 5 states:

> ***parent*** *includes the following —*
>
> *(d) a person who is a parent within the meaning of the Artificial Conception Act 1985;*
>
> *(e) a person who is an adoptive parent under the Adoption Act 1994;*
>
> *(f) a person who is a parent in a relationship of parent and child that arises because of a parentage order under the Surrogacy Act 2008;*

Sections 5 and 6 of the *Artificial Conception Act 1985* (WA) (**the ACA**) relate to maternity and paternity:

> *Section 5: Rule Relating to Maternity*
>
> *(1) Where a woman undergoes an artificial fertilisation procedure in consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the pregnant woman is the mother of any child born as a result of the pregnancy.*
>
> *Section 6: Rule Relating to Paternity*
>
> *(1) Where a married woman undergoes, with the consent of her husband, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the husband –*
>
> *(g) shall be conclusively presumed to have caused the pregnancy; and*
>
> *(h) is the father of any child born as a result of the pregnancy.*

A "*married woman*" includes a woman in a de facto relationship.[10] There is also a specific section covering same sex couples. It has the same effect as section 6 of the ACA.[11]

The egg or sperm donor is specifically stated *not to be* the mother or father of any child born as a result of an artificial fertilisation procedure.[12]

The next Act to consider is the *Adoption Act 1994* (WA) (**Adoption Act**).

Section 75 states:

[10] See section 3 of the ACA.
[11] See section 6A of the ACA.
[12] See section 7 of the ACA.

Where an adoption order is made, for the purposes of the law of this State –

(a) the relationship between the adoptee and the adoptive parent is to be treated as being that of child and parent; and

(b) the relationship between the adoptee and –

(i) the adoptee's birth parents; or

(ii) if the adoptee was previously adopted, the previous adoptive parent,

is to be treated as not being that of child and parent; and

(c) if the adoptee had been previously adopted, whether under the law of this State or otherwise, the previous adoption ceases to have effect; and

(d) the relationships of all persons to the adoptee, the adoptive parent and the birth parent or previous adoptive parent are to be determined in accordance with this section.

…

(4) If an adoption order is made in relation to an adoptee, an appointment, in a deed or will existing at the time the adoption order is made, of a person as the guardian of the adoptee, ceases to have effect,

…

*(7) In this section a reference to **child** includes a reference to a person who is 18 or more years of age.*

Section 78 of the Adoption Act requires the court to notify the Registrar of Births, Deaths and Marriages when an adoption order is made. The adoptive parents are included in the birth certificate as the child's parents.

That leaves the *Surrogacy Act 2008* (WA) (**Surrogacy Act**). Section 14 states:

> ***child** refers to the status of a person in a relationship as parent and child, and it includes a person of that status even after the person has reached the age of full legal capacity.*

Section 26 states:

(1) The effect of a parentage order is that, for the purposes of the law of this State –

(a) the relationship between the child whose parentage is transferred and each of the arranged parents is to be treated as being that of child and parent; and

(b) the relationship between the child whose parentage is transferred and each of the child's birth parents is to be treated as not being that of child and parent; and

(c) the relationships of all persons to the child whose parentage is transferred, to each of the arranged parents, and to each of the birth

parents of the child are to be determined in accordance with this section.

(2) If a parentage order is made, an appointment, in a deed or will existing at the time the parentage order is made, of a person as the guardian of the child whose parentage is transferred, ceases to have effect.

Since 2002 the Administration Act, the ACA, the Adoption Act and the Interpretation Act have been amended (amendments include references to "*parentage*" rather than "*paternity*" and "*parent and child*" rather than "*father/mother and child*") so that same-sex couples may also fit the definition of 'parents' of children, so long as they fit the definition (or follow the criteria specified in) those Acts.[13]

Turning to the Wills Act and the Administration Act, the provisions relating to parent and child relationships are effectively the same. The differences appear underlined below:

Wills Act; section 31	**Administration Act; section 12A**
(1) <u>Unless the contrary intention appears by the will, where for the purpose of determining who is entitled to an interest in any property that is the subject of a disposition…</u> the relationship between a child and his or her parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be construed accordingly. (2) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (1) – (e) that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court; and (f) where the parents are not, or have not been, married to each other, the relationship between a child and his or her parent, and all other lineal or collateral relationships, shall be recognised only – (i) if parentage is admitted by or established against the parent in his or her lifetime; and (ii) where the purpose for which	(1) <u>Where, after the coming into operation of the Administration Act Amendment Act 1971, any person dies intestate</u> … the relationship between a child and his parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be determined accordingly. (2) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (1) — (a) that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court; and (b) where the parents are not, or have not been, married … the relationship between a child and his parent … shall be recognized only — (i) if parentage is admitted by or established against the parent in his lifetime… (ii) where the purpose for which the relationship is to be determined enures for the benefit of the parent, if parentage has been so admitted or established in the

[13] See the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*.

	the relationship is to be determined enures for the benefit of the parent, if parentage has been so admitted or established in the lifetime of the child.	lifetime of the child.

The Wills Act allows testators to stipulate a different mode of determining parent and child relationships. However if the Will was amended to say, for example, that none of the testator's illegitimate children could take under the will, such children would still be able to fall back on the FPA.

The FPA amendments do not read the same as the Wills Act and Administration Act. Instead, section 4(1) provides a definition of "child", "grandchild" and "stepchild" to include illegitimate children and goes on, at section 4(4), to state:

> *For the purposes of this Act… the relationship between a parent and a child and any other relationship traced in any degree through that relationship, shall be recognised only if parentage is admitted by or established against the parent in the parent's lifetime.*

However that section is expressly stated not to apply to a relationship established by the ACA.[14]

Section 4(2) requires such a fact to be proved to the reasonable satisfaction of the court.

Thus it appears (at least for the FPA) as though legitimate and illegitimate children have to prove the same thing; an admission of paternity or its establishment against the parent during the parent's lifetime. One would think, however, that in a large portion of cases it would be a simple thing to prove establishment through the production of a birth certificate listing the deceased as a parent.

THE TWO STAGE TEST

In light of all of the above, it will assist to review some of the WA case law in this area.

Most of the cases tend to arise from the application of section 12A of the *Administration Act* when there is a child born outside of marriage.

The courts have tended to adopt a two stage test when the child's parents are not, or have not, been married to one another. The order of the stages has varied, however for practical purposes it does not matter. The test is as follows:

(a) The first stage requires proof that parentage was:

  (i) established against that person during their lifetime; or

  (ii) admitted by that person during their lifetime.

(b) The second stage requires establishing, to the 'reasonable satisfaction of the Court', that the person was *in fact* the child of the deceased.

[14] Section (4a) of the FPA.

This may appear to be a simple test, but from my experience this is not commonly understood.

ADMINISTRATION ACT CASES

The following cases apply section 12A of the Administration Act:

(a) *The Public Trustee v Gulvin & Ors* [2004] WASC 140;

(b) *Riches v McInnes* [2010] WASC 298;

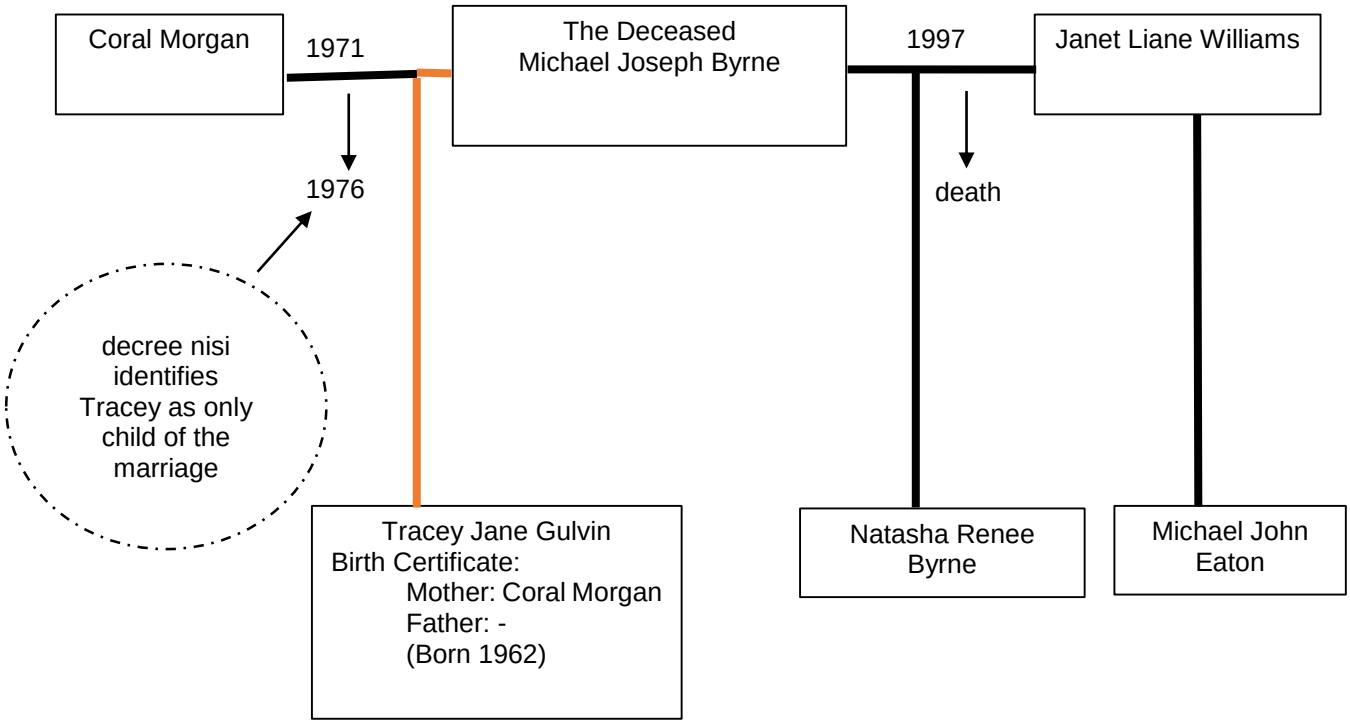
(c) *The Public Trustee as Administrator of the Estate of Jeffrey Stephen Alau v the Public Trustee of Queensland as Administrator of the Estate of Ellen Padal Pearson* [2011] WASC 321;

(d) *Schor v Mary Furesh* (as administrator of the intestate estate of Paul Slipcevich) [2011] WASC 346; and

(e) *Sweeney v Castle* [2014] WASC 266.

The Public Trustee v Gulvin & Ors [2004] WASC 140.

Gulvin's Case



This was a decision of Master Sanderson arising from an application by the executor pursuant to section 45 of the Administration Act. The executor wanted to determine if Tracey was entitled to participate in the distribution of the deceased's intestate estate.

This depended upon whether:

(a) Tracey was the deceased's daughter, and

(b) that fact was established against or admitted by the deceased during his lifetime.

Evidence led **in support of paternity** for purpose of section 12A included:

(a) A *decree nisi* from the Family Court in 1976, stating that Tracey was the only child of the relationship.

However upon analysing what the decree nisi meant when describing Tracey as a "child of the marriage" (for the purpose of the *Family Law Act* it was sufficient if the child was ordinarily a member of the household of the husband and wife) Master Sanderson concluded that it did not assist on the issue of paternity.

(b) A statutory declaration from Ms Christine West, describing herself as the deceased's sister and saying "to the best of her knowledge and belief" the deceased was the biological father of the first defendant. However she gave no basis for that conclusion and thus it was found to be of little value.[15]

Evidence led **in support of an admission** during the lifetime of the deceased included only the *decree nisi* from Family Court in 1976, but it was found that this certainly could not be seen as an admission by the deceased.

Apart from the above, there was no further evidence. This was despite the Executor making significant enquiries of UK family members and engaging genealogists for assistance. The executor even:

(a) tried to obtain some DNA evidence from Tracey, but Tracey refused and the court would not make an order forcing her to provide it[16]; and

(b) offered for Tracey to obtain legal assistance at the cost of the estate, but she refused.

Some interesting questions were raised in the proceedings regarding the constructions of section 12A. Master Sanderson was concerned that the section did not address what would occur if a child was either conceived or born before a marriage between a mother and a deceased father. Master Sanderson wanted to know if a presumption of paternity arose if the alleged father of the child had *at any time* been married to the mother of the child.

In deciding this Master Sanderson reverted to the standard principles of construction. Starting first with the purpose or object underlying the law, he noted that the purpose had to be "*deduced by looking at the statute as a whole*".[17]

Bearing in mind the amendments to the Administration Act were followed, in close succession, by similar amendments to the Wills Act and the FPA (or *Inheritance (Family & Dependants Provision) Act 1974* (WA) as it then was), Master Sanderson said there could be "*no doubt…*

[15] *The Public Trustee v Gulvin & Ors* [2004] WASC 140 at [7].
[16] *The Public Trustee v Gulvin & Ors* [2003] WASC 134.
[17] *The Public Trustee v Gulvin & Ors* [2004] WASC 140 at [13].

that the primary purpose of s12A [is] to give illegitimate children the same rights to participate in their deceased parents' estate as legitimate children".[18]

Master Sanderson then discussed whether section 12A(2)(b) was intended to reflect the common law presumption of legitimacy if a child is born or conceived in wedlock, or whether the presumption was extended to include children who were born illegitimate but whose parents subsequently married. He said the following:

> *… the provisions of s12A(2)(b) impose three conditions to be met to establish the paternity of the deceased of illegitimate children. No proof of paternity is required except where the deceased father and the mother are not, or have not, been married to each other. It is clear that the purpose of the Act is to allow illegitimate children to partake in their father's estate if they can persuade the Court that the paternity was admitted or established during the deceased's lifetime. The legislation imposes a high standard of proof. The Court must be "reasonably satisfied" that paternity had been admitted or established for paternity to be proved. It seems then that the legislation recognised the rights of illegitimate children subject to quite stringent evidentiary requirements.*[19]

Importantly, he found that a child of a woman cannot claim paternity against any man her mother subsequently married.

Based on the evidence, Tracey was not found to be a child of the deceased.

Riches v McInnes [2010] WASC 298

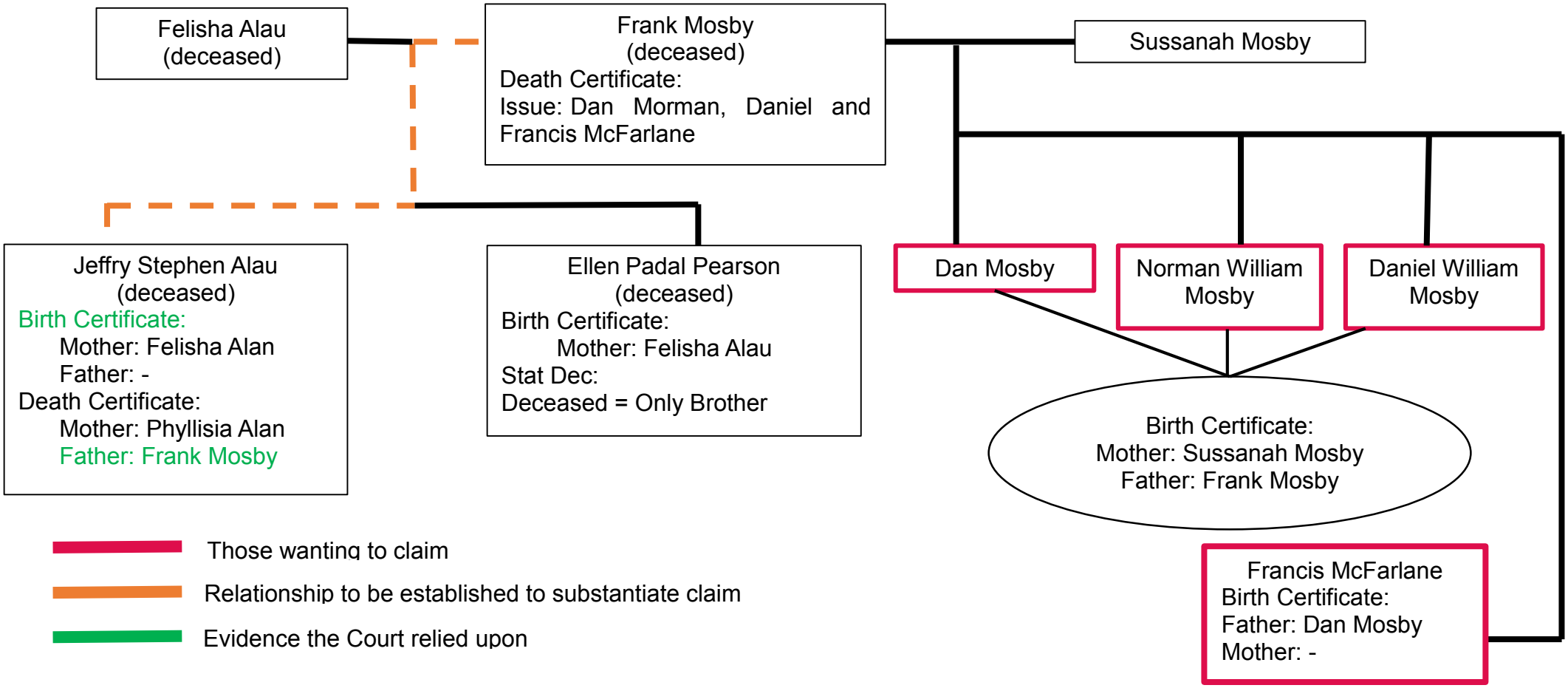
This was a decision of His Honour Justice Heenan that discussed the test for illegitimate children pursuant to section 12A, however it focussed more on the proof of an informal will.

His Honour confirmed that the alleged children would need to prove that there was an admission by, or establishment against, the deceased during his lifetime, which the evidence did not support.[20] Accordingly he concluded that those alleged children would not be entitled to a grant of letters of administration (should there be no informal will).

[18] *The Public Trustee v Gulvin & Ors* [2004] WASC 140 at [15].
[19] *The Public Trustee v Gulvin & Ors* [2004] WASC 140 at [16].
[20] *Riches v McInnes* [2010] WASC 298 at paragraph [20]

The Public Trustee as Administrator of the Estate of Jeffrey Stephen Alau v the Public Trustee of Queensland as Administrator of the Estate of Ellen Padal Pearson [2011] WASC 321 ("Alau's Case")

Alau's Case



This was an application pursuant to section 66(5) of the *Trustees Act 1962* (WA) by the executor to determine if Jeffrey Stephen Alau (**the deceased**) was the son of one Frank Mosby.

The issue was whether Dan, Daniel and Norman could claim against the deceased's intestate estate as half-brothers.

This depended upon whether Frank Mosby was the deceased's Father and that was established against or admitted by him during his lifetime.

The evidence found to be of highest weight for the s12A question regarding paternity was the fact that the deceased's death certificate referred to Frank Mosby as his Father. By virtue of the operation of section 57(3) of the *Births, Deaths and Marriages Act* 1997 (WA) this was evidence of the fact contained therein despite the informant (the funeral director) failing to give evidence of why he put that down. This is because there was no contrary *admissible* evidence.

The information/proposed evidence that was found to be of little or no weight on the issue of paternity included:

(a) A statutory declaration of Elder Mosby who said he knew Dan Mosby and the deceased, and knew that Frank Mosby was the father of both Dan Mosby and the deceased, although he failed to state how he knew.

(b) The fact that Frank Mosby's death certificate did not list the deceased as issue.

(c) Hearsay evidence from a remote family member saying that the deceased and Ms Pearson were not "taken in" by Frank Mosby's family when their mother died, but rather by others.

(d) The deceased's Department of Community Services records failing to mention a father.

There was no evidence that paternity was established against Frank Mosby during his lifetime. His Honour confirmed that "*established*" within section 12A could mean "*established by legal proceedings*" against the parent during their lifetime.

It also seems arguable that parentage of illegitimate children could be "*established*" via DNA, the Adoption Act or the Surrogacy Act during the lifetime of the deceased.

Evidence found to be of weight regarding whether there was an "admission of paternity during the lifetime of the deceased" included the lack of "issue" on Frank Mosby's death certificate.

Information found to be of little or no weight regarding whether there was an "*admission of paternity during the lifetime of the deceased*" included:

(a) Ms Pearson's evidence that Frank Mosby was not involved in her or the deceased's upbringing.

(b) Hearsay evidence from a remote family member saying that the deceased and Ms Pearson were not "taken in" by Frank Mosby's family when their mother died, but rather by others.

(c) The statutory declaration of Elder Mosby who said he knew Dan Mosby and the deceased, and knew that Frank Mosby was the father of both Dan Mosby and the

deceased, although he failed to state how he knew.

Thus it was concluded that Frank Mosby was the deceased's father, but that he did not admit it during his lifetime. His Honour said "*I so conclude on the basis of the deceased's and Frank Mosby's death certificates, reminding myself again of the requirement from Gulvin that a high standard of proof in matters of paternity is called for.*"

Schor v Mary Furesh (as administrator of the intestate estate of Paul Slipcevich) [2011] WASC 346

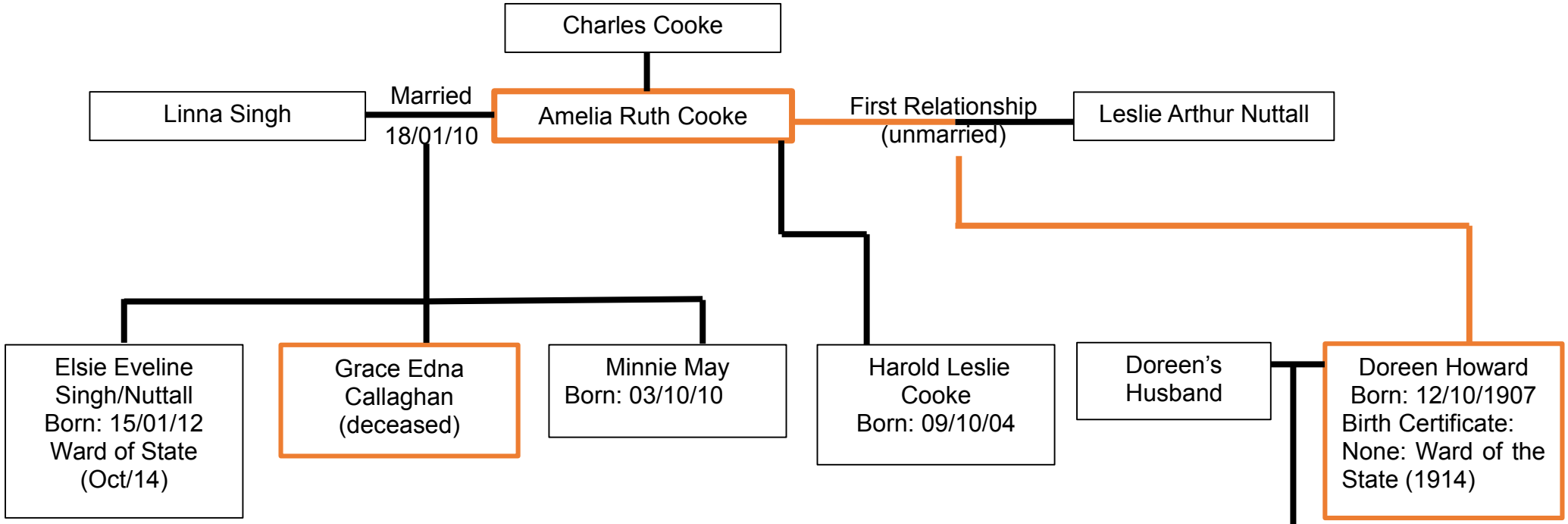
Master Sanderson noted that subsection 12A(2) of the Act involved two distinct and separate elements:

> *In this case it is necessary for the plaintiff to establish "to the reasonable satisfaction of the court" she is a child of the deceased. The DNA testing proposed would go to that end. Secondly, the plaintiff needs to establish that parentage was admitted during the lifetime of the deceased. Of course any DNA testing would not be relevant to s12A(2)(b)(i) because even if it established the deceased was a parent of the plaintiff, it was not so established during his lifetime. So the plaintiff is faced with establishing the deceased admitted parentage…*

This case ultimately went on appeal, but in relation to the issue of DNA evidence. The above case related to the Master's refusal to order a trial of a preliminary issue, making the provisions of s12A relevant.

Sweeney v Castle [2014] WASC 266

Sweeney v Castle



- Betty Castle = deceased's niece and Amelia's granddaughter.
- Lorraine Sweeney wants to be the deceased's niece, because she'd classify as a "child of a sister" of the deceased for the purpose of s14 Admin Act.

This was a case before Master Sanderson. The issue was the distribution of the intestate estate of Grace Edna Callaghan.

The Plaintiff was alleging that she was a niece of the deceased (of the half-blood) thus she was trying to prove that her Mother was half-sister to the deceased.

Doreen has no birth certificate. Elsie and Doreen were made wards of the State in October 1914. The Ward Register noted their parents were Leslie Nuttal and Amelia Singh. However Elsie was in fact Singh's daughter. The Plaintiff is relying on the Ward Register to establish that Amelia was Doreen and Elsie's mother.

A newspaper report from 4 May 1911 makes the matter uncertain by saying that, as at the date of the marriage of Amelia and Singh (12 January 10) Amelia had one child. But Harold Leslie Cooke was born 9 October 1904. If Amelia was Doreen's mother surely the article would have referred to two children?

Amelia had lived with Nuttall for approximately 2 years before she left him for Singh.

Amelia may not have married Singh immediately after she left Nuttall. It is possible that, when Amelia left Nuttall, Doreen remained with Nuttall. Thus it is possible Amelia had Harold with an unknown person, then she went to live with Nuttall and produced Doreen. When she left Nuttall for Singh, Doreen remained with her father and Harold went with his mother. That could explain the reference to the one child in the newspaper article.

To complicate matter further, the Ward Register:

(a) refers to the two girls as Doreen and Elsie Nuttall. But Singh was Elsie's Father,

(b) says the girls were living with and being looked after by Charles Cooke, and that Cooke was Amelia's father (which would explain Harold's surname), and

(c) makes no reference to Minnie May, born on 3 October 1910.

If Doreen and Elsie were living with Cooke, where was Minnie? And where was Harold?

Further evidence was brought by the Plaintiff that:

(a) There were adoption proceedings in relation to Elsie in 1931. At the time the Adoption Act required parental consent, a finding the parents were both dead or a finding that the child had been deserted. A finding of desertion meant the court had to be satisfied as to who the parents were. The court decided Amelia was Elsie's mother, based on the Ward Register. The Plaintiff argued this meant Doreen was also Amelia's daughter. Betty Castle argued it did not, it only related to Elsie and the Adoption proceedings finding was only as good as the Ward Register. The court agreed with Betty.

(b) The plaintiff had contact with the deceased.

(c) The deceased referred to herself as Doreen's sister. In this regard the court said it seems doubtful whether any statement by the child could be decisive. What would be decisive is an admission by the parent.

(d) Affidavit of Betty Castle (in support of probate) referring to the deceased as Doreen's sister.

Master Sanderson:

(a) determined there was enough evidence to say that parentage was established against Amelia during her lifetime (in this regard the Ward Register was considered to be the strongest evidence); and

(b) noted that "establishment" does not have to be correct; all the Administration Act requires is establishment, not *correct* establishment.

He said that the more difficult question was whether *in fact* Doreen was Amelia's daughter.

After weighing all of the evidence Master Sanderson said it would be likely Doreen was the daughter of Amelia. The most important evidence in this regard was that:

(a) Amelia had a relationship with Nuttall prior to marrying Singh.

(b) Doreen was born on 12 October 1907 and Amelia married Singh in January 1910.

(c) Amelia had lived with Nuttall prior to marrying Singh.

(d) There is no evidence of any relationship with any other individual save the relationship which led to the birth of Harold in 1904.

(e) Doreen always appeared to use the surname Nuttall.

The newspaper article doesn't support this, but it's possible the newspaper got it wrong.

Master Sanderson said the correct approach to section 12A involves two stages:

(a) The first stage is under section 12A(2)(b)(i) and required establishing, against the parent, that a particular person was their child.

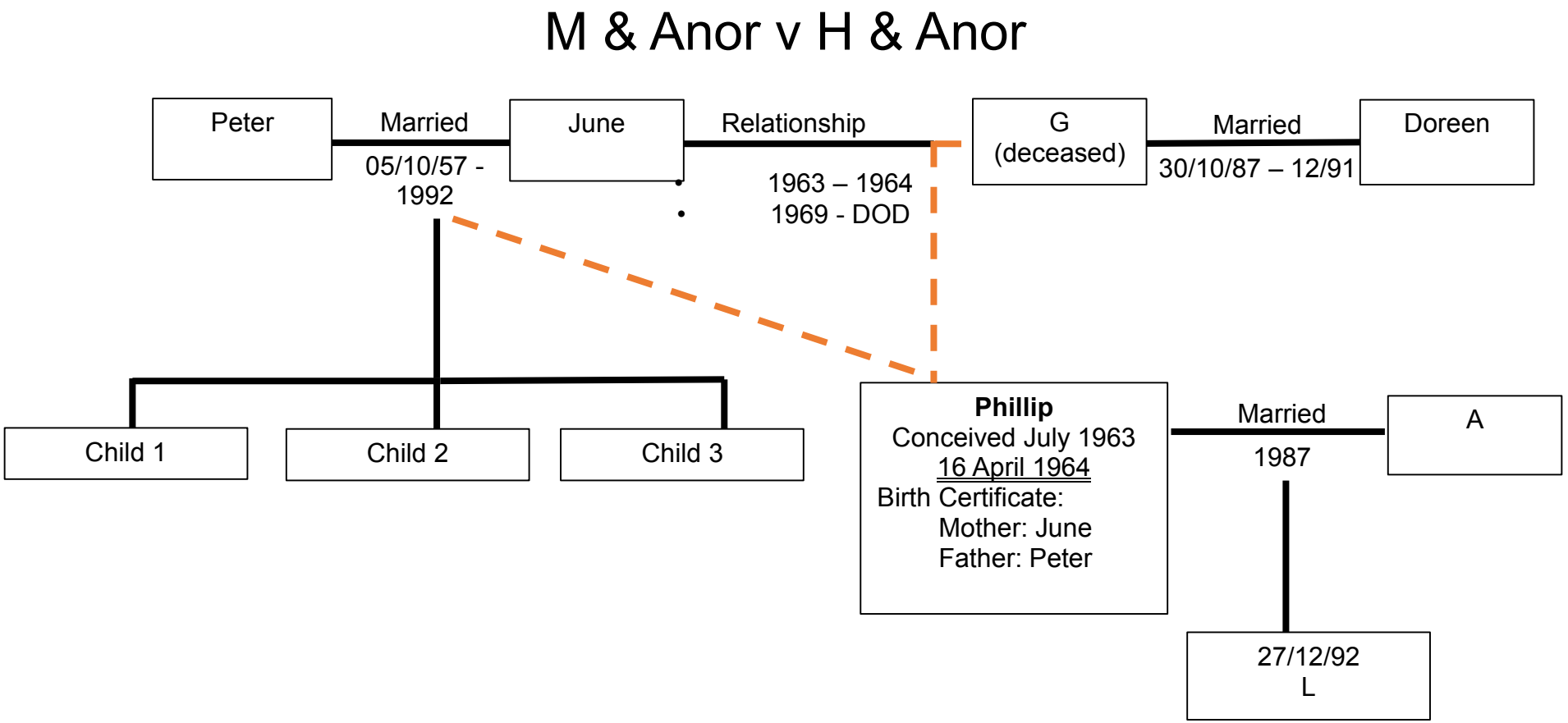
(b) The second stage is establishing, to the 'reasonable satisfaction of the court' that the person was *in fact* the child of the deceased.

The Master said that, in many cases, there would be no practical difference between the two stages.

A court finding is not the only way of 'establishing' during the lifetime of the deceased that he or she was the parent, as all available evidence may suggest parentage, but then after the alleged parent's death, DNA testing may show that, in fact, there was no parent/child relationship. That would mean the first stage of the test could be satisfied but not the second, and the court would give effect to the true position.

FPA case

M and Anor v H and Anor – Supreme Court of WA in chambers, Murray J (14 June 1995)



This was a claim by Philip against his Father's (G's) estate pursuant to s7(1)(c) of the FPA.

There was an allegation the deceased conceived the child with June, who was married to Peter at the time.

It appears to be the only case on the issue of paternity in the context of the FPA that has made it to hearing in WA.

The facts are as follows:

(a) June was unhappy in her marriage with Peter, despite them having three children together. He was an accountant preoccupied with his work. As a result, June would go out dancing without him. It was at one of these dances, in 1963, that June met G. Within a few months they had a sexual relationship.

(b) By September 1963 she realised she was pregnant. The child was Philip and he was born on 16 April 1964, 2 weeks overdue (therefore conceived in July 1963). At the time of conception June gave evidence that she hadn't had a sexual relationship with her husband for 2-3 months.

(c) June discussed the pregnancy with G and he suggested she go away with him. June would not consider this unless he would take on her three other children. G wasn't willing to, and thus June decided to persist with her marriage and cease her relationship with G.

(d) G suggested she should go to bed with Peter as soon as possible so that he might be persuaded the child was his. She did this and Philip was born into the family and treated as though he were Peter's son.

(e) In 1969 June and G resumed their relationship in secret. June told G he had to promise not to tell Philip he was his father. He never broke that promise. Instead he attended Philip's sporting events as a bystander, careful never to reveal his presence to anyone but June. June gave him photographs of Philip, which he kept until his death. They were found amongst his papers along with a newspaper clipping of Philip's marriage in January 1987.

(f) G married Doreen in 1987 but separated from her in 1991. He kept up his relationship with June.

(g) June ultimately divorced Peter in 1992, following separation in 1991.

(h) Meanwhile, Philip and his wife went to work in the UK for two years, returning briefly to Perth at Christmas of 1991. It was then that G was introduced to Philip as June's partner, although he and some other family members knew they were together before that.

(i) G and Philip got along very well. In 1992, when G travelled to the UK, G stayed with Philip. They spent a considerable amount of time together over the year. In 1992 Philip's wife had a baby boy. G was besotted with the child.

(j) Philip didn't know his true paternity until after G was dead (October 1993). His birth certificate had always read that Peter was his father.

His Honour considered June's evidence to be the only direct evidence of paternity. He referred to circumstantial evidence, particularly:

(a) Photographic evidence, and

(b) Oral testimony of witnesses who said G and Philip appeared similar, and shared certain mannerisms and interests, whereas Peter and Philip were dissimilar,

dismissing them as being of marginal weight.

His Honour said that the circumstantial evidence, by itself, would not be sufficient to cause him to be reasonably satisfied that G was Philip's father.

Despite Peter not being called to give evidence, and despite the lack of DNA testing between Peter and Philip, the court declined to draw an inference that such evidence would not have helped Philip.

His Honour noted that he thought it was unclear whether Peter would have assisted with the DNA testing. He said it would also be difficult for Peter to remember if he had sexual relations with his wife between April and the end of July 1963, which was over 30 years ago. He also thought it would be unlikely that Peter would want to assist Philip's claim that G was his father, given he always assumed he was Philip's father.

There were some interesting comments from His Honour Murray J regarding section 12A:

> *In its terms, however, it seems to me that it is designed to add an additional requirement to the proof of paternity upon which, in a case such as this, the capacity of a child of the deceased to make a claim under the Act depends. Such a claimant will not be permitted to rely upon the fact that the deceased might otherwise be established to be his father where the relationship is illegitimate unless paternity was admitted by the deceased or established against him during his life time. Perhaps the rationale behind that provision is that in a case where the fact of paternity was unknown to the deceased, it may not be said that there has been a failure on the part of the deceased to discharge the moral obligation to make adequate provision for the proper maintenance, support, education or advancement in life of the child. If that is the legislative intention the proposition would be equally valid in a case of intestacy as in a case where there is a will.*

He said that the subsection shouldn't be interpreted as setting out the mode of proof of paternity because:

(a) It would be strange to assume that paternity could only be 'established' during the Father's lifetime by a process of res judicata as a result of proceedings to establish paternity.

(b) The admissibility of an admission of paternity by the natural father is doubtful, as a condition of admissibility of declarations of pedigree is that the declarant must be a blood relation of the person whose pedigree is in issue.

(c) It would also be difficult to admit is as a declaration against his interest, as he may not have direct knowledge and it would be difficult to say such a declaration was against his interests if, at the time of making it, there were no proceedings against him.

In any event, Murray J said it should only be admissible as evidence of the admission occurring, not the truth of the admission (i.e. the *fact* of paternity). If the evidence was to be

admitted in relation to the issue of paternity itself it could not be regarded as having more than marginal weight.[21]

In dealing with what "reasonable satisfaction" should mean, His Honour referred to the decision of Dixon J in *Briginshaw v Briginshaw*[22] where it was said that:

> *…reasonable satisfaction is not a state of mind that is attained or established independent of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequence flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable' satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

There was no clear application of a two stage test in this case, however given the interpretation of the Administration Act (in light of the authorities detailed above) it would seem logical that the test should be the same.

SUMMARY

The Wills Act and the Administration Act (arguably also the FPA) require children born out of marriage and not otherwise covered by the terms of the ACA to pass a two stage test:

(a) **First**, they must prove that paternity was established against or admitted by the deceased during the deceased's lifetime (irrespective of whether such establishment or admission was correct). For this stage compelling evidence of "establishment" would include public registers, for example the Register of Births, Deaths and Marriages. Compelling evidence of an "admission" by the deceased will include statements made by the deceased, but such statements will only be admissible to establish the fact that such an admission was made, not the truth of it.

(b) **Second**, assuming the answer to the above is yes, they must prove that the parent actually <u>was</u> the parent of the child. For this stage compelling evidence would include evidence of an exclusive relationship between the parents and the timing and duration of that relationship.

The court must be "reasonably satisfied" at both stages. Reasonable satisfaction will not be achieved by inexact proofs, indefinite testimony or indirect inferences.

DNA can play an important role, but this will be discussed in part two of the article.

[21] See *Re Jenion*.
[22] (1938) 60 CLR 336.