JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 2/2002

BEFORE: **THE HON MR. JUSTICE BINGHAM. J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

M.W.	**Appellant**
v.	
P and Another	**Respondent**

Mrs. Dale Porter-Greenwood, instructed by Brown, Godfrey and Morgan for the appellant

Debayo Adedipe for the respondent

April 4 and October 15, 2003

BINGHAM, J.A.

I have read the draft judgment written by Panton, J.A., and agree with the reasoning and conclusion.

PANTON, J.A.

1. On April 4, 2003, we heard this appeal and reserved our judgment. The matter had been dismissed for want of prosecution on the 1st October, 2002, when no parties appeared. It was however re-listed by an order of this Court made on December 16, 2002.

The appeal is against a refusal of His Honour Mr. Oswald Burchenson, Resident Magistrate for the parish of Manchester, to revoke an adoption order made on the 19th April, 2000. The learned Resident Magistrate found that he had no jurisdiction to revoke the order.

2. The appellant has challenged the decision by filing grounds of appeal which complain that:

(i) the Resident Magistrate had jurisdiction by virtue of section 20(1) and section 20A(1) of the Children (Adoption of) Act;

(ii) the Resident Magistrate should have adjudicated on the matter and revoke the adoption order as the order was obtained in breach of the principles of natural justice as the appellant was never afforded the opportunity to be heard; and

(iii) the relevant agencies of the state failed to properly discharge their functions thereby causing the order to be made without full disclosure of and due consideration of all the facts.

3. The circumstances of this case are quite unusual. The records indicate that on the 19th April, 2000, His Honour Mr. Bertram Morrison, Resident Magistrate for Manchester, granted to Mr. P.P. and his wife Mrs. S. P. business operators, "permanent transferral of parental rights" in respect of a female child, named M. W. , resident in Manchester. The adoption order directed the Registrar General to record the adoption in the Adopted Children Register and to name the adopted child M. S. P., giving her date of birth as October 18, 1997. On August 17, 2000, the appellant, who is the natural mother of the child, filed an

application in the Resident Magistrate's Court for the adoption order to be revoked and for full parental rights to be restored to her.

4. During the hearing of this application, evidence was produced indicating that the child was born at the Manchester Public General Hospital, to the appellant, Miss M. W., and Mr. B. W. The birth registration form does not provide any particulars in respect of the father, but it shows the child as having been named A. W. It appears that the birth was registered on March 19, 1997.

5. The appellant lived with her daughter A. at the home of Miss P. W. (the appellant's mother) in the parish of Manchester. In December, 1998, the appellant indicated to Mr. W. that she intended to take up employment in Curacao. They discussed the idea of the child residing with her grandmother P. W. but Mr. W. told the mother that he had made other arrangements for the child's accommodation and welfare. On December 28, he took the child on the understanding that he would return her on December 30. The child was not returned. His explanation for this failure was that she was with the person who would be caring for her in the appellant's absence. After discussions between the parents, it was agreed that the child would be returned on January 3, 1999, for the appellant to see her before the former left the jurisdiction. Although both parents saw each other on the agreed date, there was no sight of the child, and the appellant left the country on January 4, 1999.

6. At the suggestion of the appellant, her mother tried to locate the child. In so doing, she sought the assistance of the pastor of her church. The pastor

interviewed Mr. W. who informed him that he had taken the child to the Williamsfield Police Station and reported that he had found her abandoned in the area. The Police had then advised him to take the child to the New Hope Childrens' Home. This, he did and, there, the child was renamed M. The child was subsequently brought before the Juvenile Court and made a ward of the state. Efforts by the Children's Officer to find the parents proved futile. In that situation, Mr. and Mrs. P., who live in a district adjoining that in which the child and her mother and grandmother lived, came into the picture as proposed adopters. They received high ratings from the Children's Officer who formed the opinion that they were in a position to offer the child a stable home environment, love, attention, care and the necessary financial and emotional support. Subsequently, her grandmother identified her and reported the matter to the Mandeville Police who arrested and charged Mr. W. for creating a public mischief. He pleaded guilty to the offence and was fined. During the month of May, 2000, the appellant returned to Jamaica and filed the application for the adoption order to be revoked.

7. His Honour Mr. Burchenson, having considered the application, ruled that he had no jurisdiction to revoke the adoption order; and he held that the word "revoke" in section 20A(1) of the Children (Adoption Of) Act bore reference to revocation by the Court under section 19A. The learned Resident Magistrate commented that the evidence indicated that:

> "The agency of the State fixed with the responsibility of carrying out the necessary investigation to

> ascertain the identity of the infant leaves much to be desired and this Court is not sure whether such enquiry would not have led to the identity of the infant's parents".

He further observed that it was unclear whether the grandmother, Miss P.W., had launched an enquiry and made contact with the Children's Services Division before the adoption order was made. The learned Resident Magistrate also found that the procedures followed by the Adoption Board and the adoptive parents were correct.

8. Mrs. Porter-Greenwood did not bother to file skeleton arguments in this matter. This was so, although she had ample time to comply with this requirement of the Court of Appeal Rules. Attorneys who, without very good reason, ignore the Court of Appeal Rules are hereby advised to mend their ways as the Court will not for one moment countenance defiance of the Rules. Public rebuke is one option that the Court would not necessarily wish to use.

9. In her oral submissions, Mrs. Porter-Greenwood referred to the fact that section 9 of the Children (Adoption Of) Act gives the Resident Magistrate's Court the power to make adoption orders. "Inherent in that grant", she said, "is the power to revoke". The learned Resident Magistrate had erred, she said, in regarding the reference to revocation in section 20A as a reference to section 19A. She said that this should not be so interpreted as the Court must be regarded as having jurisdiction to revoke where the order has been made as a result of fraud or material non-disclosure. She cited the case **Robinson v. Robinson** (1982) 2 All ER 699 at 700b. There, a passage from Lord Diplock's

judgment in **de Lasala v. de Lasala** (1979) 2 All ER 1146 at 1155, is quoted. It reads:

> "Where a party to an action who seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issue raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing fresh action to set it aside".

The decision of the Court, she said, was a nullity so the learned Resident Magistrate was in error in saying he had no jurisdiction as the order could have been set aside ex debito justitiae. She cited three other cases, namely, **Re F.(R)(an infant)** (1969) 3 All E.R.1101; **Re M.(Minors)(Adoption)** (1991) 1 FLR 458; and **Re B** (adoption order: jurisdiction to set aside) (1995) 3 All E.R. 333.

10. In **Re F** and **Re M**, the matters under consideration by the English Court of Appeal were applications for leave to appeal out of time with a view to challenging the adoption orders that had been made. In the former, an adoption order had been made without the knowledge of the child's mother. On learning of the order, she took immediate steps to appeal. The order was set aside and the case remitted to the county court for reconsideration in the circumstances. In the latter, the appeal was by the children's natural father and was on the basis that he was ignorant as to a material fact in respect of the children's natural mother's health. The children had been adopted (with the natural father's consent) by the natural mother and her second husband. The natural mother

died three months after the making of the adoption orders, and their natural father, his second wife as well as the adopted father were all agreed that it was in the best interests of the children if they were to live with their natural father and his second wife. This, incidentally, was also the wish of the children.

Glidewell, L.J., at page 459H to 460A, cautioned against the use of this case as a precedent. He said:

> "I should say, as a postscript, that this is, if not unique, at the very least a wholly exceptional case. I say that because I do not want the setting aside of this adoption order in these circumstances to be thought of as being some precedent for any related set of facts in some other case. That is, happily, a most unusual case and, in the circumstances and for the reasons I have sought to give, I think it right that the appeals should be allowed".

Butler-Sloss, L.J. at page 460B said:

> " I also agree, and would only underline the most unusual features of this case and would again respectfully underline what Glidewell, L.J. has said, that this is in no way a precedent for any other adoption case, and these are quite exceptional circumstances".

Neither **Re F** nor **Re M** may be regarded as supportive of the proposition that a Resident Magistrate in Jamaica has the jurisdiction to set aside an adoption order made by another Resident Magistrate.

11. **Re B** does not seem to be of any help to the appellant's cause either. The applicant was born in 1959 to an English mother and a Muslim Arab father from Kuwait. Three weeks after his birth, he was placed for adoption. Through an error, he was placed with a Jewish couple and an adoption order was made in

July, 1959. He was brought up as a Jew as the adoptive parents thought both the applicant's parents were Jewish. In 1968, the adoptive parents discovered the nationality of the applicant's mother. However, the applicant was received into the Jewish faith and community in 1970. In 1986, the applicant emigrated to Israel where he was subsequently suspected of being an Arab spy, and was told to leave the country. The applicant made enquiries into his background and traced his natural mother who later stated that she would have had serious reservations had she known that the prospective adoptive parents were a working class Jewish couple. The applicant also made contact with his father in Kuwait. The applicant was caused very serious hardship and pain by what had transpired in his life as he was qualified to work in the Middle East and wished to do so, but felt he was neither Jewish nor Arab. In those circumstances, he applied in 1993 for the adoption order to be set aside.

The application was refused on the ground that the court had no jurisdiction to set aside an order that had been regularly made in accordance with the correct procedure. The applicant appealed, contending that the mistake as to his ethnicity went to the root of the adoption order in that none of the parties would have acted as they had done if they had known the true facts; and that the court had an inherent power to set aside an adoption order that had been made under a fundamental mistake of fact.

12. The English Court of Appeal, Civil Division (Sir Thomas Bingham, M.R., Simon Brown and Swinton Thomas, L.JJ.), held that the court had no inherent

power to set aside an adoption order which had been regularly made in accordance with the proper procedure by reason of a misapprehension or mistake by the parties as to the race, ethnic origin or religion of the natural parents of the child. To allow such considerations to invalidate an otherwise properly made adoption order would undermine the whole basis on which adoption orders were made, namely that they are final and for life as regards the adopters, the natural parents and the child and, as such, they could be set aside only in cases where natural justice had been denied; where for example the natural parent who might have wished to challenge the adoption had never been told it was going to happen, or where the order had been obtained by fraud.

The Master of the Rolls had this to say:

> "I was at first inclined to think that the recent case of **Re M (minors)(adoption**)(1991) 1FLR 458 was difficult to reconcile with earlier authority. On further examination of the case, I think this is not so. It was an application to appeal out of time (and an appeal) by the natural father of the children, who had been a party to the earlier proceedings which he now sought to set aside. Time being extended, he was permitted to adduce evidence which put a very different complexion on the facts as they were understood by the judge at the time when the order was made. This being so, it does not appear that the members of the Court of Appeal were opening the door to a new and wide-ranging jurisdiction to set aside adoption orders, but were simply showing a measure of indulgence to an appellant seeking an extension of time. In granting that indulgence the court were no doubt alive to the interests of the children, which would in the circumstances described to the court be much better served by revocation of the adoption order. Even so, the court was at pains to emphasise the exceptional nature of the case which had led it to

> allow the application and the appeal and to discourage reliance on the decision as a precedent. I do not think this decision can properly be treated as modifying in any way the earlier authorities, which were not in any event cited, so far as one can tell from the report. In the end, and much as I would like to help the appellant, I feel that it is impossible to do so without creating a discrepancy between English and Scottish authority, which is in itself highly undesirable in a field such as this, and without a risk of disturbing in a potentially mischievous way the basic assumption upon which the adoption regime is founded in this country".

13. Mr. Adedipe for the respondents emphasised that this was not an appeal against the making of the adoption order, but rather against the refusal of the Resident Magistrate to revoke the order made by another Resident Magistrate. He submitted that the Resident Magistrate being a creature of statute, the question of inherent jurisdiction does not arise. Prior to 1974, he said, there was no power to revoke an adoption order for any reason whatsoever; neither was there a right of appeal. Section 19A of the Act, he said, has created only a limited power to revoke. If Parliament had intended to give a wider power of revocation, it would have done so. Therefore, he urged, the Resident Magistrate was not in error in declining jurisdiction.

14. There is no doubt that the powers and functions of a Resident Magistrate are determined and circumscribed by statute. These powers include the making of adoption orders.

The Children (Adoption Of) Act was assented to by the Governor of colonial Jamaica on the 22nd December, 1956, but it was not brought into operation until

the 2nd January, 1958. As originally enacted, it was known simply as the Adoption of Children Law, 1956. That law specified, in section 14(1), the need for the Court to be satisfied:

- that every person whose consent was necessary under the Law, and whose consent had not been dispensed with, had consented to and understood the nature and effect of the adoption order...;
- that the order would be for the welfare of the child...; and
- that the applicant had not received or agreed to receive, and that no person had made or given or agreed to make or give to the applicant, any payment or reward in consideration of the adoption except such as the Court may have sanctioned.

Section 15(1) provided for the extinguishing of all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, upon the making of an adoption order. Thereupon, such rights, duties, obligations and liabilities vested in and were exercisable by and enforceable against the adopter as if the child were a child born to the adopter in lawful wedlock.

These sections indicated the serious view that the legislature took of the adoption process. Notwithstanding the serious and permanent consequences of the process, the legislature at that time did not empower a Resident Magistrate to revoke an adoption order, whether made by himself or by another Resident Magistrate. Curiously, there was also no provision for an appeal.

15. Sections 14(1) and 15(1) of the original legislation remain untouched. However, in 1974, the legislature introduced several amendments, two of which require mention for the purposes of this appeal. Firstly, section 19A (1) now provides as follows:

> "Where a person adopted by his father or mother alone has subsequently been legitimated on the marriage of his father and mother in accordance with the provisions of the Legitimation Act, the Court by which the adoption order was made may, on the application of any of the parties concerned, revoke that order".

Subsection (2) of the said section provides for the notification of a revocation to be communicated by the Court to the Registrar-General.

Secondly, section 20A(1) provides thus:

> "An appeal shall lie to the Court of Appeal from an order made by any Court referred to in subsection (1) of section 20 (hereinafter referred to as the Court of first instance), or from any refusal to make such order, or from the revocation, revival, or variation of such an order".

The appellant is contending that when sections 19A(1) and 20A(1) are considered together, there is a clear power to revoke and a refusal to exercise that power is subject to appeal. For completeness, section 20(1) has to be set out in order that section 20A(1) may be properly understood. It reads thus:

> " The Court having jurisdiction to make adoption orders under this Act shall be the Supreme Court of Judicature or at the option of the applicant, any Resident Magistrate's Court within the jurisdiction of which either the applicant or the child resides at the date of the application for the adoption order".

So, whereas section 20(1) states the Court having jurisdiction to make adoption orders, section 20A(1) provides for an appeal against the making of

such an order or the refusal to make same as well as the revocation, revival or variation of such an order. This section clearly does not provide for an appeal against the refusal of a Resident Magistrate to revoke an adoption order made by another Resident Magistrate. Further, the contention that section 19A(1) provides such a power is misconceived. Section 19A(1) is specifically providing for the revocation of an adoption order where an individual who has been adopted by his father or mother alone has subsequently been legitimated on the marriage of his father and mother in accordance with the Legitimation Act.

16. In the circumstances, the learned Resident Magistrate was quite correct in declining the legislative jurisdiction and competence which the appellant sought to have him exercise. I would therefore dismiss this appeal with an order that costs $15,000 be paid by the appellant to the respondents.

17. Before leaving this case, however, it is appropriate to mention that we are conscious of the fact that there may be several questions, unanswered so far, in respect of the history of the matter. The appellant may yet attempt to move the Court to grant her leave to appeal the adoption order out of time. If such leave were to be granted, the Court may then be persuaded to view the process of adoption to see whether the appellant has any just cause for complaint in respect of the proceedings before His Honour Mr. Morrison.

SMITH, J.A.

I also have read the judgment of Panton, J.A., and agree with the reasoning and conclusion therein.