

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2022/0013

BETWEEN:

MARILY JEFFERS NEE WESTE

Appellant

and

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

[2] RUPERT ALEXANDER JOSEPH aka BENJAMIN
JOSEPH

[3] 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 THE
PURPOSES OF THESE PROCEEDINGS ONLY)

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant
Mrs. Stacy Richards-Roach for the Respondents

2022: October 17;
2023: March 24.

Civil Appeal - Status of Children Act – Paternity order - Applications to set aside an order of a court of concurrent or coordinate jurisdiction - Whether the learned judge exceeded her jurisdiction by dealing with the application to set aside the paternity order in the manner that she did – Standard of proof - Whether the learned judge applied the correct standard of proof in assessing the evidence upon which the paternity order was made

The appellant, Marily Jeffers nee Weste, filed a paternity claim on 13th May 2005 under section 10 of the **Status of Children Act** (“the Act”), seeking a declaration that Wyndham Weste (“the Deceased”) was her father. The claim was supported by evidence

such as the appellant's baptism certificate from the Methodist Church and affidavits of persons (including the appellant herself) attesting to the fact that the Deceased was the appellant's father. On 2nd December 2005, the first judge found that the relationship of father and daughter existed between the Deceased and the appellant and declared the Deceased to be her father ("the Paternity Order").

On 9th July 2009, the first judge heard counsel for the respondents on an application by the respondents under section 12(2) of the Act to set aside the Paternity Order. The first judge set aside the Paternity Order. Neither the appellant nor her counsel was present at the hearing. The appellant applied to set aside the order of the first judge made on 9th July 2009 setting aside the Paternity Order. The application was dismissed by the second judge on 5th December 2016.

The appellant appealed this decision to the Court of Appeal on several grounds. The Court of Appeal allowed the appeal, set aside the orders made on 9th July 2009 and 5th December 2017, and reinstated the Paternity Order.

On 9th November 2020, the respondents were granted leave to apply to set aside the Paternity Order. They filed the application on 17th February 2021 and the hearing took place on 8th October 2021 before the third judge. In a written judgment delivered on 25th May 2022, the third judge set aside the Paternity Order made on 2nd December 2005. She found that in cases where an alleged father is deceased and there is a claim against his estate, even though the standard of proof remains on a balance of probabilities, there should be cogent evidence of paternity. Consequently, she found that the first judge erred in concluding that there was sufficient evidence to prove the existence of the relationship of father and daughter between the appellant and the Deceased when she made the Paternity Order in 2005.

Being dissatisfied the appellant appealed against the order of the third judge, citing three grounds of appeal. However, at the hearing of the appeal, two main issues emerged for determination: (i) whether the third judge exceeded her jurisdiction by dealing with the application to set aside the Paternity Order in the manner that she did; and (ii) whether the third judge applied the incorrect standard of proof in assessing the evidence upon which the Paternity Order was made.

Held: allowing the appeal, setting aside the orders of the third judge made on 25th May 2022, reinstating the Paternity Order made by the first judge on 2nd December 2005, and awarding costs to the appellant in the sum of \$1,000.00, being two-thirds the amount awarded in the lower court, that:

1. When the High Court is dealing with applications to set aside an order of a court of concurrent or coordinate jurisdiction it is not sitting in an appellate jurisdiction. The function of the Court is limited in these circumstances. A court exercising a setting aside jurisdiction is different from a court exercising an appellate jurisdiction. In this case, the third judge was required to determine whether the evidence before the first judge in 2005 was false or mis-stated, or whether there was a material change of circumstance, to determine whether the Paternity Order should be set aside. The third judge was not sitting in an appellate jurisdiction, and it was not open to her to

make determinations on findings of fact and the sufficiency of evidence before the first judge who made the Paternity Order. The third judge conducted a complete re-evaluation of the evidence and substituted her ruling for that of the first judge who granted the Paternity Order. In doing so she exceeded her jurisdiction, and her decision must be set aside.

Harding v Forrester and others (2014) 84 WIR 389 applied.

2. It is trite that the civil standard of proof is always on a balance of probabilities. However, there are circumstances that require a flexible application of that standard. The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. The flexibility of the standard lies in the strength or quality of the evidence that will, in practice, be required for an allegation to be proved on the balance of probabilities, not in any modification to the degree of probability required for an allegation to be proved.

R (on the application of AN) v The Mental Health Review Tribunal (Northern Region) [2006] 4 All ER 194 applied.

JUDGMENT

- [1] **WEBSTER JA. [AG.]:** This is an appeal against the judgment of the learned judge made on 25th May 2022 in which she set aside a paternity order obtained by the appellant on 2nd December 2005. This matter is one of some antiquity and an outline of the factual background is helpful in understanding the issues in the appeal.

Background

- [2] The appellant claims that she was born on 21st May 1954 to her mother, Eloise Daniel and her father, Wyndham Weste (“the Deceased”). Further, that the Deceased acknowledged her as his daughter, provided for her financially and showed love and affection towards her up until his death on 10th June 1955, approximately one year after she was born.
- [3] On this premise, she filed a paternity claim on 13th May 2005 under section 10 of the **Status of Children Act** (“the Act”),¹ seeking a declaration that the Deceased was her father. This claim was numbered ANUHCV2005/0214. The evidence in support of the

¹ Cap 414, Revised Laws of Antigua and Barbuda 1992 (now repealed).

claim was the appellant's baptism certificate from the Methodist Church and affidavits of persons (including the appellant herself) attesting to the fact that the Deceased was the appellant's father. On 2nd December 2005, the first judge found that the relationship of father and daughter existed between the Deceased and the appellant and declared the Deceased to be her father ("the Paternity Order").

- [4] Armed with the Paternity Order, the appellant filed a claim on 22nd February 2006 against Maudlyn Joseph, in her capacity as administratrix of the estate of the Deceased, seeking, inter alia, a revocation of the Letters of Administration that had been issued to her. The appellant asserted that she was the sole issue of the Deceased and the only person entitled to represent and take under his estate. This claim was numbered ANUHCV2006/0100. On 10th November 2006, Thomas J issued directions for trial, but there is no evidence in the court's records or otherwise that the claim was tried.

- [5] On 9th July 2009, the first judge heard counsel for the respondents on an application by the respondents under section 12(2) of the **Status of Children Act** to set aside the Paternity Order originally made by her on 2nd December 2005. The first judge set aside the Paternity Order. Neither the appellant nor counsel for the appellant was present at the hearing.

- [6] On 31st July 2009, the appellant applied to set aside the order of the first judge made on 9th July 2009, setting aside the Paternity Order. The application was made on the grounds that the order was made in the appellant's absence and her absence was not contumelious; the application was made promptly and there was a bona fide excuse for the delay; the appellant had a good defence to the claim; the court did not have jurisdiction to set aside the order because the respondents had not obtained leave to make the application as required by section 12(2) of the Act; and had the appellant attended the hearing it is likely that another order would have been made.

- [7] The files in both ANUHCV2005/0214 and ANUHCV2006/0100 were in an unsatisfactory state and it was unclear whether the appellant's application to set aside the order made on 9th July 2009 was heard or determined. The files were referred to the Chief Justice and Chief Registrar for directions. On or about 27th July 2015, the Chief Justice directed that the set-aside application be heard de novo.

- [8] On 30th May 2016, the appellant filed an application seeking the following orders:
- i. that the application filed on 31st July 2009 be determined and judgment rendered accordingly;
 - ii. a declaration that the Paternity Order made on 2nd December 2005 still stands;
 - iii. any further orders to resolve the matters in dispute; and
 - iv. costs.
- [9] On 5th July 2016, the appellant filed another application seeking to set aside the order made on 9th July 2009, this time on the sole ground that there was no notice of the hearing date of 9th July 2009.
- [10] The matter was heard de novo by a second judge on 14th July 2016. She was of the view that, notwithstanding the various applications before the court, the application filed by the appellant on 31st July 2009 to set aside the first judge's order of 9th July 2009 was what the court ought to consider de novo.
- [11] In a written decision delivered on 5th December 2017, the second judge concluded that the order made on 9th July 2009 was a final order that determined the question of whether the relationship of father and daughter existed between the appellant and the deceased. Accordingly, the court did not have jurisdiction to set it aside. Alternatively, even if the court had jurisdiction, this was not a proper case to exercise it in favour of the appellant because she did not provide a good reason for not attending the hearing on 9th July 2009. The second judge did not consider any other grounds on which the appellant had relied to set aside the order of 9th July 2009, nor did she consider the application to set aside filed on 5th July 2016. Accordingly, she denied the application to set aside the order made on 9th July 2009.
- [12] The appellant appealed this decision to the Court of Appeal on the grounds that: the learned judge erred in finding that she had no jurisdiction to entertain the application; the learned judge erred in failing to set aside the order when the application was made without leave; the learned judge erred in applying the criteria dictated by rule 11.18 of the **Civil Procedure Rules 2000** ("CPR") in dismissing the application of 31st July 2009

when the 9th July 2009 order was never served on the appellant;² and the learned judge erred in failing to adjudicate on the application filed by the appellant on 5th July 2016 when she was under a duty to do so.

[13] This Court allowed the appeal, set aside the orders made on 9th July 2009 and 5th December 2017, and reinstated the Paternity Order. The Court found that service of notice of the hearing of the application for leave to set aside the Paternity Order on the appellant was mandatory. The appellant was not served with the notice. Therefore, there was a good explanation for the appellant's non-attendance at the hearing, and had she attended, there is a real possibility that a different order would have been made. Thus, the Court ordered that the respondents' application for leave to set aside the Paternity Order be heard de novo by another judge of the High Court.

[14] On 9th November 2020, the respondents were granted leave to apply to set aside the Paternity Order. They filed the application on 17th February 2021. The hearing of the application took place on 8th October 2021 before a third judge. Counsel for both parties were present.

[15] In a written judgment delivered on 25th May 2022, the third judge set aside the Paternity Order made on 2nd December 2005. She found that in cases where an alleged father is deceased and there is a claim against his estate, even though the standard of proof remains on a balance of probabilities, there should be cogent evidence of paternity. Consequently, she found that the first judge erred in concluding that there was sufficient evidence to prove the existence of the relationship of father and daughter between the appellant and the Deceased when she made the Paternity Order in 2005.

The appeal

[16] The appellant appealed against the order of the third judge, citing three grounds of appeal. However, at the hearing of the appeal, two main issues emerged for determination:

² This is how the judgment of the Court of Appeal reads but it should have been a reference to the notice of hearing that was not served, not the order of 9th July 2009.

- i. whether the third judge exceeded her jurisdiction by dealing with the application to set aside the Paternity Order in the manner that she did; and
- ii. whether the third judge applied the incorrect standard of proof in assessing the evidence upon which the Paternity Order was made.

Analysis

[17] While both parties focused much of their respective arguments on the sufficiency of the evidence as it related to the actual proof of paternity, it is important to bear in mind that what this Court has been called upon to determine is whether the third judge erred in setting aside the Paternity Order, and not whether this Court would itself have set aside the Paternity Order. With this in mind, I now turn to the consideration of the appeal.

Whether the learned judge exceeded her jurisdiction

[18] The Paternity Order was made under section 10 of the Act which allows a relevant person to apply for a paternity order. Section 12 provides as follows:

- “(1) A paternity order remains in force until it is set aside under this section.
- (2) An application to set aside a paternity order may be made with leave of the Court to the Court by which the order was made.
- (3) The Court may confirm the order or set it aside.
- (4) The setting aside of a paternity order shall not, unless the Court otherwise directs, affect rights which vested while the order was in force.”

[19] This section confers power on the court to set aside a paternity order made by the same court or a court of coordinate jurisdiction. The section does not give any guidance on how the power to set aside a paternity order is to be exercised. Learned counsel for the parties attempted to assist the court by referring to cases decided in England on legislation giving a similar power to set aside orders.

[20] Counsel for the appellant relied heavily on the case of **Norman v Norman**³ both in this Court and the lower court and submitted that the third judge did not even mention the case in her judgment. The essence of **Norman v Norman** is that legislation that creates a right to apply to set aside or rescind an order made by the same court that granted the order will be considered ‘against the backdrop of the desirability of finality in litigation,

³ [2017] EWCA Civ 120.

the undesirability of permitting litigants to have ‘two bites at the cherry’, and the need to avoid undermining the concept of appeal’.⁴

[21] The case went on to say that the court can only set aside an order following an application that is made promptly and in the following circumstances:

- (i) where there had been a material change of circumstances since the order was made;
- (ii) where the facts on which the original decision was made had been misstated; or
- (iii) where there had been a manifest mistake on the part of the judge in formulating the order.

[22] Counsel for the respondents, Mrs. Stacy Richards-Roach, contended that the **Norman** case should be distinguished as it related to a financial consent order made in family proceedings. Instead, she relied on the test in **Papanicola (as trustee in bankruptcy for Mak) v Humphreys and others**⁵ as the more appropriate test. **Papanicola** is based on an application under insolvency legislation in England which allows the court to review, rescind or vary any order made by it in the exercise of its discretion. At paragraph 25, the court noted that:

“(1) The section gives the court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction. (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour. (3) Those circumstances must be exceptional. (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order. (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court’s attention at that time. (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.”

[23] I do not think it is important to decide whether to apply the **Norman** test or the **Papanicola** test. What I gather from the tests is that the threshold requirement for

⁴ Ibid at para 55.

⁵ [2005] 2 All ER 418.

applying for an order to set aside another order made by the same court (as in section 12(2) of the Act) is that there must be a material change of circumstances since the making of the original order, or the application for the original order was made on misstated facts or there was a mistake in the drafting of the order. If the applicant can establish any of these three criteria then the other factors come into play such as delay, the desirability of finality of litigation, avoiding multiple attempts at litigating the same matter, and any other relevant factor.

[24] Another important factor that was not mentioned in the cases cited by counsel is that a statutory jurisdiction to set aside an order of a court of concurrent or coordinate jurisdiction is not equivalent to an appellate jurisdiction. Counsel for the respondents admitted as much at page 8 of her skeleton submissions.

[25] An excellent example of the correct approach as to how courts should deal with applications to set aside an order of a court of concurrent or coordinate jurisdiction is **Harding v Forrester and others**⁶, a decision of the Court of Appeal of Guyana. The Commissioner of Title of the Land Court of Guyana granted title to parcels of land to the respondents based on their prescriptive claim. The appellant challenged the grant by a claim in the High Court on the grounds of deliberate concealment of evidence and fraud by the respondents. The High Court (Chang CJ [Ag.]) dismissed the claim, finding that there had been no deliberate fraudulent concealment of evidence. On appeal, the Court of Appeal noted that the jurisdiction of the High Court is not appellate in nature. The High Court, being a court of coordinate jurisdiction to that of the Land Court, the trial judge had to decide whether a fraud was perpetrated on the Land Court in making its decision to grant prescriptive title. The task of Chang CJ [Ag.] was not to find whether or not the Commissioner of Title would have arrived at a different decision, since he was not sitting on appeal of the Commissioner of Title's decision. His task was to find out whether fraud was proved, and if so, to set aside title on that basis. The Court of Appeal also noted the limited function of the trial judge in reviewing the decision of the Commissioner. The trial judge was not required to find whether the facts set out in the petition before the Land Court were insufficient to grant title, or whether there were shortcomings in the petition. The judge was required to find whether fraud was proved.

⁶ (2014) 84 WIR 389.

[26] Applied to this case, the third judge was required to determine whether the evidence before the first judge in 2005 was false or mis-stated, or whether there was a material change of circumstance, to determine whether the Paternity Order should be set aside. The third judge did not do this. At paragraph 28 of the judgment she referred to the position of a 'reviewing court' in interfering with findings of fact. She did not distinguish between a court exercising a setting aside jurisdiction and a court exercising an appellate jurisdiction. Instead, she considered authorities exploring the jurisdiction of appellate courts and then went on to adopt an appellate approach in dealing with the application. Specifically, she cited the case of **Webster Dyrud Mitchell et al (A Partnership) v Jenny Lindsay**⁷ which speaks to how an appellate court should treat with the review of a trial judge's findings of fact. She also relied on **David Sampson (Intended Administrator of the Estate of Elisha Sampson, deceased) v David Adolphus McKenzie**⁸ as support for the proposition that appellate courts may determine issues of sufficiency of evidence.

[27] While these cases remain good law, the third judge was not sitting in an appellate jurisdiction and it was not open to her to rely on them as authority to make determinations on findings of fact and the sufficiency of evidence before the judge who made the Paternity Order. She conducted a complete re-evaluation of the evidence and substituted her ruling for that of the judge who granted the Paternity Order. In doing so she exceeded her jurisdiction and her decision must be set aside.

[28] For completeness, I would add that it is irrelevant whether this Court is of the view that there was insufficient evidence before the first judge to warrant the making of the Paternity Order as there is no appeal against that order and the time to appeal has long passed.

Whether the Norman/Papanicola test was satisfied

[29] The foregoing analysis of the third judge's approach and her decision is sufficient to dispose of this appeal. The discussion that follows is out of deference to the very full

⁷ AXAHCVP2017/0001 (delivered 20th September 2021, unreported).

⁸ SVGHCVAP2005/0006 (delivered 5th December 2005, unreported).

submissions by counsel on both sides on the issues of changed circumstances affecting an extant order of the court and standard of proof in paternity cases.

[30] Mrs. Richards-Roach contended that although the third judge did not explicitly rely on the **Norman** or **Papanicola** test, there was a material change in circumstances which warranted the setting aside of the order under either test. She highlighted that the baptism certificate presented to the first judge in 2005 differed from the baptism certificate presented to the learned judge in 2021.

[31] I disagree with the submission that the differing baptism certificates were a material change in circumstances sufficient to warrant the setting aside of the Paternity Order. Baptism certificates are documents that can be issued and re-issued by religious institutions at any time. The only difference between the two certificates is that the 2005 certificate had five listed sponsors while the 2021 certificate had three listed sponsors. The critical information from the certificate is that the deceased is recorded as being present on both certificates and is named as the appellant's father.

[32] In any event, the baptism certificate was only one piece of evidence before the first judge in 2005 when she made the Paternity Order. She considered the baptism certificate, affidavits and witness testimonies before finding that a relationship of father and daughter existed between the appellant and the deceased. Therefore, I do not find that there was any material change in circumstances warranting the setting aside of the order.

The standard of proof

[33] Counsel for both parties made submissions on the standard of proof to be applied in paternity cases.

[34] Dr. Dorsett criticised the third judge's use of **Hulda Stanley v Lanval E. Phillips (as Administrator of the Estate of Cuthbert Ambrose Phillips aka Ambrose Phillips, deceased)**⁹ in arriving at the standard of proof to be used in this case. At paragraph 31 of her judgment, the third judge agreed that the standard of proof should be the usual

⁹ AXAHC0054/2009 (delivered 13th January, 2011, unreported).

civil standard - on a balance of probabilities. However, given the gravity of the situation, the evidence required to meet this standard must be sufficient and convincing. In a case where the alleged father is deceased and therefore unable to personally attest to or answer questions, and in circumstances that may have far reaching consequences as it concerns the estate of the putative father and inheritance of heirs, more cogent evidence is required.

[35] Dr. Dorsett relied primarily on the case of **In re S-B (Children) (Care Proceedings: Standard of Proof)**,¹⁰ where the Supreme Court of the United Kingdom held that the standard of proof for findings of past fact was the balance of probabilities, nothing more and nothing less, and that there was no 'heightened standard of proof' in cases where the allegations were serious.

[36] Counsel for the respondents on the other hand accepted that there is no question that the standard of proof is on a balance of probabilities. However, she relied on the case of **Re B (Children) (sexual abuse: standard of proof)**¹¹ which stated that 'the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability'.

[37] I find no difficulty with the third judge's flexible approach to the application of the standard of proof. It is trite that the civil standard of proof is always on a balance of probabilities. However, I agree that there are circumstances that require a flexible application of that standard. I think the position was stated quite eloquently in **R (on the application of AN) v The Mental Health Review Tribunal (Northern Region)**¹² where the English Court of Appeal said:

"[I]n English law the civil standard is one single standard, namely proof on the balance of probabilities (or preponderance of probability). The other standard is the criminal standard of proof beyond reasonable doubt. There is no intermediate standard, nor is the civil standard to be broken down into sub-categories designed to produce one or more intermediate standards... Although there is a single civil standard of proof on the balance of probabilities, it is flexible

¹⁰ [2009] UKSC 17.

¹¹ [2008] UKHL 35.

¹² [2006] 4 All ER 194 at paragraphs 60 and 62.

in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus, the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”

[38] The third judge acknowledged that the correct standard of proof was on a balance of probabilities but given the far-reaching consequences of making a paternity order in a case like this, she was of the view that cogent evidence was required to reach that standard. Admittedly, however, the words ‘the onus of so proving must be higher’¹³ may cause some confusion as they suggest that the judge applied a heightened standard of proof as opposed to simply requiring stronger evidence to arrive at the usual standard of proof.

[39] Nevertheless, the position remains that the third judge did not have jurisdiction to embark on such an evaluation to determine whether the evidence before the first judge in 2005 was sufficient for paternity to be proved on a balance of probabilities.

¹³ Paragraph 32 of the judgment.

Conclusion

[40] For the foregoing reasons, I make the following orders:

- i. The appeal is allowed and the orders of the third judge made on 25th May 2022 are set aside.
- ii. The Paternity Order made by the first judge on 2nd December 2005 is reinstated.
- iii. Costs are awarded to the appellant in the sum of \$1,000.00, being two-thirds the amount awarded in the lower court.

I concur.
Mario Michel
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar