ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 43 OF 2000

In the Matter of the Status of Children Act
Chapter 180 of the 1990 Revised Laws
of Saint Vincent and the Grenadines

and

In the Matter of Applications on behalf
of Wendy Hilda Carter nee Marsden
and
Michelle Amanda McCree
for Declarations of Status

Appearances:
Stanley K John for the Applicants
Dr Kenneth John for the Opposant Advira Bennett

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2000: March 9, July 28, November 3
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DECISION

[1] MITCHELL, J: These are two separate applications for declarations of status under the Status of Children Act, Cap 180 (hereinafter "the Act") made on one originating summons issued on 25th January 2000, presumably because the alleged father was the same person. The applications are for declarations that the late Robert Milton Cato was the father of both applicants. The further application by both applicants is that the court find that the requirements of section 7(1) of the Act have been complied with.

[2] Michelle Amanda McCree. This applicant was born in England on 31st January 1967 and presently resides in Toronto, Canada. The evidence in support of the applicant consists of her own affidavit of 25 January 2000, and that of her mother Stella McCree, formerly of St Vincent but presently residing in Canada. There is

also an affidavit of Hermie Miller of Fair Hall in St Vincent, a clerk in the Chambers of Mr John exhibiting a copy of a Notice published in the Vincentian Newspaper on 28th January to the effect that this application and that of the other applicant Wendy Hilda Carter will be made before the High Court, and giving two weeks for anyone to make objection. A summary of the evidence on behalf of this applicant is that the mother claims to have had an intimate relationship with the late Mr Cato in St Vincent prior to her departure for Canada in 1958. In 1963 she had gone to live in the United Kingdom. In 1966, while the mother was in England, she had been visited by the late Mr Cato, and the result was the birth of the applicant. The mother claims that the late Mr Cato sent her letters, telegrams, messages and money, and always acknowledged that the applicant was his daughter. I note in parenthesis that none of these documents referred to are exhibited. The evidence continues that the late Mr Cato's name was not placed on the birth certificate because it was not deemed prudent to do so given his political profile in St Vincent. Indeed, the court is aware that the late Mr Cato went on to be the first Prime Minister of an independent Saint Vincent and the Grenadines. The applicant claims that the late Mr Cato frequently visited her and her mother in Canada, and on her visits to St Vincent in 1974 and 1991, and always acknowledged her as his daughter. There is no corroboration of this claim that would be acceptable in a Magistrates Court on affiliation proceedings.

[3] Wendy Hilda Carter Nee Marsden. This applicant lives at Ashton under Lyne in Lancashire in England. She was born in that city on 24th October 1944 while her mother was married to George Marsden. George Marsden's name is given on her birth certificate as her father. Both her mother and her husband have now died. The evidence in support of her application consists of her affidavit of 25th January 2000, and two affidavits of Lucy Ann Cato of Ratho Mill, the widow of the late Mr Cato the one of 15th March and the other of 9 June 2000. Advira Bennet, the mother of two children sired by the late Mr Cato, filed an affidavit of 10th February 2000 in opposition to her application. The evidence in support of the application can be summarised as follows. The applicant's mother and her mother's husband

were Caucasians. The late Mr Cato was a Black West Indian. The applicant was brought up as the daughter of George Marsden, but she was always aware of the distinctive physical differences in the racial characteristics of her two sisters and herself. After George Marsden's death in on 12th March 1989, her mother told her that her natural father was a Mr Cato of St Vincent whom she had known briefly in England during the war as a member of the Canadian Armed Forces in England. Mr Marsden had known that she was not his daughter, but had gallantly accepted her as his in order to preserve the marriage. The applicant had then made enquiries in St Vincent and obtained Mr Cato's address. She had written to Mr Cato in 1991 introducing herself to him. She had subsequently visited St Vincent and met Mr Cato and his wife, and had been introduced by them to other family members and friends as Mr Cato's natural daughter. Mrs Cato's two affidavits filed on behalf of this applicant confirm her story. The ground for the objection by Advira Bennett is not stated, she merely says she objects to the application and puts in a copy of the applicant's birth certificate, but can be deduced to be that the applicant is the legitimate child of George Marsden and his wife.

[4] The Law. The long title of the Act is, "An Act to remove the legal disabilities of children born out of wedlock and to provide for matters connected therewith or incidental thereto." Section 6(1) of the Act provides under the heading Presumption regarding parenthood of child born during marriage as follows:

> A child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband or former husband, as the case may be.

[5] Section 7 of the Act, where relevant, under the heading Recognition of paternity required in cases of succession, etc, provides as follows:

(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 which devolves after the commencement of this Act or to the construction of any will or other testamentary disposition or of any instrument creating a trust operating after such commencement, be recognised only if:

(a) . . .

(b) the 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, . . .

(2) In any case where by reason of subsection (1) the relationship of the father and child is not recognised 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 recognised shall not affect any estate, right or interest in any real or personal property to which ay person has become absolutely entitled, whether beneficially or otherwise, before the act, event or conduct occurred.

[6] Section 8 of the Act under the heading Evidence of proof of paternity provides:

(1) If pursuant to the provisions contained in the Registration of Births and Deaths Act, or under any other law, 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 commencement of this Act) a certified copy of the entry made or given in accordance with any provision made by or under that

Act shall be *prima facie* evidence that the person named as the father is the father of the child.

(2) The entry in the register kept by any minister of the Christian religion before the 29th June, 1867, and all copies and extracts therefrom duly certified as provided in the Registration of Births and Deaths Act, showing the name of the father of the child to whom the entry relates, shall be *prima facie* evidence that the person named as the father is the father of the child.

(3) 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 by each of those persons in the presence of a notary public, commissioner for oaths, justice of the peace, registrar of the courts, registered medical practitioner, marriage officer, midwife or the head of a public educational establishment, be *prima facie* evidence that the person named as the father is the father of the child.

(4) An affiliation order, within the meaning of any written law, made in any proceedings between the parties, shall be *prima facie* evidence whether or not between the same parties.

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

(6) An order made in any state outside Saint Vincent and the Grenadines declaring any person to be the father or putative father of a child, being an order to which this subsection applies pursuant to subsection (7) shall be *prima facie* evidence that such person is the father of the child.

(7) The Minister may, by order, declare that subsection (6) shall apply with respect to an order made by any court or public authority of a state outside Saint Vincent and the Grenadines or by any specified court or public authority in any such state.

[7] Section 10 of the Act under the heading Declaration of paternity provides:

> (1) Any person who
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> (1) being a woman, alleges that any named person is the father of her child;
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> (2) alleges that the relationship of father and child exists between himself and any other person; or
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> (3) being a person having a proper interest, wishes to have it determined whether the relationship of father and child exists between two named persons,
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> may apply, in such manner as may be prescribed by rules of court, to the High 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.
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> (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 section 7(1)(b), whether any of the requirements of that paragraph have been satisfied.

[8] Section 17 of the Act under the heading Regulations generally provides as follows:

> (1) The Minister may make regulations for all or any of the following purposes:
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> (a) prescribing fees and forms for the purposes of this Act;
>
> (b) providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

(2) . . .

(3) . . .

[9] The Minister has made no regulations under the Act, despite the passage of some 20 years since the Act was passed into law. This is a grievous omission that causes the court to have to fall back on general principles of construction and interpretation, which may in certain instances have the unfortunate consequence of being viewed by some as not carrying into effect the undoubted enlightened intention of the Legislature in passing this Act. It is high time that the Minister corrected this omission.

[10] The Procedure. The procedure followed in these two applications was to apply by originating summons as provided by Order 5 Rule 3 of the Rules of the Supreme Court. No parties are named in the summons. When the alleged father is alive, and affiliation proceedings are commenced under section 16 of the Maintenance Act Cap 171, (hereinafter "the Maintenance Act") the mother applies by way of complaint for a summons by the Magistrate to be served on the man alleged by her to be the father of the child. He is given an opportunity to be heard and to either admit or deny the claim. The basic rule of natural justice is served in proceedings in the Magistrates Court. It has not been indicated whether or not Mr Cato died testate or intestate, and in consequence whether or not any Executor of his Will or Administrator of his Estate has been appointed. The finding by this court in these proceedings brought under the Act may have material consequences on the distribution of the estate of the deceased. Applications of this sort, though not necessarily these two particular applications, are not always made only for the sentimental reason of knowing who one's father is, they are sometimes made for the cold hard reason of allowing one to participate in the estate of a deceased person. In a contested case, the court will hardly be in a position to make an order binding on the estate of a person if that estate is not represented in the suit. If the alleged father has no Executor or Administrator or other personal representative, then the usual application in civil proceedings in the

High Court will always have to be made under the provisions of Order 15 Rule 15 for some person to be appointed to represent the estate of the alleged father for the purpose of the proceedings brought on behalf of the alleged child. There may not always, as in this case, be a widow or lawful child conveniently available to be appointed. It may be necessary to go further afield to a brother or sister or cousin to be appointed. There is no public trustee or public administrator in St Vincent who can be appointed. Even if there were, the human and financial resources of the legal departments of the government of this State are such that I cannot see the justice in appointing such a public official. It is far more practicable in our circumstances to make the family members of the parties bear the responsibility for the disposition of the estate of the deceased. The personal representative having been appointed and served with the proceedings, the deponents will attend the hearing to give any further evidence and be cross-examined on behalf of the alleged father and any other interested party. In the absence of any regulations made by the Minister to the contrary, it is clearly necessary in the interests of justice that in applications under the Act the deceased's estate be made a party to the proceedings.

[11] It appears from the file that the procedure has grown up in these matters of the proposed applicant placing an advertisement in a newspaper of the intended application at the time that the application is being filed in the High Court. This is not an acceptable alternative to having the estate of the alleged father made a party to these proceedings and serving the proceedings on that party. If, in a proper application for substituted service, the court is made aware that an alleged father is dead and has no personal representative in the country, nor any person who may properly be made a personal representative to represent the interests of the estate, then it is conceivable that the court may order the proceedings to be served on a representative of the estate not resident in the jurisdiction by publication in a newspaper or by some other appropriate form of substituted service. It is not acceptable for the proposed applicant unilaterally to publish a notice of an intended application in a newspaper. In a contested case under the

Act, the court must be satisfied that not only is the mother or the child the applicant, and the father or estate of the father the respondent, but that the proceedings have been properly served on him or on his personal representative if he is dead. The society at large has an interest in the proper, fair and just disposition of the estates of deceased persons. All persons who are claimants on the estate ought to be made aware of a particular claimant so that they can present their support or objection to the particular claim. For this reason, it is likely that the court may as part of its routine procedure order that an announcement of the claim by the claimant be published in a local or other newspaper. The publication of such a notice should await the order of the court and comply with any directions that the court may give. It is not appropriate or a satisfactory substitute for publication on the directions of the court for the claimant or anyone else to unilaterally take it upon themselves to publish a notice of the claim in a newspaper.

[12] The Evidence. It has been submitted on behalf of the applicants that, unlike in the Maintenance Act, no corroboration is required in claims brought under the Status of Children Act. The familiar rule for corroboration in affiliation cases is found in section 18 of the Maintenance Act. It provides that

> (1) On hearing of a complaint under section 16, the court may adjudge the defendant to be the putative father of the child but shall not do so unless, if the mother be alive and of sound mind, she gives evidence and her evidence is corroborated in some material particular by other evidence to the satisfaction of the court.
> (2) Where the court has adjudged the defendant to be the putative father of the child it shall make an order, called a paternity order, to that effect.

A single woman making an application under section 16 of the Maintenance Act is required by section 17 to make an application for an affiliation order within 5 years of the child's birth or within 5 years of the father last supporting the child. One of the usual explanations for this and other similar time limits on bringing proceedings is the need to ensure that the dispute is brought to court while the memories of the witnesses are fresh, and before the testimony of possible witnesses disappears. No similar time limit is placed on the High Court in applications under the Status of Children Act. Indeed, the latter Act specifically omits any mention of a time limit to bring applications under it. The Maintenance Act was enacted on 27th December 1989. The Status of Children Act came into effect on 1st July 1980. They appear to have been two parts of a single reform effort in relation to the rights of children in St Vincent and the Grenadines. The two Acts contain no contradictory provisions, but rather appear to be part of a modern general scheme of provision for paternity orders and other rights relating to children born out of wedlock. Affiliation proceedings in the Magistrates Court are described by lawyers as "quasi criminal" proceedings. This is because, although the matter is a family matter and not a criminal matter, both the proceedings and the standard of proof in affiliation matters are of a criminal nature, in particular the forms for the complaint and the summons are the criminal forms and the mother has to prove beyond reasonable doubt to the Magistrate that the man is the father of her child. In a paternity application under the Act, the standard of proof is the civil standard of on a balance of probabilities. The standard of proof required in the Magistrates Court in affiliation proceedings is thus greater than the standard of proof required in the High Court in applications for paternity declarations. Corroboration is not a requirement under the Act, as it is in affiliation proceedings.

[13] It has been submitted that the forms of evidence mentioned in section 8 as being *prima facie* evidence of paternity are not exclusive, and other lesser kinds of evidence will suffice, so that the evidence of the mother and child and others as to loving acts of acceptance of paternity by the father during his lifetime will suffice.

In support of this proposition, it has been submitted that section 7(1)(b) makes reference to "evidence specified in section 8 or otherwise." Do the words "or otherwise" in section 7(1)(b) permit the court to find evidence of a lesser kind than those itemised in section 8? Or, does the Act require the High Court to look for types of evidence such as those itemised in section 8? Section 8(1) provides that if the name of the father has been entered on the birth certificate that shall be *prima facie* evidence that he is the father of the child. For the father's name to get on the birth certificate, section 28 of the Registration of Births and Deaths Act, Cap 179, provides three alternative methods for the father to accept paternity. The first is that the father attends together with the mother at the time the registration of birth is being made and both jointly sign the form and the counterfoil, or, secondly, there may be a joint declaration in the prescribed form by the mother and the person claiming to be the father made in the presence of a notary public, justice of the peace, or other similar public officer, or, thirdly, one of the two parties may attend before the Registrar and request in writing the registration of the father's name and must at the same time present a declaration by the other of the two parents in the form as above. This is a relatively strict form of procedure for a father to follow if he is to acknowledge paternity at the time of the registration of the birth of the child. And, where the father has taken such a solemn proceeding as that set out in this subsection and in the following subsections, the Act provides that proceeding taken by the father is only *prima facie* evidence, ie, the court may choose to find that there is other evidence which makes it more likely that the man was not the father for the purpose of a paternity order under the Act. Section 8(2) provides for the records kept by ministers of religion prior to 1867 (when presumably compulsory registration of births came into effect in St Vincent and the records of baptisms kept by ministers of religion ceased to be the only record of birth) to be *prima facie* evidence that the person named as the father is the father of the child. This would appear to be of historical interest only, but it is significant that the legislature chose a form of admission made on a solemn occasion such as the baptism of the child to be admissible. Section 8(3) refers to an instrument in the form of a deed signed by both the

mother and the father acknowledging that he is the father being admissible as *prima facie* evidence that he was the father. There can be few forms of acknowledgment more solemn and binding on a person than a deed "signed sealed and delivered" by him and registered in the Registry of Deeds. Section 8(4) provides that an affiliation order made in the Magistrates Court is *prima facie* evidence of the paternity of the father in question for the purpose of the High Court making a paternity order under the Status of Children Act. It is significant that an affiliation order made against a man following the strict rules referred to above is yet only prima facie evidence in an application for a paternity order, and the High Court is permitted to find in the face of such an order that there is other evidence which causes it to decide that on a balance of probabilities the man against whom an affiliation order was made is not the father for the purpose of making a paternity order under the Act. Section 8(5) provides merely that a declaration of paternity made by the High Court under section 10 shall be conclusive proof of the matters contained in the order. Section 8(6) provides that an order made in certain foreign countries declared by the minister under section 8(7) that a man is either the father or putative father of the child in question shall be *prima facie* evidence in paternity proceedings under the Act that such person is the father of the child. The forms of evidence envisaged by section 8 as acceptable as *prima facie* evidence of proof of paternity are not light: the standard is heavy and weighty. We have referred to the procedure in the Magistrates Court on affiliation proceedings while the father is alive. Applications under the Status of Children Act are invariably made when the father is dead. There are alternative and much less expensive methods for a father to put on record his acceptance of paternity, or if he declines to accept paternity to be found by a court to be the putative father, while he is alive. Can the Legislature have meant by the words "or otherwise" that the type of evidence that will be acceptable to the court under section 8 is to be lesser when the father is not around to explain himself? Especially when the application will have serious consequences for the family of the deceased left behind? What rule of interpretation should the court apply to understand what the legislature meant by the words "or otherwise?" It seems that the proper and appropriate rule to apply to

the words "or otherwise" in cases of disputed paternity is the *eiusdemi generis* rule of interpretation. That is, the words "or otherwise" in section 7(1)(b) only make sense if they mean "of a similar type" to those itemised in section 8. 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 relationship of father and child was recognised by the alleged father. Although the standard of proof in the High Court in applications for paternity declarations is the civil standard of proof on a balance of probabilities, the Legislature has provided that the High Court must look for a higher level of evidence than is acceptable in the Magistrate's Court in affiliation proceedings. Mere corroboration is not sufficient in applications under the Act as it is when applications are made under the Maintenance Act. The High Court is not seeking to determine whether or not the mother has proved that the child is the child of the alleged father, it is seeking to determine whether or not it is satisfied on a balance of probabilities that the father either admitted paternity during his lifetime, or that paternity was established during the lifetime of the father. It is within this context that corroboration becomes relevant. The more evidence of the type prescribed by the Legislature there is that supports the allegation of the mother and/or of the child of the admission of paternity or the establishment of the paternity, particularly in a disputed case, the better.

[14] The opposant. What is the effect of the objection by Advira Bennett, the mother of two of the late Mr Cato's children born out of wedlock? As she is not a party to the proceedings, does she have the right to enter into the dispute between the estate of the late Mr Cato and one of the two applicants? Does she have *locus standi*? Who are the proper parties to paternity proceedings under the Act? My view is that the alleged father or his personal representative if he is dead must be the principal defending party. Only the estate of the deceased and his personal

representatives stand in his place in matters of legal representation. I have mentioned above that there is no public trustee or other similar official in this State who can be made a party to the proceedings. Though the public has an interest in the just distribution of the estates of deceased persons, there are no public resources available to be expended on investigations into the merits of such claims. If the personal representative of the deceased alleged father has been properly served with the proceedings, and accepts in sworn testimony the claim of paternity, or there is evidence of the type required by the Act, that should be very strong evidence for a court to consider. If there is no widow or lawful child or other suitable personal representative surviving the deceased, it is for the applicant to apply to the court for some other suitable person to be made administrator for the purposes of the suit. The court will order personal service or service by publication in a newspaper or such other form of service in the particular case as it sees fit. All the dependants of the deceased father have *locus standi*, to object to the application or otherwise as the estate belongs to all of them. The objection of Advira Bennett, on behalf of her minority children, must be weighed along with all the other evidence before the court in determining the merits of the application.

[15] Rebutting the presumption of legitimacy. There is the point, peculiar to this case and not of general application in paternity applications, whether the application of Wendy Hilda Carter should be allowed when the effect of granting the application would be to render her born out of wedlock. This was the presumed basis of the objection by Advira Bennett. Counsel for the applicant has referred the court to the words of section 6(1) of the Act that provide that evidence may be led that a husband was not the father of a child. He submitted that the Act provides no bar to an application the result of which will be to render the applicant having been born illegitimate. Counsel also produced the case of Burnaby v Baillie (1889) 42 Ch D 282 in which North J cited with approval at page 298 the dicta in Morris v Davies 12 PD 177 to the effect that, "There is the highest authority for saying that the presumption in favour of legitimacy may be rebutted by evidence." Counsel also produced the case of Re: Hamer's Estate, Public

Trustee v Attorney-General (1937) 1 All E R 130, where it was held upon a consideration of the evidence that the *prima facie* presumption of legitimacy arising from the birth certificate was displaced and the illegitimacy of the respondent was established. The court must conclude upon authority that there is no bar at common law to the application of Wendy Hilda Carter.

[16] Conclusion. The application of Wendy Hilda Carter is supported and by the sworn written affidavits of the widow of the deceased, which support amounts at the very least to a declaration against interest that is binding on the estate. The affidavits in support by the widow are of a similar type of evidence of admission of paternity as those types set out in section 8 of the Act. The originating summons did not name the estate of the late Robert Milton Cato as a party. The court is, however, satisfied from the filing of the widow's affidavits that the proceedings brought by Wendy Hilda Carter were served on the widow of the late Robert Milton Cato, and that the widow was a proper person to represent the estate in these proceedings for the purpose of binding the estate of the late Mr Cato. I am prepared to order that the court is for the purposes of section 7(1)(b) satisfied that the late Robert Milton Cato during his lifetime admitted that Wendy Hilda Carter was his daughter. The application of Michelle Amanda McCree is more problematic. In her case, there is no corroboration of any kind. The only evidence on file at this point is the self-serving evidence of the applicant and her mother. This would not be acceptable in the Magistrates Court in affiliation proceedings because of the statutory provision that governs in that court, nor does it amount to evidence of the type required by the Act for the purpose of High Court proceedings for a declaration of paternity. As her application has not met the procedural requirements, ie, is not supported by evidence of a type required by section 8; nor has the estate been made a party to the proceedings; nor is there any evidence of service on the widow or whoever else is the personal representative of the estate, the application on behalf of Michelle Amanda McCree is dismissed. Because her application has been dismissed in a preliminary way for purely procedural reasons and not after a hearing on the merits, she has liberty to come to the court again in

a fresh application under the correct procedure and with proper evidence as set out above.

I D MITCHELL, QC
High Court Judge