SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 12 OF 2003

BETWEEN:

**DAVID ADOLPHUS McKENZIE**

Appellant

and

**DAVID SAMPSON**
**(Intended Administrator of the Estate of Elisa Sampson, deceased)**

Respondent

**Before:**

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| The Hon. Mr. Albert Redhead | Justice of Appeal [Ag.] |
| The Hon. Mr. Adrian Saunders | Justice of Appeal |
| The Hon. Mr. Michael Gordon, QC | Justice of Appeal [Ag.] |

**Appearances:**

Mr. Stanley John for the Appellant
Mr. Richard Williams for the Respondent
Mr. Jaundy Martin, Crown Counsel

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2004: March 1;
March 29.

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## JUDGMENT

[1] **SAUNDERS, J.A.:** David Adolphus McKenzie, the Appellant, claims that he is the child of Elisha Sampson. In accordance with the provisions of the Status of Children Act ("the Act"), Mr. McKenzie applied to the Court for a declaration that the relationship of father and son exists between him and Elisha Sampson. Several affidavits were filed in support of this application. Mr. McKenzie himself swore to two. Thomas Sampson, who claimed to be the nephew of Elisha Sampson, and Lester Richards, a retired Superintendent of Police, also swore

affidavits supporting the application. So too did Mr. Charles James who said he had known Elisha Sampson from childhood. In these affidavits various facts and circumstances were alleged for one to conclude that Elisha Sampson had loved, supported financially and generally treated David McKenzie as his son and that McKenzie in turn had looked after Elisha in the latter's old age until he died.

[2] Mr. McKenzie's application was contested by Mr. David Sampson. He is the Respondent and everyone acknowledges that he is a nephew of Elisha Sampson. David Sampson swore an affidavit denying that Mr. McKenzie was the son of Elisha Sampson. At the end of the day, there were therefore several affidavits before the Court vigorously alleging that Mr. McKenzie was Elisha Sampson's son. And there was also David Sampson's affidavit equally forcefully denying that this was the case. The problem is that Elisha Sampson was not around to speak for himself. Elisha Sampson had died some six years before Mr. McKenzie made his application.

[3] Section 10(1) of the Status of Children Act permitted Mr. Mckenzie to apply for a declaration of paternity even, as here, where his alleged father was dead. However, the Act stipulates that if Mr. McKenzie wished to succeed to property owned by the deceased, then he was required to satisfy the Court that the paternity was admitted by, or established during the lifetime of, Elisha Sampson "by one or more of the types of evidence specified by section 8 or otherwise"[1].

[4] This was indeed a case where Mr. McKenzie wished to make a claim against the estate of Elisha Sampson. It clearly was for this reason that Mr. David Sampson so stoutly opposed Mr. McKenzie's application. David Sampson is actually the Administrator of the estate of Elisha Sampson. In a sense therefore, this case is one that might determine who should inherit the estate of Elisha Sampson.

[1] Section 7(1)(b)

[5] The matter came before the Court on the 26th July, 2002. When it did, the learned Judge sought to manage the case and prepare it for trial. The Judge ordered that any further affidavits be filed by 31st August, 2002; that all deponents make themselves available for cross-examination at the trial; and that the trial be set for 9th October, 2002. Further affidavits were indeed filed on behalf of the defence. David Sampson's cousin, his sister, and one Titus Prince, all filed affidavits denying that McKenzie was Elisha's son .

[6] The trial did not come off on 9th October. It was re-scheduled for later that month. A week before the matter came on for hearing, Mr. McKenzie filed a supplemental affidavit exhibiting two letters allegedly written by Mr. David Sampson to Elisha Sampson when the latter was alive. The purpose for exhibiting these letters was to show that David Sampson had made references in them to Mr. McKenzie as being a family member.

[7] On the hearing date, before any of the deponents could be cross-examined, counsel for David Sampson made some preliminary submissions. The Judge identified as the most substantial of these, the submission that the affidavits filed by Mr. Mckenzie did not disclose any sufficient evidence to meet the standard of proof required by an applicant in a case such as this. The Judge agreed with this submission, holding that:

> "….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."

[8] Effectively, what this ruling meant was that, if he so desired, Mr. McKenzie could proceed with a claim to have the Court declare that Elisha Sampson was his father. This is what the Judge referred to as a declaration of paternity simpliciter. However, even if he were successful in such a claim, Mr. McKenzie would be ineligible to share in the estate of Elisha Sampson. This, notwithstanding the fact

that, among other things, the Act seeks to permit children born out of wedlock to inherit from their putative fathers.

[9] David Sampson had no difficulty with the Court making a declaration of paternity simpliciter. Without objection, counsel allowed the Court to make such a declaration. In the mean time, Mr. McKenzie lodged an appeal against the Judge's ruling that he was not entitled to succeed to any property of Elisha Sampson, deceased. It is this appeal that has come before us.

[10] When the appeal first came on there were extant, a judgment disentitling the claimant from sharing in the estate of the deceased and also an order declaring that the claimant was the son of the deceased. At first blush, this state of affairs struck us as something of a paradox. We thought that more than simply the private rights of the parties to the action was at stake. With the concurrence of counsel, we made an order giving leave to the Attorney General to intervene and to make submissions on the issues at hand and we allowed counsel for Mr. David Sampson to withdraw the concession earlier made by him. The following questions were formulated for determination and the appellate hearing was re-scheduled so that we could have counsel's prepared submissions on the issues at hand. These were the questions we wished to have explored:

> [1] Was the trial Judge wrong in denying the Claimant the opportunity to cross-examine the Respondent and his witnesses on their witness Statements?
>
> [2] Was the trial Judge wrong in upholding the preliminary submission by counsel for the Respondent that there was insufficient evidence to show a prima facie case on behalf of the Claimant's application?
>
> [3] Was the trial Judge wrong in holding that 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 Status of Children Act Chapter 180 (the Act) have been satisfied?

[4] Do the provisions of Section 10 of the Act enable the Court to make two distinct declarations of paternity, one affecting the devolution and succession to property pursuant to Section 7(1)(b), and the other which does not, or does it only permit for the making of one declaration of paternity? And

[5] Are the provisions of Sections 7 & 10 of the Act discriminatory in such a manner as to contravene Section 13 of the Constitution of St. Vincent and the Grenadines?

**The legislation**

[11] Section 10 of the Act states:

[1] Any person who –

[a] being a woman, alleges that any named person is the father of her child;

[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, wishes to have it determined whether the relationship of father and child exists between the two named persons, 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.

[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."

[12] Section 7 of the Act states:

"[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] the father and the mother of the child were married to each other at the time of its conception or at any time subsequent thereto; or

[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, if the purpose aforesaid is for the benefit of the father, there shall be the additional requirement that paternity should have been so admitted or established during the lifetime of the child or during the period when the child was conceived."

[13] Section 10 therefore permits the making of declarations of paternity in circumstances where the father or the child or both of them are dead. However, the conjoined effect of sections 10 and 7 is that where such a declaration is made, the applicant cannot succeed to property unless there is compliance with section 7(1)(b). The latter section in turn requires us to examine section 8.

[14] Section 8 states:

"[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 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, or 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."

[15] When read together, sections 7, 8 and 10 provide for two different standards of proof. If the alleged father is alive, and/or if he is dead but the applicant is uninterested in succeeding to property, then a court merely has to be satisfied that the relationship of father and child exists in order to make a declaration of paternity. This is what has been referred to as a declaration of paternity simpliciter. Mitchell, J. in **Re Cato**[2], observed that the standard of proof for a declaration of paternity simpliciter is much lower than would be acceptable in affiliation proceedings. On the other hand, where the alleged father is dead and the applicant wishes to go further and succeed to property of his/her deceased father, then the applicant can only obtain the further declaration, referred to in section 7(2), if evidence of the kind outlined in section 8 is forthcoming.

[16] In **Cato's** case, the court properly interpreted the phrase "or otherwise", in section 7(1)(b), to mean evidence of a type that is similar to the kind of evidence itemized in section 8. Mitchell, J. stated that:

> "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

[2] Saint Vincent and the Grenadines High Court Civil Suit No. 43 of 2000

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."[3]

[17] It follows that the Act does indeed permit the making of two separate declarations in circumstances where an alleged father is deceased and an applicant wishes to succeed to the estate of the deceased. That the law could, in such circumstances, sanction the existence of two classes of children born out of wedlock, namely those who could inherit from their father and those who could not, is paradoxical given that the professed aim of the Act is to remove the legal disabilities suffered by children whose parents were not married to each other. The question arises as to whether the Act is discriminatory. It clearly is not, according to the Constitution.

[18] Section 13 of the Constitution of Saint Vincent and the Grenadines states:

"[1] Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

[2] Subject to the provisions of subsections (6), (7) and (8) of this section, no persons shall be treated in a discriminatory manner by any persons acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

[3] In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject

[3] Re Cato, op. cit. @ page 13

> or are accorded privileges or advantages which are not accorded to persons of another such description."

[19] In the case of **Nielsen vs. Barker**[4] Crane, C. in the Guyana Court of Appeal gave a definitive interpretation of a clause akin to that of section 13(3) when he opined:

> "The word 'discrimination' ….. does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on 'race, place of origin, political opinions, colour or creed'. No other kind of favouritism or differentiation is 'discriminatory' within the narrow constitutional definition of that contravention of a person's fundamental rights …. where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

[20] The double standards in the Act, regarding paternity applications where the father is deceased and succession rights are at stake, are disquieting[5]. One may say, in fairness to the legislators, that the further declaration that section 10 speaks to, is aimed at ensuring that spurious claims are not made, or if made do not succeed, against the estate of a deceased person and that, for this reason, Parliament has provided that an applicant should provide very cogent proof of paternity before being allowed to claim against the estate of the deceased. Saint Vincent and the Grenadines is not alone in having a provision of this nature. Section 7 of the Status of Children Act of Jamaica is identical to its St. Vincent counterpart.

[21] The only remaining issue to be considered is the narrow one that really is the crux of this appeal. Was the Judge right to dismiss, solely on the basis of the affidavits filed, the application made pursuant to section 10(2)? I think it is useful briefly to recap the background. This is a matter that was commenced by a Fixed Date Claim Form. The court had ordered that all deponents attend the trial for cross-

[4] *(1982) 32 W.I.R. 254*

[5] See for a discussion on this: Leighton Jackson, The Law Relating to Children in Jamaica, Part 2, Status of children, 1984, page 30

examination. Mr. McKenzie, in his affidavit, had declared that the deceased had freely and openly acknowledged that both himself and one Lynnette James were his (Elisha's) children. Mr. Sampson on the other hand had sworn that his uncle, the deceased, had never indicated to him (David Sampson) that McKenzie and Lynnette were his children and that if they were, the deceased would have told him. Mr. McKenzie in one of his affidavits had exhibited two letters written by David Sampson to his deceased uncle. In one such letter David Sampson wrote, among other things:

> "Give my regards to Mr. Prince Almaida and Mrs. McDowall and Mary and family and say hello to Lynnette and Peter….."

In the other letter, he said:

> "….What about uncle them. Say hello to them for me also Mr. Prince Almaida, Peter and all the rest of the family…"

[22] I agree that given the cogency of the proof required by section 8 to sustain an application under section 10(2), absent these letters, there may well have been no point in holding a trial. The facts and circumstances outlined in the various affidavits of Thomas Sampson, Lester Richards and Charles James might support other concrete and tangible evidence that may exist. But, *ex facie*, on their own, those affidavits fell short of meeting the extraordinarily high standard and nature of proof required by section 8. I believe however that the Judge should have permitted a trial to be held in this case in light of the content of the two letters exhibited. Did David Sampson regard Lynnette and Peter as family friends or family members? If the latter, did the deceased so recognize them by implication? If so, does Peter refer to the applicant? These are all matters that could have been explored in the course of a trial. They may have taken the case for the applicant further or they may not have. If the matter went on for trial and they did not, then the Respondents would have had their costs.

[23] One has to bear in mind that, in practice, given prevailing levels of literacy and an oral tradition in Caribbean societies and in light of the relative lack of attention to form paid by large sections of society, few applicants for an order under section

10(2) might be in a position to provide the types of evidence specified in section 8. This is what makes the standard of proof required for a section 10(2) declaration so troubling. Many applicants for such a declaration would be seeking to persuade a court to grant the declaration on the basis of some evidence that is other, though not less convincing, than the types of evidence specified in section 8. Section 7(1)b permits this. In fact, it was this "other" type of evidence that held sway in **Re Cato**. The decisive evidence for the successful applicant in that case was the sworn support for the application by the widow of the deceased who corroborated the evidence of the applicant. I think that case illustrates the point that in matters such as these, it is better to err on the side of hearing all the evidence. Moreover, the court here was faced with serious factual disputes on the affidavits filed and oral examination and cross-examination is the best method of resolving such disputes. In all the circumstances I am of the view that, in lieu of a peremptory dismissal of the application under section 10(2), a trial should have been held.

[24] For the sake of completeness, I would answer the questions outlined at paragraph 10 of this judgment in the following manner.

As to Questions 1 & 2, I would answer Yes.

As to Question 3, I would answer that it was the totality of the evidence at trial and not necessarily the content of the affidavits filed that needed to meet the requirements of the relevant sections.

As to Question 4, I would answer that the provisions of section 10 do enable the court to make two distinct declarations. I would prefer not to speak of two declarations of paternity but rather a declaration of paternity and a further declaration related to succession of property. I further agree with the trial Judge that **Re Cato** was rightly decided. I would strongly suggest however that Parliament may wish to consider whether the standard and types of proof specified in section 8 are not, in the context of current realities, unreasonably high. I suppose in cases of this kind it is open to an applicant to request the production of DNA evidence. That would certainly be evidence that will be as satisfactory if not even more convincing than the types of evidence specified in section 8.

As to Question 5, I would answer No.

[25] This appeal is therefore allowed. On the matter of Costs, it was earlier agreed that for this appeal, the State would pay $5,000.00 to each counsel.

**Adrian Saunders**
Justice of Appeal

I concur.

**Albert Redhead**
Justice of Appeal [Ag.]

I concur.

**Michael Gordon, QC**
Justice of Appeal [Ag.]