SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HIGH COURT CIVIL APPEAL NO.13 OF 2003

BETWEEN:

OLIVE CLARKE

Appellant

and

ALICIA BELLA MARY GELLIZEAU

Respondent

Before:

The Hon Sir Dennis Byron	Chief Justice
The Hon Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C.	Justice of Appeal

Appearances:

Mr. Emery Robertson for the Appellant
Mr. Victor Cuffy for the Respondent

2003: November 24;
2005: December 5.

JUDGMENT

[1] GORDON, J.A.: When this matter came on for hearing before the Court, it was recognized that the issue to be determined was one of pure law. In the circumstances the court decided that this was an appropriate case to be determined on written submissions by counsel for the parties. A case management order was made and duly complied with by counsel for the parties. I apologise to the parties for the delay in delivering this decision which is regrettable.

[2] This case arose out of a claim by the Respondent against the Appellant qua Administratrix of the estate of Melvin Clarke, (the deceased) that she, the

Respondent, was entitled to a share in the estate by virtue of the fact that she was an illegitimate child of the deceased.

Background facts

[3] On May 31, 1996, some five months after the death of the deceased, based on an Application made by the mother of the Respondent, the High Court made a declaration (hereinafter the Paternity Declaration) that the deceased was the father of the Respondent and that paternity was established during the life time of the deceased. The significance of the latter part of the declaration will become apparent. It is common ground that the application was heard ex parte and that there was no intervention by any other interested parties in the proceedings, nor was there any attempt to serve or notify any interested parties.

[4] On September 21, 1996 the Claimant's solicitor sent to the Appellant a letter, and copied it to her solicitor, informing the Appellant of the Paternity Declaration and enclosing a copy thereof. On April 20, 1998 the Appellant applied for Letters of Administration in the estate of the deceased which application was granted on May 7, 1998. On October 25, 1999 the Appellant, as administratrix, vested in herself and five children, progeny of the deceased and the Appellant, the estate of the deceased including the real property being 2 acres, 1 rood and 33 perches of land situate at Sion Hill in the State of Saint Vincent and the Grenadines. The Respondent was excluded from sharing in the estate of the deceased.

[5] In March 2002 the Respondent filed a Claim Form and Statement of Claim claiming her proportionate share in the deceased's estate and a declaration that the Appellant holds the said share of the deceased's estate in trust for her. The Appellant filed a defence. The matter went to Case Management and the learned Judge made the following order inter alia:

> "that counsel frame the legal issue(s) arising on the pleadings and that such issue(s) be tried as a preliminary question on Tuesday 14th January 2003 before all other issues in this Suit."

Counsel for both sides complied with the directions of the Case management Order and the matter came up for trial on the 14th January 2003.

[6] The issues identified by counsel for the parties were:

- When a person dies intestate in accordance with the Administration of Estates Act, Cap 377 of the laws of Saint Vincent and the Grenadines 1990, at what point are the rights of succession to be determined?
- If the class closing rules apply, when does it close, at the date of death, or at the date of the application for the grant of Letters of Administration of the estate?
- Can a "child" apply for an order for a declaration of paternity in order to claim?
- Does the Status of Children Act, Cap 180, (hereafter "the Act") section 7 (1) (b) empower a child to claim a share or interest in his father's intestacy?
- Does the Paternity Declaration of the court validate the position of the Respondent, it having been made ex parte after the death of the putative father and does the order contradict the express provisions of section 7(1) of the Status of Children Act?
- What is the effect of section 7(2) of the Act on section 62 of the Administration of Estates Act, Cap 377?
- Assuming that the paternity declaration is valid does it have retrospective effect to entitle the Respondent to a share or interest in the estate of the deceased?

[7] The learned trial Judge ruled in favour of the Respondent. Specifically the trial Judge found:

- That the Paternity Declaration was a valid order and that there was no reason to question its validity;
- That paternity was established during the lifetime of the deceased Melvin Clarke, and not from the date of the Paternity Declaration;

- The effect of the Paternity Declaration, with specific regard to its second limb establishing paternity of the Respondent during the lifetime of the deceased, is that it clothes the Respondent's claim with retrospectivity and hence the Respondent was entitled to an interest in the estate of the deceased.

[8] The Appellant being dissatisfied therewith has appealed to this Court. The Appellant filed a number of grounds of appeal, but in essence they resolve themselves into two broad grounds. The first ground is a challenge to the finding by the learned trial Judge that the Paternity Order was a valid order and fulfilled the requirements of Section 7 (1) of the Act for purposes relating to succession. The second challenge to the trial Judge's findings was predicated on the argument that pursuant to the Administration of Estates Act, Cap 377, the class of beneficiaries closed as of the date of death of the deceased and no finding of paternity subsequent thereto could have the effect of re-opening the class.

[9] In order to properly determine and analyse whether the Paternity Order fulfilled the requirements of section 7 (1) of the Act it is necessary to consider not only that section, but also sections 8 and 10. Sections 7,8 and 10 are reproduced hereunder for ease of reference:

> "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 –
>
> (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."
>
> (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 such event or conduct which enables the 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.

"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.

(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, 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 –

(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."

[10] These sections came before this Court for interpretation in David Adolphus McKenzie v David Sampson[1], where Saunders J.A. said the following in relation to the above sections of the Act:

"[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

[1] Civil Appeal No. 12 of 2003 SVG
[2] Saint Vincent and the Grenadines High Court Civil Suit No. 43 of 2000

> 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.'
>
> "[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."

[11] On the authority of McKenzie v Sampson it is clear that an order can be made by the court after the death of the father declaring that paternity has been established in such manner as satisfies section 7 of the Act.

[12] The first issue to be determined is whether the Paternity Declaration is a valid order of the court and, if so, does it fulfill the requirements of section 7 (1) (b). In Re Cato Mitchell J pointed to the fact that although section 17 of the Act provided for the Minister to make regulations under the Act, no such regulations had been made by the time that Re Cato was decided in November 2000, and, notwithstanding a plea by the learned Judge for regulations to be promulgated no such regulations have yet seen the light of day. One is therefore left to rely on the general law. As remarked above, it was common ground between the parties that

the Paternity Declaration was applied for and granted on an ex parte application. It is also to be recalled that the proceedings leading to the Paternity Declaration fell to be regulated under the Rules of the Supreme Court 1970 (hereafter "the 1970 Rules")

[13] Order 15 Rule 15 of the 1970 Rules reads as follows:

> "15. – (1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceeding ; and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.
>
> (2) Before making an order under this rule, the Court may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate in as it thinks fit.

Order 15 rule 15 is in pari materia with Order 15 rule 15 of the Rules of the Supreme Court 1965 of England.

[14] As I read the Order 15, where a deceased person is interested in the matter in question in a proceeding the court can only proceed in the absence of a person representing the estate of the deceased person if there is an application made to the court in that regard. I am fortified in my view by a reading of the precursor rule of Order 15 rule 15, which was Order 16 rule 46 in the antecedent Rules of the Supreme Court of England. That rule reads:

> "If in any cause, matter or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all purposes of the cause, matter or other proceeding…"

The clear difference between the two rules is that in the old rule the court might act of its own volition whereas in the later Order 15 rule 15 the court could only act to exclude a representative of the deceased on application by a party to the proceedings.

[15] It is perfectly clear that an application for a declaration of paternity intimately involves and interests the putative father. The putative father being dead is "a deceased person interested in the matter in question in the proceedings". No application to proceed in absence of a person representing the estate of the deceased was made to the court by the applicant for the Paternity Declaration. Had such an application been made it is obvious that the affidavit in support of the application would have had to disclose the existence of the wife of the deceased (the Appellant) and the legitimate children of the deceased. The trial Judge would then have been in a position to give directions as to the future conduct of the case with what is now referred to as the overriding objective in mind, that is to do justice between all interested parties.

[16] In Re Cato Mitchell J said the following:

> "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…The personal representative having been appointed and served with the proceedings, the deponents will attend the hearing to give any further evidence and to be cross-examined on behalf of the alleged father and any other interest party. In the absence of any regulations made by the Minister of the contrary, it is clearly necessary in the interest of justice that

in applications under the Act the deceased's estate be made a party to the proceedings."

I agree with Mitchell J. The Civil Procedure Rules 2000 contain comparable provisions to Order 15 rule 15 of the 1970 Rules. The estate should have been represented on the application for a Paternity Declaration. The whole premise of the defence of the Appellant was that the Paternity declaration had been obtained in such circumstances as would disentitle the Respondent from relying upon it for the purpose of establishing rights to inheritance.

[17] However, as the learned trial judge found, there has been no challenge to the Paternity Declaration. It is fundamental that until an order of a court of competent jurisdiction is set aside on appeal it is binding and effective according to its terms; the decision of the Privy Council in Isaacs v Robertson[3] is clear authority for that proposition. It is also fundamental that a collateral attack upon such an order will not be permitted, especially when it was open to the estate to make the necessary application to intervene and to appeal against the Paternity Declaration. Whatever may be the misgivings of this court about the circumstances in which the Paternity Declaration was obtained it is not for this court to collaterally pronounce upon its validity when there has been no direct challenge to that order of the High Court.

[17] The second broad ground of appeal was that the class of beneficiaries closed on the death of the deceased and no subsequent order of the court could have the effect of enlarging that class. Learned Counsel for the Appellant referred the Court to the Administration of Estates Act, Cap 377, and in particular section 61 thereof. With the greatest of respect to learned Counsel, section 61 seeks only to put a child born out of wedlock on the same footing as a legitimate child in so far as rights to inheritance on intestacy of its parent are concerned. It speaks not at all to the closing of a class of beneficiaries. It is only logical that if an illegitimate child obtains a declaration of paternity, such paternity must, by definition, have existed from the time of the birth of the child. I find no merit in this ground of appeal.

[3] [1985] 3 W.L.R. 705

[18] The Appellant was sued in her capacity of Administratrix. In the circumstances I would order that the costs of this appeal be borne by the estate of the deceased to be determined on an "assessed costs" basis.

Michael Gordon, QC
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal