[2012] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 54/2005

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**MADGE YOUNG-LEE**	**APPELLANT**
AND	**ZAILIA YOUNG**	**RESPONDENT**

Trevor Ho-Lyn instructed by Ho-Lyn, Ho-Lyn and Morris for the appellant

Leroy Equiano for the respondent

10 May, 18 July 2011 and 30 March 2012

PANTON P

[1] I have read in draft the judgment of my sister McIntosh JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of McIntosh JA and agree with her reasoning and conclusion.

McINTOSH JA

[3] This appeal, brought by Madge Young-Lee against an order issuing out of the Supreme Court on 13 January 2005, by virtue of which it was declared that the relationship of father and child existed between Ethan Dudley Young (deceased) and the respondent, came up for hearing before this court on 10 May 2011 but, as the respondent was unrepresented, the panel deemed it fit to grant her time to settle her representation. To that end the matter was adjourned until she was able to secure the assistance of counsel, after which, time was allowed to file and serve submissions and authorities on her behalf as well as any response found necessary by the appellant. The court indicated that on receipt of the submissions and authorities it would consider the matter on paper and render its decision in writing. This is the promised decision.

[4] The respondent's application for a declaration of paternity was made ex parte, by way of fixed date claim form filed in the Supreme Court on 25 May 2004. At its first hearing on 17 December 2004, the matter was adjourned and an order made for service on the appellant, by registered post, as the administratrix of the estate of Ethan Dudley Young, "at her last known address in the United States of America and any other means permitted by the Civil Procedure Rules (CPR), 2002 within the jurisdiction". The adjourned hearing was set for 13 January 2005 in contemplation of which two notices were mailed by the respondent's attorney-at-law to the appellant, one to an address in the United States of America and one to a local address.

[5] On 13 January 2005, there was no appearance for or by the appellant and, being presented with affidavit evidence of the service of the notices by registered post, complete with an averment that the notices had not been returned, the learned trial judge heard the application and made the following orders:

> "1. Pursuant to The Status of Children Act it is declared that the relationship of father and child existed between the deceased Ethan Dudley Young and the Claimant Zailia White nee Young during the said deceased's lifetime.
>
> 2. This Order is to be served on Madge Young-Lee who is the Administratrix of the deceased's estate."

In the very brief note of her decision, the learned trial judge stated that this Order was made pursuant to section 10 of the Status of Children Act.

The grounds of appeal

[6] The appellant challenged the procedure adopted by the learned trial judge in dealing with the respondent's application and set out the following grounds in her notice of appeal filed on 22 April 2005:

> "(a) The Order made did not comply with the requirements of section 7 (1) (b) of the Status of Children Act.
>
> (b) That a declaration of paternity under section 7 (1) (b) of the Status of Children Act should not be made ex parte."

In the written submissions advanced on her behalf, however, these were condensed into one ground, namely that "[T]he procedure adopted by the Learned Trial Judge in respect to a matter which would affect the rights in rem of parties was incorrect and should not have been heard by affidavit alone and in the absence of all those persons whose rights would be affected by the making of the declaration". The challenge was therefore concerned with the interpretation of sections 7, 8 and 10 of the Status of Children Act (the Act) and the application of these provisions to the facts of the instant case.

A review of the respondent's claim

[7] The respondent claimed "a declaration pursuant to section 7(1)(b) and section 10(2) of the Status of Children Act that the relationship of father and child exist between the deceased, Ethan Dudley Young and the Claimant during his lifetime". It is therefore necessary to look closely at the provisions of those sections for a proper understanding of the order made by the learned trial judge. The sections provide as follows:

> "7—(1) The relationship of father and child, and any other relationship traced in any degree through that relationship shall for any purpose related to succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, be recognized only if—
>
> (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
>
> (b) paternity has been admitted by or established during the lifetime of the father (whether by one or more of the types of evidence specified by

section 8 or otherwise):

Provided that, if the purpose aforesaid is for the benefit of the father, there shall be the additional requirement that paternity has been so admitted or established during the lifetime of the child or prior to its birth.

(2) In any case where by reason of subsection (1) the relationship of father and child is not recognized for certain purposes at the time the child is born, the occurrence of any act, event, or conduct which enables that relationship, and any other relationship traced in any degree through it, to be recognized shall not affect any estate, right, or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred."

"10.—(1) Any person who—

(a) being a woman, alleges that any named person is the father of her child; or

(b) alleges that the relationship of father and child exists between himself and any other person; or

(c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons, may apply in such other manner as may be prescribed by rules of court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.

(2) Where a declaration of paternity under subsection (1) is made after the death of the father or of the child, the Court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of section 7, whether any of the requirements of that paragraph have been satisfied.

(3) An application under subsection (1)(a) may be made by a woman who is with child, before the birth of the child.

(4) An application may be made under subsection (1) to-

(a) the Resident Magistrate's Court for the parish in which any of the parties reside or, as the case may be, the Family Court; or

(b) the Supreme Court."

[8] Proof that "paternity has been admitted by or established during the lifetime of the father", for the purposes of section 7(1)(b), is therefore required to be in accordance with the provisions of section 8 which are set out below:

"8.—(1) If, pursuant to section 19 of the Registration (Births and Deaths) Act or to the corresponding provisions of any former enactment, the name of the father of the child to whom the entry relates has been entered in the register of births (whether before or after the 1st day of November, 1976), a certified copy of the entry made or given in accordance with section 55 of that Act or sealed in accordance with section 57 of the said Act shall be *prima facie* evidence that the person named as the father is the father of the child.

(2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of an attorney-at-law or a Justice of the Peace or a Clerk of the Courts or a registered Medical practitioner or a minister of religion or a marriage officer or a midwife or the Headmaster of any public educational institution as defined in the Education Act be *prima facie* evidence that the person named as the father is the father of the child."

Section 7(1)(b) also permits, in proof of the existence of the relationship, other evidence of the type specified in section 8 and section 8(4) provides that:

> "(4) Subject to subsection (1) of section 7, a declaration made under section 10 shall, for all purposes, be conclusive proof of the matters contained in it."

[9] Mr Ho-Lyn correctly submitted that the purpose of the respondent's claim was to establish her entitlement to the estate of the deceased. Her affidavit evidence made that clear, hence her reliance on section 7(1)(b) of the Act and in that regard she supported her application with affidavits from persons who averred that to their knowledge the deceased had acknowledged that the respondent was his daughter and treated her accordingly. There was also an affidavit from her mother, Lindel Clarke who spoke to the relationship between the deceased and herself resulting in the birth of the respondent and, in her own supporting affidavits the respondent exhibited a will purportedly made by the deceased in which she was named as one of the beneficiaries and a settlement deed in which she was named as his daughter. Probate of the will was not pursued, Mr Ho-Lyn submitted, as it was found to be defective. Instead, the sister of the deceased sought and was granted letters of administration in 2001 to the certain knowledge of the respondent who referred to it in her affidavit. It was against this background that the learned trial judge adjourned the first hearing of the respondent's fixed date claim form to 13 January 2005 and ordered that the administratrix of the estate be notified of the adjourned

hearing.

The appeal

[10] Mr Ho-Lyn's complaint is substantially concerned with the procedure which the learned trial judge employed in arriving at her decision to grant the respondent's application when the matter came back before her on 13 January 2005. It was his contention that the respondent's application, being concerned with succession to property, was not to be heard ex parte. All parties with an interest in the outcome of the application should have been notified and in this case that was not done. It was incumbent upon the learned trial judge, counsel contended, to have exercised more vigilance in ensuring that the rights of those persons were protected.

[11] Counsel submitted that a distinction must be drawn between an application of the kind made by the respondent and one where no inheritance rights were involved. Finding no supporting local authorities for this submission, he turned to two cases from the Court of Appeal of St Vincent and the Grenadines, namely ***David Adolphus McKenzie v David Sampson,*** Civil Appeal No. 12/2003, delivered 29 March 2004 and ***Olive Clarke v Alicia Bella Mary Gellizeau,*** Civil Appeal No. 13/2003, delivered 5 December 2005 both being concerned with the interpretation of provisions of the Status of Children Act in that jurisdiction which is similar to the Jamaican Act. For my part, the provisions of the Act set out above make it clear that a distinction is to be made

between two categories of paternity declarations, namely declarations where the applicant seeks only to establish that the relationship of father and child exists (see section 10(1)(b)) and those contemplated by section 7(1)(b) of the Act and I am fortified in this by the similar views expressed in the aforementioned cases, which in my humble opinion, were rightly formed.

[12] I also share the opinion of the Court of Appeal expressed in the two cases under reference that each category of paternity declaration requires a different standard of proof with the declaration contemplated by section 7(1)(b) attracting a higher standard, as is evident from the provisions of section 8 of the Jamaican Act. Mr Ho-Lyn contended that this higher standard of proof requires that the section 7(1)(b) type of application be heard inter partes and not ex parte so that all interested parties should be notified. It is to be noted that ***David Adolphus McKenzie v David Sampson,*** and ***Olive Clarke v Alicia Bella Mary Gellizeau,*** were contested cases and the Court of Appeal was concerned, inter alia, with considerations of the standard of proof but, in the instant case, which was described by the learned trial judge as uncontested (and certainly neither the estate nor interested parties were represented), the question of whether the standard of proof was met by the respondent appeared not to have been considered.

[13] Although he did not specifically address the issue of the distinct categories of paternity declarations and their separate treatment, Mr Equiano submitted

that the judge had the jurisdiction to hear the application and to make the declaration whether or not any consequential relief is claimed. That, I think, is beyond question but that is not the issue here. As he submitted, rule 8.6 of the CPR, does provide that "[a] party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed" but did this rule provide for the procedure to be followed, leading to the grant of the declaration? Mr Equiano submitted that it was a matter for the trial judge's discretion whether the application was heard *ex parte* or *inter partes* and for this submission, he relied on Lord Hoffmann's opinion in ***National Commercial Bank v Olint*** PCA No 61/2008, delivered 28 April 2009 particularly as expressed at paragraph [13] where Lord Hoffmann disapproved of the practice in this jurisdiction of making ex parte applications but recognized that "…the matter is in the end one for the discretion of the judge…". In the instant case, counsel said, it may have been more desirable to have had all parties present or informed but it was within the discretion of the judge to deal with the matter in their absence. The learned trial judge had recognized that there may be an interested party in this case, counsel argued, hence her order for service of the notice of the adjourned hearing on the administratrix of the estate. It was his contention that the learned trial judge had exercised her discretion in favour of the respondent only after being satisfied on affidavit evidence that the administratrix was served by registered post and this was a judicial exercise of her discretion.

[14] I am unable to accept that the procedure to be followed in these applications is dependent on the discretion of the learned trial judge in light of the regime set out in the Act. A declaration for the purposes of recognition of paternity in cases of succession to property is governed by section 7 while a simple declaration of paternity, that is, a declaration *simpliciter*, without more, is by virtue of the provisions of section 10(1). In my opinion, Mr Ho-Lyn's submission that the procedure is dictated by the provisions of the Act and not by the trial judge's discretion is therefore sound.

[15] It was clear that there were persons with an interest in the outcome of the application and they were easily identified so that it was not correct to say, as Mr Equiano seemed to suggest at paragraph [14] of his written submissions, that there were no identifiable interested persons. They were the beneficiaries under the grant of the letters of administration whose rights would be affected by a declaration involving succession to the property of the deceased and the application ought not to have been heard in their absence, particularly in circumstances where the respondent allowed so much time to pass before making her bid. She disclosed in her affidavit evidence that the deceased died in 1993 and she gave no explanation for her delayed application which was only made in 2004, allowing for sufficient time for the estate to have been administered and all the assets distributed. Apart from any other consideration,

the interests of justice required that these persons be afforded an opportunity to be heard.

[16] Mr Equiano quite correctly observed the absence of any complaint that the appellant had not received the notices that were mailed to her so Mr Ho-Lyn's challenge to the affidavits of service at the addresses stated is entirely without merit. Her failure to attend the adjourned hearing, however, could not affect the rights of the other persons with an interest in the outcome of the application, to be separately notified. If, after service they failed to avail themselves of the opportunity to participate, then, providing all the legal requirements had been met, there would have been nothing to bar the grant of the declaration for the purposes of section 7(1)(b).

[17] Counsel's further observation that the appellant is not challenging the existence of the relationship of father and daughter between the deceased and the respondent was however, incorrect. The notice of appeal stated that the appellant challenged this finding of fact but, essentially, the appeal was more concerned with procedure than the evidence of the relationship and in light of Mr Ho-Lyn's reliance on the case of ***Olive Clarke v Alicia Bella Mary Gellizeau,*** pointing out that the court did not disapprove of ex parte applications for a declaration of paternity where inheritance rights were not involved, the appellant's challenge could be taken to be concerned only with a declaration

which contemplated a claim to the estate of the deceased, without the participation of all interested parties.

[18] In all the circumstances of the case under review, an inter partes hearing was necessary, particularly as the evidence disclosed not only that there were interested persons but that there were issues which would need to be addressed concerning, inter alia, the distribution of the assets under the grant of the letters of administration in the estate of Ethan Dudley Young, the will and the Settlement Deed produced by the respondent, requiring the participation of all the beneficiaries. No serious effort was made in that regard and the learned trial judge's description of the matter as "uncontested" was highly inaccurate, especially in relation to the first hearing date on 17 December 2004, when there was no evidence that any attempt had yet been made to notify even the administratrix.

What was the effect of the order made by the learned trial judge?

[19] In my opinion, the order did not comply with the requirements of section 7(1)(b). The respondent had placed no reliance on the types of evidence specified in section 8 and it was, therefore, for the learned trial judge to determine whether she was satisfied that the evidence adduced by the respondent was of the other type contemplated by section 7(1)(b). In **Re Cato**, St Vincent and the Grenadines High Court Civil Suit No. 43/2000, Mitchell J had interpreted the words "or otherwise" in section 7(1)(b) of the Status of Children

Act in that jurisdiction (the Jamaican Act being similarly worded) to mean "evidence of a type that is similar to the kind of evidence itemized in section 8" and Saunders JA had approved of that interpretation in ***Adolphus McKenzie v David Sampson***. I am persuaded that that interpretation is correct for the reason advanced by Mitchell J who stated as follows:

> "Section 8 would not have been limited, as it was by the Legislature, to forms of documentary admission by the alleged father and findings by a court if the applicant need only produce any lesser type of self serving evidence. In disputed cases, the intention of the legislature appears to have been that only evidence of the type provided for by section 8 or similar types of evidence is to suffice to satisfy the court that the section 8 relationship of father and child was recognized by the alleged father."

[20] In the instant case, the learned trial judge did not indicate which of the types of evidence required by section 7(1)(b) that she accepted in proof of the existence of the relationship. It was not enough for the learned trial judge to state that she was satisfied "that the relationship of father and child existed between the Applicant and Ethan Dudley Young" and to make "the order sought pursuant to Section 10 of the Status of Children Act". The appellant had based her application on section 7(1)(b) and section 10(2), the latter providing for two declarations to be made namely, a declaration of paternity and a declaration, "at the same or any subsequent time" determining "for the purposes of paragraph (b) of subsection (1) of section 7, whether any of the requirements of that paragraph have been satisfied". One aspect of the respondent's application

had therefore not been determined as that second declaration was not made. All that the respondent received by virtue of the learned trial judge's order was a declaration simpliciter and she would therefore need to return to the court for the other declaration before her right of succession to any property of Ethan Dudley Young may be recognized.

Conclusion

[21] In my view, the effect of the foregoing on the appeal as framed would be a determination that the appellant is correct in her submissions that since this paternity declaration involved the rights in rem of parties, it should not be decided on affidavits alone and in the absence of all those persons whose rights would be affected by the making of the declaration. To the extent however, that the learned trial judge must, in these circumstances be taken to have granted a declaration simpliciter, I would not set aside the order as the court merely needed to be satisfied on the evidence that the relationship of father and child existed in order to make that declaration and there was such evidence before her. Since the respondent was really interested in succeeding to property and it appears that the appellant has an interest in that aspect of the application being properly determined I would send the matter back to the court below for a determination as to whether the second declaration should be granted, that court being careful to ensure that the rights of all the interested parties are protected.

PANTON P

ORDER

The appeal is allowed in part. The declaration of paternity granted by the learned trial judge under section 10 of the Act is not recognizable for the purposes of section 7(1)(b) of the Act. The matter is remitted to the Supreme Court for a determination, at an inter partes hearing, as to whether the second declaration under section 10(2) of the Act should be granted