ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV262 / 2002

IN THE MATTER OF THE STATUS OF CHILDREN ACT CHAPTER 180 OF THE REVISED LAWS OF SAINT VINCENT AND THE GRENADINES
AND
IN THE MATTER OF AN APPLICATION BY DAVID MCKENZIE FORA DECLARATION OF STATUS

DAVID ADOLPHUS MC KENZIE
LYNETTE ANNETTE JAMES

Claimant

and

DAVID SAMPSON
(INTENDED ADMINISTRATOR OF THE ESTATE OF ELISA SAMPSON DECEASED)

Defendant

Appearances:

Mr. Stanley K. John for the claimants
Mr. Richard Williams and Miss Roxann Knights for the defendant

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2002:October 23, 29

JUDGMENT

ALLEYNE J.

[1] On June 12, 2002, the claimants issued a Fixed Date Claim Form against the defendant wherein they claimed an Order declaring that Elisa Sampson aka Elisha Sampson is the father of the applicants David Mc Kenzie and Lynette James. At the hearing on October 23, 2002, on the application of counsel for the claimants and without opposition by counsel for the defendant, the claim was amended to

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include a claim for a further declaration "that the requirements of Section 7(1)(b) of the Status of Children Act Chapter 180 of the Laws of St. Vincent and the Grenadines have been satisfied and complied with".

[2] The statutory provisions governing the claimants' claim are contained in sections 7(1), 8 and 10 of the Status of Children Act Chapter 180, which I quote so far as relevant to the claim;

> 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 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 -
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> (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 in section 8 or otherwise):
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> 8. (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.
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> (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.
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> (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 of 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 a 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.

10. (1) Any person who –

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

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 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 time 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.

[3] In the Statement of Claim the claimants allege that Elisa Sampson during his lifetime had common law relationships with Marie Mc Kenzie, during which time David Adolphus was born on 22nd April 1956, and with Olney James the mother of Lynette Annette James who was born on 8th March 1961, but at the time of the registration of their respective births the name of their father was not recorded. They further allege that during his lifetime Elisa Sampson acknowledged that he

was the father of the claimants by supporting them financially from their youth, meeting their daily needs, giving them monetary gifts and animals to care for themselves. He had them spend time with him at his home, had a close relationship with them and treated them in all respects as his children and part of his household.

[4] The claimants filed in support of their claim and of an interlocutory application also filed on June 12th, affidavits of Charles James, Thomas Sampson, Lester Richards, and the claimant David McKenzie, and on June 25th, the defendant David Sampson filed an affidavit in response.

[5] The defendant is the nephew of Elisa Sampson, and as Attorney of the deceased's brother, has made application for a grant of letters of administration in the estate of Elisa Sampson deceased.

[6] On July 26th, the court made an order that, *inter alia,* any further affidavits be filed on or before 31st August, 2002, that all deponents be available for cross examination at the trial, and that the trial be on Wednesday 9th October 2002. On August 15th affidavits sworn by Verrol Sampson, the defendant's cousin, Olive Douglas, the defendant's sister, and Titus Prince were filed on behalf of the defendant and in opposition to the claim.

[7] On 8th October it was ordered that the defendant file skeleton arguments on or before 18th October, and the trial was re-scheduled for 28th October. The claimant David McKenzie filed a supplemental affidavit on 21st October. It is to be noted that despite the court's directions, the claimant Lynette Annette James did not sign a statement of truth, nor was one signed on her behalf as is a mandatory requirement under Rule 3.12 of the Civil Procedure Rules 2000 (**CPR**). She also has not sworn any affidavit, has not attended any hearing, and informed the court through counsel for the claimants that, due to her religious conviction, she will not participate in any legal proceeding. Consequently the claim of Lynette Annette James is dismissed.

[8] The affidavit evidence tendered in support of the claim of David Mc Kenzie (hereinafter the claimant) makes bare assertions, unsupported by any cogent facts, that the claimant "was born to Elisha Sampson and Marie Mc Kenzie", that "Elisha Sampson has one son named David with one Marie Mc Kenzie", that "David was born to Marie Mc Kenzie and Elisha Sampson", and, on the affidavit of the claimant, that "I was born on the 22nd April 1956, to Marie Mc Kenzie and Elisha Sampson". At best, this evidence is hearsay or based purely on speculation.

[9] The deponents in support of the claim attest further that the deceased provided for the claimant while he was at school, supplying him with food and clothing as well as books and other necessities. They assert that the claimant frequented the deceased's home and business place, and assisted him in the shop. It is also claimed that the claimant assisted the deceased in his butchering business, had lunch at the home of the deceased, and was given a young "cattle" by the deceased for his own use and benefit. One deponent claims that the deceased gave the claimant money to assist with his wedding, and, in the presence of that deponent, gave the claimant all his title deeds several months before he died.

[10] Some time before the death of the deceased, the claimant took over the running of the business, and cared for the deceased until his death. The claimant himself asserts that the deceased had no children other than him and Lynette Annette James, and that prior to the death of the deceased he, the applicant left his own home and stayed at the home of the deceased, taking care of him until his death. In that time the deceased delivered all his title deeds to him, saying to him that "the lands are for my sister (Lynette) and I, because he loves us". From these alleged statements the claimant concludes that "his intention was that my sister and I should inherit his estate".

[11] In his supplemental affidavit the claimant presents two letters written to the deceased by the defendant which, the claimant asserts, support his claim that the deceased is his father.

[12] The defendant in his affidavit claims that he lived with the deceased, his uncle, from the time that he, the defendant, was 7 years old, gives considerable details of his uncle's life and of their relationship, and of his uncle's alleged instructions for the disposition of his money upon his death. The deceased died intestate on 22nd August 1996.

[13] The deponent Verrol Sampson is a niece of the deceased and supports the defendant's account. She denies any significant relationship between the applicant and the deceased. The deponent Olive Douglas is the defendant's sister. She likewise denies any significant relationship between the claimant and the deceased until the claimant "was much older and Elisa (the deceased) was ill" when she admits that the claimant "started coming around to the shop and helping out". She also admits that "When Elisa got too ill to look after himself, David Mc Kenzie (the claimant) helped him out. Elisa was a very kind man and people helped him and did things for him when he was too ill to do it for himself." The affidavit of Titus Prince, a close friend and former employee of the deceased, is to similar effect.

[14] At the commencement of the trial of the claim on October 23rd, learned counsel for the defendant raised a number of preliminary points, with which I must now deal.

[15] Counsel submitted that the defendant is not a proper party to the action, since no grant of letters of administration has been made. Counsel admits that the defendant, as attorney for a brother of the deceased and one of the persons who claims to be entitled on the intestacy, has applied for a grant but the application has not yet been processed. Counsel argues that the defendant is embarrassed by having been made a party, in that he could thereby incur personal liability to costs, and indeed has already been forced to incur costs in defending the action. Counsel urges further that an order made in this action could be in vain because if, in the future, a person other than himself, entitled to a grant, made a successful application for a grant, this order would not bind the estate.

[16] The Status of Children Act makes no specific provision as to parties. Section 10 of the Act provides for the manner of application under the Act to be prescribed by rules of court. Rule 8.5 of CPR 2000 provides as follows;

> **Claim not to fail by adding or failing to add parties**
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> 8.5 (1) The general rule is that a claim will not fail because a person -
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> (a) who should have been made a party was not made a party to the proceedings; or
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> (b) was added as a party to the proceedings who should not have been added.
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> (2) However -
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> where a claimant claims a remedy to which some other person is jointly entitled, all persons jointly entitled to the remedy must be parties to the proceedings, unless the court orders otherwise; and
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> if any such person does not agree to be a claimant, that person must be made a defendant, unless the court orders otherwise.
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> This rule does not apply in probate or administration proceedings.

[17] **CPR 2000** rule 21.4 is in the following terms;

> ***Representation of persons who cannot be ascertained, etc. in proceedings about estates, trusts and construction of written instruments***
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> 21.4 (1) This rule applies only to proceedings about -
> (a) the construction of a written instrument;
> (b) the estate of someone who is deceased; or
> (c) property subject to a trust.
> (2) The court may appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (whether presently or for any future, contingent or unascertained interest) where -

(a) the person, or the class or some member of it, cannot be ascertained or cannot readily be ascertained;
(b) the person, or the class or some member of it, though ascertained cannot be found; or
(c) it is expedient to do so for any other reason.

(3) An application for an order to appoint a representative party under this rule may be made by any -
(a) party; or
(b) person who wishes to be appointed as a representative party.

(4) A representative appointed under this rule may be either a claimant or a defendant.

(5) A decision of the court binds everyone whom a representative claimant or representative defendant represents.

[18] In High Court Civil Suit No. 43 of 2000, St. Vincent and the Grenadines, (the **Cato** case), Mitchell J. at paragraph 10 and 11 of his judgment delivered on November 3, 2000, pointed out that applications of this sort are sometimes (I would say usually), made "for the cold hard reason of allowing one to participate in the estate of a deceased person." His Lordship recognised that the findings of the court "may have material consequences on the distribution of the estate of the deceased". This reality is clearly acknowledged and consequential provision made in sections 7 and 10(2) of the Status of Children Act. Mitchell J. held that in such circumstances 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". Mitchell J indicated the procedure to be followed under the Rules of the Supreme Court 1970. The procedure under **CPR 2000** is found in rule 21.4(2) which, like its predecessor, provides for the court to appoint a representative party. In this case the court's intervention was not sought. Nevertheless, no objection was taken in the many appearances of or on behalf of the defendant prior to the last hearing, and the defendant has participated fully in the proceedings up to this eleventh hour. What is more, the defendant admits that he has applied for a grant in the estate, and it is apparent that he expects to benefit from the estate if the claimant's claim fails. I am of the view that the defendant is a proper and necessary party to the proceedings, and his objection is overruled. Section 31 of the Administration of Estates Act Cap. 377 provides that, in the case of intestacy, until administration

is granted, the real and personal estate of a deceased intestate shall vest in the Chief Justice, and the Public Trustee Act Cap. 382 makes provision for the Solicitor General to be appointed to administer unrepresented estates in certain cases. The latter option may be considered in cases where the law permits. However, it is not necessary in this case, at this stage at any rate, to apply either of these provisions.

[19] Mitchell J. addressed fully the issue of publication of notice of the proceedings in newspapers, and severely criticised the practice of publishing notice without leave of the court and otherwise than in accordance with the court's directions. At the same time his Lordship emphasised the necessity that all persons who are claimants on the estate be made aware of a particular claimant so that they can present their support or objection to the particular claim.

[20] By far the more substantial issue in this case is the question of the nature of the evidence required to establish paternity under the Status of Children Act. Given the property implications of a declaration of paternity and the impact such a declaration may have on the proprietary interests of others, the provisions of sections 7 and 10(2) are clearly of paramount importance in the consideration, interpretation and application of section 8 of the Act, and also in the consideration of the application of the principles of natural justice regarding notice to and the opportunity to be heard of potential beneficiaries in the estate of a person dying intestate or partially intestate.

[21] Counsel for the defendant argued that there are two classes of applicant for declarations of paternity; the applicant for a declaration of paternity simpliciter, and the applicant who seeks an additional declaration under section 10(2), which declaration, unlike a declaration simpliciter, might confer on the applicant a right relating to succession to property which devolves on the death of a deceased person, or affects the interpretation of a will or other testamentary disposition or of any instrument creating a trust. The distinction is nicely made by Mitchell J. in the **Cato** case, between those applications "made only for the sentimental reason of

knowing who one's father is, (or those) made for the cold hard reason of allowing one to participate in the estate of a deceased person".

[22] Learned counsel points out that the latter class of application, in the absence of marriage between the mother and father of the child at the time of conception or thereafter, depends, under section 7(1)(b) of the Act, on the paternity having been admitted by, or established **during the lifetime of** the father. That subsection declares that in such case proof of the admission or of the establishment during the lifetime of the alleged father of the fact of paternity must be by one or more of the types of evidence specified by section 8 **"or otherwise."** Counsel for the defendant contends that "or otherwise" must be interpreted in light of the *ejusdem generis* rule. The words "only if" used in the section are indicative of the importance the legislature placed on the nature of the evidence to be relied on. Counsel concedes that the standard of proof is the civil standard, but the nature of the evidence is specific and indicates that the court will not be satisfied with proof of a nature that does not reflect the type of evidence specified in section 8.

[23] Learned counsel for the defendant was emphatic that the evidence tendered by or on behalf of the claimant is largely hearsay and intrinsically inadmissible as such, and in any event falls well short of meeting that standard established by the Act.

[24] Counsel referred the court to **Maxwell on Interpretation of Statutes** at page 58 wherein the learned author posits that

> "it is an elementary rule that construction (of a statute) is to be made of all the parts together, and not of one part only by itself. … if it is found that a number of such expressions have to be subjected to limitations and qualifications, and that such limitations and qualifications are of the same nature, that circumstance forms a strong argument for subjecting the expression in dispute to a like limitation and qualification."

[25] Mitchell J. addressed this very issue comprehensively in his judgment in the **Cato** case. In paragraph 18, at page 12 , his Lordship says this;

> "Can the legislature have meant by the words "or otherwise" that the 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 *eiusdem 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 satisfy the court that the relationship of father and child was recognised by the alleged father."

[26] Of interest on the question of proof of paternity is the opinion of Sir Raymond Evershed, M.R. in **re Jenion** *(deceased)* [1952] 1 All E.R. 1228 at 1234;

> "Nor does his statement: "I am the father" satisfy the condition that the fact is one of which he has peculiar or direct personal knowledge. … the House of Lords (in Lloyd v Powell Duffryn Steam Coal Co., Ltd [1914] A.C. 733) while accepting the view of the Court of Appeal, held that declarations of a putative father were admissible on the issue of paternity as part of the *res gestae*. Still, as evidence of paternity, Rooney's declarations cannot in any case be of great weight, and I do not attach more significance to them than as lending some (though slight) corroboration to the declarations proved to have been made by the intestate."

[27] Counsel for the claimant, in response, urged that to hold the evidence inadequate and insufficient to meet the burden of proof at this stage would be premature and would deprive the claimant of a fair hearing. Counsel argued that the court having made an order that deponents be available to be cross-examined, it must be presumed that the court considered that the evidence is sufficient to make a prima facie case, and should allow itself the benefit of hearing the full evidence, which would only be before the court after the witnesses have been cross-examined. I cannot agree. The order that the witnesses be available for cross-examination

was made pursuant to the provisions of rule 30.1(3), and is a purely routine order raising no presumption whatever.

[28] Counsel concedes that the evidence does not satisfy the specific requirements of section 8 of the Act, and he depends on the latitude which arises from the words "or otherwise" in section 7(1)(b). He accepted that in order for the claimant to succeed the court must be satisfied, on a balance of probabilities, that paternity was admitted or established during the lifetime of the deceased. Counsel contended that the evidence tendered on behalf of the claimant and the defendant, taken as a whole, sets up a prima facie case which could be confirmed and satisfy the statutory requirements when tested by cross-examination.

[29] Counsel referred the court to subsections (3) and (4)(b) of section 53 of the Evidence Act in support of the proposition that in matters involving pedigree, reputation and family tradition are admissible in proof of the issues in question. I accept that. However, that does not address the question of the statutory provisions relating to the quality of evidence required to prove the issue of paternity in cases such as the present.

[30] It is for the claimant to prove his case to the standard required by law, that is to say on a balance of probabilities, and by means of the type of evidence demanded by the statute, that is the type of evidence specified in section 10 of the Act or evidence of a similar nature under the *ejusdem generis* rule. I agree with and adopt the reasoning of Mitchell J. in the **Cato** case and apply the principles there so clearly stated. By that standard the claimant's statement of case and affidavits in support do not meet the requirements of section 8 or otherwise so as to enable the court to make a declaration under section 10(2) determining that the requirements of section 7 (1)(b) of the Act have been satisfied. The defendant's affidavits do nothing to assist the claimant in that respect. The claim for that remedy is dismissed but the claimant may proceed with his claim for the declaration of paternity simpliciter.

[31] The matter of costs is reserved.

Brian G.K. Alleyne
High Court Judge

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