EASTERN CARIBBEAN SUPREME COURT ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2005/0214

In the Matter of the Status of Children Act 414 of the Revised Laws of Antigua and Barbuda And

In the Matter of an Application by MARILY JEFFERS nee WESTE for a Declaration of Paternity

Pursuant to Section 11 of the Status of Children Act BETWEEN:

MARILY JEFFERS nee WESTE

Applicant/Claimant

and

[1] THE PERSONAL REPRESENTATIVE OF THE ESTATE OF WYNDHAM WESTE, deceased

and

[2] RUPERT ALEXANDER JOSEPH AKA BENJAMIN JOSEPH

Respondent/Defendant

CONSOLIDATED WITH CLAIM NO ANUHCV2006/100

In the Matter of the Letters of Administration Issued in the Estate of WYNDHAM WESTE DECEASED

BETWEEN:

MARILY JEFFERS nee WESTE

and

Respondent/Claimant

MAUDLYN JOSEPH (ALSO KNOWN AS MODLYN B. JOSEPH)

(Now deceased and replaced by Rupert Alexander Joseph as Personal

Representative of the Estate of MAUDLYN JOSEPH for purposes of these proceedings only)

Applicant/Defendant

Appearances:

Dr. David Dorset for the ApplicanUClaimant Marilyn Jeffers nee Weste

Mrs. Stacy A. Richards Anja for the RespondenUDefendant Rupert Alexander Joseph

2016: July 14

2017: December 5

DECISION IN CHAMBERS

Introductory and Relevant Background

[1] **LANNS, J. [AG]:** By Fixed Date Claim Form and affidavit in support, filed on the 13th May 2005, the Claimant Marily Jeffers, nee Weste claimed against the Personal Representative of the Estate of WYNDHAM WESTE, deceased, an order declaring her to be the child of WYNDHAM WESTE , deceased. This claim was numbered ANUHCV 2005/0214

[2] On the 2nd December 2005, Blenman J, (as she then was) made an order in the following terms: "IT IS ORDERED

"1, That the Court finds that a relationship of father and daughter existed between the Applicant MARILY JEFFERS nee WESTE of English Harbour in the Parish of Saint Paul, Antigua and WYNDHAM WESTE late of English Harbour, aforesaid, hereby declares the said WYNDHAM WESTE the father of the Applicant MARILY JEFFERS nee WESTE by virtue of the status of Children Act Cap 414 of the Revised Laws of Antigua and Barbuda 1992;"

"2. The Registrar General of Antigua and Barbuda is hereby directed to make the appropriate entry in the Register of Births in Order to reflect the findings and declarations of the Court on this application.1"

[3] On the basis of that order, Marily Jeffers nee Weste, on the 22nd day of February 2006, filed a Fixed Date Form and Statement of Claim, claiming against MAUDLYN JOSPH (also known as MODLYN B JOSEPH), Administrator of the estate of WYNDHAM WESTE, several reliefs including:

1. An order revoking the Letters of Administration issued to MAUDLYN JOSPEH in the estate of WYNDHAM WESTE;

2. In the alternative, an order for the removal of MAUDLYN JOSEPH from office of Administratrix of the estate of WYNDHAM WESTE, deceased and the substitution of the claimant or any other person in that office;

3. An order directing MAUDLYN JOSEPH to bring into and leave at the High Court of Justice the Letters of Administration in order that it be properly revoked.

4. An order that MAUDLYN JOSEPH furnish an account to the claimant forthwith in respect of the estate of WYNDHAM WESTE, deceased.

[4] The Fixed Date Claim was assigned number ANUHCV2006/0100. The matter had progressed to the stage where pleadings were essentially closed with the filing of a reply and defence to counterclaim on the 19th July 2006. Justice Thomas had on the 10th November 2006 issued directions for trial. It appears there was substantial compliance with the trial directions. However, to date, there has been no trial of Claim numbered ANUHCV2006/0100.

[5] On the 9th July 2009, on application made by Mr. Cosbert Cumberbatch, (of Cumberbatch & Associates) which application was apparently filed on the 7th November 2006 in Claim numbered ANUHCV2006/0100, Blenman J. (as she then was), made an Order in the absence of the respondent in the following terms:

1 The original order which was filed in 2005 is not on file; only a copy thereof. It is undated. The original application made before Blenman J is not on file; only a copy of it. The original supporting affidavits are not on file; only copies thereof; and there is no indication from the copies as to who filed the application, or who appeared on behalf of the applicant for a paternity order in Claim No 214 of 2005

1. "That the Order of Paternity granted on the 2nd December 2005 is set aside pursuant to Section 12 (2) of the status (sic) of Children Act Cap 414 of the Laws of Antigua an (sic) Barbuda."

2. "That a copy of the said Order be served on the Registrar of Births and Deaths."

[6] On the 31st July 2009, Marily Jeffers (through her then lawyers Lake and Kentish) filed an application for an order setting aside the order of Blenman J made on the 9th July 2009, wherein the learned judge set aside her earlier order made on the 2nd December 2005. That application was filed in claim numbered ANUHCV2005/0214. Notably, it was given a hearing date of 2nd October 2009. Indeed, the notation on the file jacket shows that the application came before Thomas J. on the 2nd October 2009, in the presence of Mr. K. Kentish and Mr. C. Cumberbatch; whereupon Thomas J. ordered the claimant to file an affidavit in response to the application of Marily Jeffers nee Weste by the 7th October 2009. The application was adjourned for hearing on the 9th October 2009.

[7] The record shows that the matter came before Thomas J. on the 9th October 2009, and the learned judge gave directions for the filing of skeletal arguments, and he adjourned the hearing to a contested chamber day on the 29th October 2009.

[8] According to the record,2 on the 29th October, 2009, the matter came before Thomas J in the presence of K. Kentish and C. Cumberbatch, and the decision was reserved.

[9] Following is the notation by the clerk of court (T. Davis) at the back of the file: "App. K Kentish C. Cumberbatch Order: Application for leave of the Order of 2.12.05 is hereby granted. All proceedings relating to this matter are hereby stayed until further ordered. Matter adjourned to contested chambers on 29th October 2009 for hearing. Parties are at liberty to file skeleton arguments if necessary. Claimant's Order."

2 The notation of court clerk T. Davis on the back of the file jacket pertaining to Claim 214 of 2005

[10] The file jacket records that on 29th October 2009, the matter came up before Thomas J. once again. In attendance were K Kentish, L Daniels, and C. Cumberbatch. The notation of the same clerk of court at back of file is:

"Order: Decision reserved".

[11] No decision is on the file.3 And it appears that the orders of Thomas J dated 2nd, 9th and 29th October 2009 were never formally drawn up.

Other Applications Pending Before the Court

[12] Examination of the file reveals other applications pending in these consolidated matters. They are:

(1) The application of Marily Jeffers nee Weste filed on the 30th May 2016 for various reliefs including a declaration that the paternity order made by Blenman J on 2nd December 2005 in Claim No. ANUHCV 2005/0214 still stands. In essence, the main ground of that application is that the order dated 9th July 2009 was made in Claim 100 of 2006 and accordingly, the order dated 2nd December 2005 in Claim No. 214 of 2005 still stands.

(2) The application4 by Rupert Alexander Joseph filed on the 21st June 2016 for an order that the order dated 9th July 2009 filed in Claim 214 of 2005 be corrected by amending the matter to say Claim No. ANUHCV2005/0214 wherever the words "Suit No ANUHCV2006/0100 appear" That application is said to be brought pursuant to CPR 42.10 (1) and 10 (2) which apply to correction of clerical mistakes and or inadvertent slips.

(3) The application by Marily Jeffers nee Weste filed on 5th July 2016 for an order that the order of 9th July 2009 be set aside on the ground that there was no notice of

3 The file was in a state of confusion (and still is) to the extent where the Chief Registrar and the Hon. Chief Justice got involved and it was directed that the matter be heard de novo. I take it that it is the application dated 31st July 2009 to set aside the order of Blenman J dated 9th July 2009 that is to be heard de novo

4 This application was not assigned a hearing date

the hearing date of the 9th July 2009 and in the circumstances, the applicant is to have the order of 9th July 2009 set aside as of right.

[13] As can be seen from the record, the applicant Marily Jeffers nee Weste has essentially filed three applications seeking to set aside the order of Blenman J. made on the 9th July 2009. These applications were made on several broad grounds including; (1) lack of service of the order of 9th July 2009 on the respondent; (2) lack of service of notice of the proceedings of 9th July 2009; (3) reliance on hearsay evidence contained in supporting affidavits; (4) breach of natural justice in that the order of 9th July 2009 was made in the absence of the respondent.

[14] It is apparent that once the applicant and her attorneys got wind of the order of Blenman J. dated 9th July 2009, wherein the learned judge set aside her earlier order dated 2nd December 2005, there was some confusion with filings in both files. Moreover, there was uncertainty as to whether a decision was pending on the application filed on 31st July 2009 in matter numbered 214 of 2005.5

After a series of correspondence from Mrs.Richards Anjo to the Registrar of the High Court, the matter was referred to the Chief Registrar and the Hon Chief Justice. The result was a directive from the Hon. Chief Justice that the matter be heard de novo. Claim No 100 of 2006 is now consolidated 6 with Claim No 214 of 2005. The matter cannot possibly proceed until the application dated 31st July 2009 to set aside the 2nd December 2005 order is determined.

[15] At the hearing before me on 14th July 2016, Dr. Dorset (the new lawyer for the applicant) expressed the view that the application by Marily Jeffers nee Weste filed on the 5th July 2016 should be heard first, as that would clean up everything. Mrs. Richards Anjo (the new lawyer for the respondent) did not agree. She referred to the application filed by her chambers on 21st June 2016 for correction of what counsel stated to be a clerical error in the order of 9th July 2009 in the number of the claim in which the order of 9th July 2009 was made. That application was not was not assigned a hearing date and it was not canvassed. In any event, it is doubtful whether the 'numbering issue' identified by counsel can be described as a clerical error or accidental slip within

5 See ruling by Cottle dated ih May 2012 (noted at back of file) where he stat ed: 'The state of confusion in this file leaves me unable to determine whether this court has jurisdiction to entertain the application. I also remain unclear as to whether there is an outstanding decision in this matter. I will seek the direction of the Hon. Chief Justice as how this matter will proceed.'

6 By order of Cottle J. made on the 19th March 2015, Claim No 100 of 2006 was consolidated with Claim No 214 of 2005 the meaning of the CPR 42.10. But I delve no further. As I have said, the application was not canvassed.

[16] Mrs. Richards Anja filed submissions in relation to the application of Marily Jeffers nee Weste filed on the 5th July 2016; but at the hearing, she told the court that she will be responding to all the applications brought by the applicant Marily Jeffers nee Weste to set aside the order of the judge made on the 9th July 2009. Dr. Dorset on the other hand was content to rely on the submissions filed by Lake and Kentish on 27th October 2009 on behalf of the applicant. At the hearing, both counsel augmented their written submissions by oral arguments.

[17] Notwithstanding the various applications on file to set aside the order of 2nd December 2005, the court is of the opinion that it is the application filed on 3151July 2009 which was apparently before Thomas J. that is to be considered de nova by this court.7

Grounds of Application

[18] Five main grounds of application were put forward:

(1) The failure of the claimant or her solicitors to attend court on 9th July 2009 was not contumelious;

(2) The claimant has promptly made an application for an order granting extension of time and setting aside the order made in her absence

(3) The claimant has a bona fide excuse for the delay;

(4) The claimant has a good defence to the defendant's application

(5) Had the claimant or her solicitor attended court on the 9th July 2009, it is likely that some other order would have been made

[19] Juliette L. Dunnah, clerk in the law offices of Lake and Kentish, swore to, and filed an affidavit in support of the application.

7 The submissions of the parties addressed thi application. It must be remembered that Dr. Dorset was content to rely on the submissions filed on the 27th October 2009 in the 31st July 2009 application. And Mrs. Richards Anjo also addressed that application.

Issues

[20] The issues which seem to arise on the application dated 31st July 2009 are:

(1) Whether this court has jurisdiction to entertain the application; If so

(2) Whether the order of the learned judge made on the 9th July 2009 should be set aside on the grounds of the application as stated; and for the reasons stated in the submissions filed by counsel of the applicant on the 27th October 2009

Whether this Court has Jurisdiction to Entertain the Application

[21] In written submissions prepared by Lake and Kentish, on behalf of the applicant Marily Jeffers nee Weste, it is stated as follows: "The jurisdiction of the Court to make the impugned order is found in section 10 of the Status of Children Act. It has not been alleged that any of the ... provisions has not been satisfied.... The trial judge had the evidence of the Claimant, Hudson Donovan and John Meade. All have deposed that Wyndham Weste acknowledged the Claimant as his child. This evidence is corroborated by the Baptismal certificate which bears the name of Wyndham Weste as the father of the Claimant. This ... is strong evidence and independent corroboration of the Claimant's case. The trial judge was entitled to accept this evidence."

[22] Let me say at the outset that the court has doubts as to whether it has jurisdiction to entertain or proceed with the application before it to set aside Justice Blenman's order made on 9th July 2009. This will depend on whether the decision of the learned judge was a final decision. The court is of the view that the order of Blenman J. was a final adjudication on the question as to whether a relationship of father and daughter existed between Marily Jeffers nee Weste and Wyndham Weste by virtue of the Status of Children Act Cap 414, and is best challenged on appeal.

[23] This, to my mind is the effect of the entire order (and its preambles) which effectively set aside the order made on 2nd December 2005 essentially declaring Marily Jeffers nee Weste to be the daughter of Windham Weste, deceased, and directing the Registrar of Births and Deaths be served with a copy of the said order

[24] If I am right in saying that the order was a final order which determined the relationship of father and daughter between Marily Jeffers nee Weste and Wyndham Weste, then it is arguable that the applicant is estopped from pursing an application to set aside the order other than by way of an appeal.

[25] It is now eight years since the order of the learned judge was pronounced. The order was made on 9th July 2009. Leave to appeal was required to be made within 42 days of the date of the order. Clearly, the time to appeal has expired, and no doubt new counsel for the applicant is aware of the hurdles which he would have to surmount before he could succeed in filing an appeal at this time. The several applications before the court may very well be tactical devices to get to the Court of Appeal. Whatever the case, I view the application filed on 31st July 2009 as one which is asking me to reconsider and reverse the judge's order of 9th July 2009. I do not view it as an application which requires me to consider it under the court's coordinate jurisdiction.

Discussion and Finding on the Jurisdiction Issue

[26] It is well settled that it is open to a judge who has given a judgment to reconsider his conclusion and, in effect, to reverse his own decision, provided that the order recording his earlier decision has not been drawn up. In**Preston Banking Co. William Allsup** & **Sons** [1895] 1 Ch 141, 143-145, AL. Smith L.J. said:

"So long as the order has not been perfected, the judge has the power of reviewing the matter, but once the order has been completed the jurisdiction of the judge over it has come to an end."

[27] I adopt that statement. The order of 9th July 2009 has been perfected and drawn up. In the premises, the application to set aside the order of Blenman J dated 9th July 2009 is denied for want of jurisdictio.n

[28] However, just in case I am found to be wrong in saying that I have no jurisdiction to entertain the application, I go on to consider whether the order of the learned judge made on the 9th July 2009 should be set aside on the grounds stated in the application dated 31st July 2009.

Whether the Order of the Learned Judge Made on the 9 th July 2009 should be set aside on the Grounds Stated in the Application

[29] The corollary issues here are whether Lake and Kentish received notice of the hearing date of 9th July 2009. Integral to this is whether the order of 9th July 2009 was made in the absence of the respondent; and whether the order was served on the respondent.

[30] There is no dispute that the order was made in the absence of the respondent and or her legal representative.

[31] By CPR 11.18 the application to set aside must be made within 14 days of service of the order which is sought to be set aside; and the application to set aside the order must be supported by evidence on affidavit showing:

(a) a good reason for failing to attend the hearing;

(b) that it is likely that had the applicant attended some other order might have been made

Was the application made within 14 days of service of the order of 9th July 2009?

(1) The evidence

[32] Juliette **L** Dunnah, clerk in the chambers of Lake and Kentish swore to an affidavit in support of the application to set side filed on the 31st July 2009. In it, Ms. Dunnah states at paragraph 6: 'To date, Lake & Kentish has not been served with a copy of the order made on 9th July 2009, Messrs Lake & Kentish heard of the existence of the order from a member of the registry staff.

[33] It is unclear as to when Lake & Kentish became aware of the existence of the order of 9th July 2009. The supporting affidavit is silent on that issue; so too are the written submissions on behalf of the applicant. However, given that the original application to set aside was filed on the 31st July 2009, this supports an inference that the applicant became aware of the order on a date between the 9th and 31st July 2009. But the applicant has not said definitively when she became aware of the order. Awareness is not the test. The test is service.

[34] That having been said, an examination of the court file reveals that the order dated 9th July 2009 was received in the Chambers of Lake & Kentish on '08/10/09 at 4:20 pm' But I can find no affidavit of service on file in proof that the order dated 9th July 2009 was actually served on the responden8t. Perhaps the date 08/10/09 assumes importance in light of the fact that the first application to set aside was filed on 31st July 2009 and further, in light of the fact that the other applications to set aside were filed in 2016. But these issues were not canvassed.

[35] Counsel for the applicant submits that the alleged failure of the respondent to serve the impugned order on the respondent does not in any way affect the validity of the order. Counsel went on to state that on two separate occasions the court directed that notice of the proceedings be advertised in a local newspaper which was done. Counsel for the applicant in his submissions reviewed the evidence that was before the trial judge when she made the earlier paternity order dated 2nd December 2005, which evidence is said to have included a Baptismal certificate which reflected that Wyndham Weste was the father of Marily Jeffers nee Weste.

[36] Mrs. Richards Anjo has not disputed the assertion that the order of 9th July 2009 was not served on the respondent. Accordingly, based on the available evidence including lack of an affidavit of service9 of the court order dated 9th July 2009, the court concludes that although the order of 9th July 2009 was apparently served on the respondents, there is no affidavit of service to substantiate such service and thus, it cannot be said that the order was served on the respondent, since proof of service is usually by way of affidavit of service. It bears noting that CPR 42.6 states that: Unless the court otherwise directs, the court office must serve every judgment or order on (a) any person on whom the court orders it to be served; and (b) every party to the claim in which the judgment or order is made. The court office is required to take note of rule 42.6, and be guided and act accordingly.

(2) Has the Applicant Provided a Good Reason for not Attending the Hearing of the Application to set Aside the Order of 2nd December 2005?

[37] At paragraph 7 of her supporting affidavit, Ms. Dunnah states that the absence of counsel for the respondent on the 9th July 2009 was due to inadvertence because the matter was not entered in

8 The file appears to have been reconstructed with selective documents

9 The court file is not complete. Several of the original documents are missing and copies supplied in their stead. It appears that the file was reconstructed, but only with some of the documents.. counsel's diary. There is no assertion by Ms. Dunnah that no notice of the proceedings had been given to the respondent or to her legal representative.

[38] Dr. Dorset in oral submissions submitted that the application was served on the chambers of Lake and Kentish but no date was assigned in the application. This is inconsistent with what Ms. Dunnah stated in her affidavit as to the reason for the absence of the respondent.

Discussion and Finding on the 'Good Reason' Issue

[39] The affidavit evidence of Ms. Dunnah puts the blame squarely at the feet of the listing clerk or secretary in the offices of Lake & Kentish, in failing to enter the hearing date in counsel's diary. Our courts have held that oversight may be excusable in certain circumstances, but inexcusable oversight which includes and not limited to administrative inefficiencies, does not amount to a good explanatio.n10 Accordingly, inadvertence on the part of the clerk or secretary not to insert the date of hearing in counsel's diary cannot be a good explanation for the failure to attend the hearing of the application to set aside the order of Blenman J dated 9th July 2009. That ground fails.

[40] I do not think it is necessary for me to consider any further ground of the application dated 31st July 2009.

Conclusion

[41] For all the reasons stated above, I make the following orders:

1. The application to set aside the order of Blenman J. dated 9th July 2009 is denied.

10 **See Yates Associates Co Ltd v Brianne Quammie BVIHCVAP2014/005; Rose v Rose SLUHCVAP2003/0019, delivered September** 2003

2. Given the nature of the application, the parties are to bear their own costs.

Pearletta E. Lanns

H . C.J.[Ag]