

**IN THE CORONER'S COURT  
HELD AT ROTORUA**

**IN THE MATTER** of the Coroners Act 2006

**AND**

**IN THE MATTER** of an Inquest into the death of  
**KELLY MARIE FITZGERALD**

Before: Coroner Dr Wallace Bain

Date of Hearing: 11<sup>th</sup> December 2009

Further Evidence: May 2010, October 2010

Witnesses:

Present Witnesses:

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**FINDINGS OF CORONER DR WALLACE BAIN**

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## ISSUES

- [1] This Inquest raises the important issue surrounding the Law of Missing Persons and when a person can be legally declared dead.
- [2] This is an Inquest into the death of Kelly Marie Fitzgerald who died in Lake Tikitapu (The Blue Lake) from presumed drowning and exposure, her body having never been found.

## EVIDENCE

### Essential Facts

- [3] The main evidence at the Inquest was given by Detective Sergeant John Wilson who was attached to the Rotorua CIB and is in charge of the Rotorua Police Search and Rescue. He gave evidence concerning his qualifications and the Court accepts him unequivocally as an expert in Search and Rescue and missing persons. On the 10<sup>th</sup> August 2009 he was called at about 8:00pm in relation to Kelly Fitzgerald being missing, presumed to be in the lake Tikitapu area in Rotorua. Her vehicle had been located at a lay-by at Lake Tikitapu near the northern end of the Lake. It appeared to be abandoned and she had been missing since earlier in the day. When he attended a Police Dog Unit was already in attendance at the vehicle and a search of the lake was underway. He activated the Rotorua Police Search and Rescue Squad and also called out the Rotorua Lakes Coastguard. They searched to midnight and then commenced the search the following morning at 6:00am.
- [4] The land team searched the lake edge and surrounding areas. Coastguard boats were tasked to search the Lake and local divers checked the area directly off the beach where the vehicle had been abandoned. It became very quickly apparent that the Police National Dive Squad would be required and they came up from Wellington later that day.
- [5] In the three days that followed the Police Dive Squad searched the area where it was felt it was the highest probability of finding a missing person. That was directly in front and out from where the vehicle had been located at the north eastern corner of the Lake. After three days the Dive Squad search was stood down. The search of the Lake however continued and three searches were being made per day.

- [6] From the 12<sup>th</sup> to the 28<sup>th</sup> August a further sixteen searches were conducted of the Lake and the foreshore. The Dive Squad returned on the 20<sup>th</sup> and 21<sup>st</sup> August and they were accompanied by an employee of the National Institute of Water and Atmospheric Research (NIWA) who was the operator of sonar equipment they brought with them. Over the next two days that sonar equipment was used to search at the bottom of the Lake for a missing person. A number of items of interest were located but eliminated in respect to this search.
- [7] At the conclusion of the search and survey of the Lake bed the data was taken away and analysed and as a result a pertinent number of items of interest were identified and warranted further investigation. A large number of items were discounted. The Dive Squad returned to dive on their items of interest and a police dog especially trained in locating cadavers was called in and conducted a search where the vehicle had been located.
- [8] A further land base search was undertaken on the 16<sup>th</sup> September 2009 using Rotorua Police SAR Squad and Land SAR personnel. National Dive Squad then dived for the next three days on 58 items of interest which had been identified by sonar on the Lake bed.
- [9] Despite all of this the missing person, Kelly Marie Fitzgerald was not located. Detective Sergeant Wilson stated in total there were 80-1/2 hours of searching by Coastguard. Five hundred man hours were spent searching the Lake and surrounding areas. At the conclusion, this was suspended pending further information.
- [10] The vehicle recovered from the Lake was then forensically examined and the clothing that the missing person had been wearing on the day she disappeared was located in the vehicle. Also located in the vehicle was a bottle of household cleaner "Exit Mould" which was established had come from Kelly Fitzgerald's laundry at her house and it was one quarter full. There appeared to be fresh vomit in the vehicle. The vehicle was left with its key in it as well as Kelly Fitzgerald's purse and its contents.
- [11] At her home address a note was located saying goodbye and sorry to her family and friends. Subsequent inquiries established that Kelly Fitzgerald had suffered from post natal depression for some time and had made previous attempts to take her own life by taking an overdose of depression medication.
- [12] The Court heard that Kelly Fitzgerald had dropped her son off at Day Care the morning of the 10<sup>th</sup> August 2009 and gone to her place of work arriving at 8:45am. She had only been

there a short time when she told her employer "I'm not up to it, I just need to go home". She left about 9:30am.

- [13] Police inquiries have established that she did not have a current passport, nor access to any other bank accounts. All of her bank cards were accounted for and according to her husband there had been no unexplained activity on any bank accounts since she went missing. Detective Sergeant Wilson confirmed to the Court that she had not been located and the indications were that she had taken her own life by drowning herself in Lake Tikitapu.
- [14] He then provided the Court with some evidence as to what usually occurs to a body in these situations. He said contrary to popular belief when a person drowns they sink to the bottom. They remain there until the body decomposes sufficiently for gases generated by the decomposition to overcome the weight of the body and it rises to the surface. In a Lake such as the Blue Lake there are no currents. Where a body sinks it will remain either until such time as it re-floats or decomposes and breaks up. How long a body would take to re-surface was dependant on many factors he said. Those include the water temperature, the water depth, the bodies fat content, and any recent meals high in carbohydrates.
- [15] The colder of the water the longer it will take for decomposition to occur. He said research indicated that in water less than 7 degrees a body may not refloat. On the day that the divers were first deployed in the search the water temperature in Lake Tikitapu was about eight degrees.
- [16] Lake Tikitapu is a large flat basin and has an amount of logs and debris accumulated in it over the years. Generally there is a flat sandy bottom and it's about 26 meters deep at the most. He said the greater the depth of water the more soluble gases are and the greater the weight of the body. Bodies below 60 meters have only a slim chance of re-floating.
- [17] A body with large amounts of fat will re-float faster than a lean one. In addition a healthy person generally has a lower number of micro-organisms and will generally not re-float as fast as someone in poor health. Meals high in carbohydrates also result in faster re-floats. He described Mrs Fitzgerald as lean, in good health, fit and had been involved in competing in triathlons. He said from the vomit located in the vehicle it would also appear that it was unlikely she would have had much, if any, stomach contents. He concluded that all of these factors would mean that it would take longer for her to re-surface once submerged

and perhaps given all the factors, not at all. If her body does re-surface and doesn't get blown to the shore it will eventually lose gases keeping it afloat and it will sink again.

- [18] He produced statements, the Police Report, photographs and missing persons report, the note left by Kelly Fitzgerald, the diary entry made by Kelly Fitzgerald, the ESR toxicology report and the job sheets from the Police National Dive Squad Search efforts, maps of the Lake, job sheets and notebook entries and a book of photographs.
- [19] He subsequently confirmed in a Deposition in May 2010 and then by letter in October 2010 that despite further inquiries Kelly Fitzgerald's body has not been found. It was also clear from the information that there was a strong bond between Kelly Fitzgerald and her child and the Court draws the inference and one of the indicia in her being dead is that she has made no contact at all with her child since the day she disappeared. The Court deliberately waited a significant period of time after the Inquest and received further evidentiary updates to confirm she was not located.

## **LEGAL POSITION**

- [20] The Court has left the final determining of these Findings for some time to allow further time to elapse between when Kelly Fitzgerald went missing and these formal Findings. The family were advised at the Inquest that the Court's preliminary view was there was little doubt that she had taken her own life and she had died on the day she disappeared at Lake Tikitapu.
- [21] Since then however, the Court has conducted very considerable research on the area of the Law of Missing Persons, has received Legal assistance from Research Counsel attached to Coronial Services Unit. The Court has also worked closely with the Rotorua District Community Law Centre and their Lawyer Mr Semisi Pohiva who has a Master of Laws with Honours and a Bachelor of Social Science. The Court is grateful to their assistance in the research they have provided.

## **Family Proceedings**

- [22] The families of missing persons may be assisted to move on in three areas of the Law. The Family Proceedings Act 1980 allows the declarations to be made to the effect that the other party of the marriage (or Civil Union) can be presumed dead if the Court is satisfied that the missing person is dead.

- [23] The High Court under its 2009 Rules, may also make an order that a person be presumed dead for the purposes of granting Probate.
- [24] There is wide power however to Coroners within their Jurisdiction to determine on the basis of the evidence presented whether or not a person is dead.
- [25] The situation of missing persons and presumption of death is where no physical body is found. It is a misconception that there needs to be a waiting period of seven years before a missing person can be legally declared dead.
- [26] Under the Family Proceedings Act 1980 (FPA) the Court has discretion to make a declaration that the other party to a marriage (or Civil Union) is presumed dead if reasonable grounds exist for presuming the death. Those reasonable grounds have been held to be where the other party has not been seen for a number of years. Usually extensive inquiries would need to be established, advertisements, and matters of that sort. This type of application is only for the purpose of dissolving a marriage. Under the (FPA) the reference to a 7 year evidence gap is applicable where there is insufficient evidence, or no contact from either party, so that a person can be presumed dead. In other words the absence itself at 7 years is evidence.
- [27] But the Act only applies to those who are married or in a Civil Union. It does not provide an avenue for parents, children, brothers and sisters. So it is not applicable to other family type relationships where there is no marriage or union to the missing person.

### **High Court Rules**

- [28] There is power for the High Court on Application for Probate of a Will to make an Order where the executor of a missing person's estate can swear the person is dead. With no dead body the applicant applies for Leave to Swear death and evidence is presented by affidavit which covers such things as the circumstances in which the application is made, the facts in which the Court is invited to infer death and whether or not there is any insurance. In some cases an Order can be made that the person is dead rather than presumed to be dead, where it is very clear and beyond any possible doubt that the person is dead.

[29] In situations however, where a person is missing, it would be difficult to prove beyond any possible doubt, if there were no witnesses to the circumstances leading to their death. That may arise for example in a drowning where a person was seen to go under the water but in a vast majority of cases there are no direct witnesses, although in many cases there is overwhelming circumstantial evidence to point to the inevitable conclusion.

## **CORONERS ACT 2006**

[30] It is clear to the Court from Section 42 that it has the power to establish, so far as possible, that a person has died. The Coroner may open and conduct an Inquiry in order to determine this fact.

[31] In the case of Kelly Fitzgerald there is no physical body which would cause the death to be reported to the Police and then to the Coroner. That should not be interpreted to mean that because a person is missing that the “death” should not be reported.

[32] It is clear under the Coroners Act that a death must be reported to a Coroner when a body is found. The question is whether a body can be reported when it has not been found. There is Jurisdiction, in the Court’s view, to Inquire into missing persons when no body is found by virtue of Section 59 of the Coroners Act 2006. That Section says “a Coroner to whom a death is reported under Section 15 (2) (a) or Section 16 (2) (b) must not open an Inquiry into it unless:

(b) the Coroner is satisfied that it is likely that the person concerned is dead, and that the person’s body –

- (i) Is destroyed, irrecoverable or lost; but
- (ii) Was in New Zealand immediately before it was destroyed, or became irrecoverable or lost.

[33] One of the key words in that phrase in the Legislation is the word “likely”. That is the Coroner may open an Inquiry if he or she is satisfied that it is likely the person concerned is dead and that the body is destroyed, irrecoverable or lost. The pre-requisite to that is that the body must be in New Zealand immediately before that occurred.

- [34] In the Court's opinion a missing person maybe reported to a Coroner as a person presumed to be dead and there is no time limit in doing that. Ipso facto if the circumstances are such that it seems very clear the person is dead then there is no need for there to be any delay. The powers vested in a Coroner to open and conduct an Inquiry and the criteria are wide including under Section 63 (f) "any other matters the Coroner thinks fit".
- [35] It needs to be remembered that if there is a failure to report a presumed death to a Coroner in a timely manner it may significantly affect the availability and quality of evidence to be considered. That was very much the situation in the Findings of Coroner Evans in the 1999 case of Lee Hazel Jean Latta <sup>(1)</sup> In this case there was no report in a timely manner of a presumed death to the Coroner and it meant for 50 years the family had no death certificate and by that time the Police missing persons file had become destroyed.
- [36] A Coroner's discretion is wide and is not bound by the rules of evidence because of the Inquisitorial Nature of the Coroner's Court. The standard of truth required is the balance probabilities having regard to the scale set in Briginshaw <sup>(2)</sup>.
- [37] In the Court's view, if the circumstances of the disappearance are clear, it is reasonable to make a Finding of fact that the missing person is dead.

### **Factors to be Considered**

- [38] From a review of the cases of relevant missing persons and relevant texts it is considered the factors relating to the facts and circumstances of the disappearance include:
- a) Time, date and place of disappearance
  - b) Witnesses and quality of evidence

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(1) Lee Hazel Jean Latta – Findings of Coroner (8th March 1999), Coroners Court, Wellington, Coroner G L Evans

(2) Briginshaw v Briginshaw (1938) 60 CLR 336

- c) Causes or likely causes of the disappearance
  - Self inflicted or a suggestion of
  - Lost/misadventure which raises the question of how familiar the person is with the area of disappearance
  - Dependant on medication or non dependant abuse of drugs
  - Any other contributing factor that leads to a cause of disappearance
- d) Disaster
- e) Medical evidence
- f) Witnesses and informant. This includes any person present at the death. Taking charge of the body at some stage or the disposal of the body.
- g) Identification of the belongings of a missing person
  - Information from relatives regarding personal affects
  - Bank account documents and passports
  - Photographs
- h) Family members – Inquiries made by family members
- i) Any contact made with a family member
- j) The extent of the search by the family members
- k) Police and other authorities. Extent of their searches and inquiries
- l) Persons financial situation – bank and credit card records:
  - Any debts owing
  - Employment history
  - Life Insurance

[39] In applying those factors to the evidence before the Court, and now given the time that has elapsed between the date of death and these Findings, and the publicity given to this death by local media, the Court concludes that Kelly Marie Fitzgerald is dead and in the Court's view took her own life in Lake Tikitapu on the 10<sup>th</sup> August 2009.

[40] I find that Kelly Marie Fitzgerald died on 10<sup>th</sup> August 2009 in Lake Tikitapu (The Blue Lake) from presumed drowning and exposure, her body having never been found.

[40] That completes this Inquest. The condolences of the Court are extended to the family of Kelly Marie Fitzgerald.

Signed by the Coroner at Rotorua on this 21<sup>st</sup> July 2011

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Coroner Dr Wallace Bain