

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2019/0183

BETWEEN:

ASHTON AMORY

Claimant

and

**ERNEST AMORY (Administrator of the Estate of Edward Ashton
Amory, Deceased)**

Defendant

Appearances:

Mr. John Cato for the Claimant

Mr. Brian Barnes with Ms. Lisa Hazel-Claxton, Mr. Nassibou Butler and Ms. Indira
Butler for the Defendant

2020: January 16
June 15

JUDGMENT

- [1] **VENTOSE, J.:** The Claimant on 10 July 2019 filed an application for declaration of paternity pursuant to the Status of Children Act, CAP 12.14 of the Revised Laws of Saint Christopher and Nevis. The Claimant states that he is the biological son of Edward Ashton Amory (Mr. Amory Senior) who died on 17 March 1992. The purpose of this application, Counsel for the Claimant submits, is to “prove [the

Claimant's] lineage and so obtain standing on his projected plans for challenging the issue of Letters of Administration with the will annexed and the revocation of the Letters of Administration".

- [2] The Claimant states that the Defendant, Mr. Ernest Amory, is his brother by father only. The Claimant avers that his uncle (Mr. Christopher O'Farrell) lived in the same dwelling house when his grandmother, Ms. Inez O'Farrell (the mother of Mr. Amory Senior) was alive and currently lives there. The Claimant also avers that he was born to a woman named Ms. Mary James on 27 December 1951 and that he is almost 70 years of age.
- [3] The Claimant avers that he was taken by Mr. Amory Senior and entrusted to the care of his (the Claimant's) grandmother, Ms. O'Farrell, "to be taken care of, reared up and schooled". The Claimant also avers that Mr. Amory Senior provided financially and materially for Ms. Inez, himself and Mr. O'Farrell.
- [4] The Claimant also avers that after Mr. Amory Senior died, he was invited by the Defendant to attend a meeting to read out a document which the Defendant claimed to be the Last Will and Testament of Mr. Amory Senior. The Claimant also avers that he was told by the Defendant that he (the Claimant) "would be contacted sometime in the near future and apprised further of matters which concerned the disposition of [Mr. Amory Senior's] property and other things (sic) which [the Claimant] would be interested in." The Claimant states that to date he has never been contacted in this regard by the Defendant.
- [5] The Claimant also avers that the Defendant, in obtaining Letters of Administration of the Estate of Mr. Amory Senior, falsely claimed to be the majority of persons to share in the Estate of Mr. Amory Senior. The Claimant states that Mr. Amory Senior had seven (7) children and five (5) were alive at the date of his death.
- [6] In the application, the Claimant also sought an order to exhume the body of Mr. Amory Senior "so that proper DNA tests could be done by competent authorities to determine [the Claimant's] paternity". The Claimant also filed on 16 July 2019 an affidavit "in support of the application for declaration of paternity by the

introduction of DNA evidence of siblings of the applicant with the consent of the Respondent".

- [7] The Claimant on 23 July 2019 also filed a without notice application for a letter of request pursuant to CPR 33.15(1) directing the issue of a Letter of Request to the Judicial Authorities in St. Croix, United States Virgin Islands, to examine or arrange for the examination of Mr. O'Farrell to enable an officer appointed by the court in Saint Christopher and Nevis to take the evidence of Mr. O'Farrell or to arrange for evidence to be taken from him concerning the paternity of the Claimant. The grounds for this application are as follows. First, CPR 33.15(1) makes provision for the taking of evidence in a foreign country upon application to the court for an examiner to be appointed to take the deposition evidence and transmit the same to the court, of a person who is required to give evidence but is incapacitated and prevented from doing so on account of sickness or injury. Second, the interest of justice requires the application for the issuance of a Letter of Request be considered favorably by a judge of this court. Third, without the evidence of Mr. O'Farrell the Claimant will be compelled to disturb the resting place of Mr. Amory Senior in order to obtain DNA evidence upon exhumation of the body of Mr. Amory Senior in order to prove the Claimant's paternity.
- [8] The Claimant avers that Mr. O'Farrell, the only brother of Mr. Amory Senior, is now advanced in age and bedridden from a recent stroke and other illnesses. The Claimant also avers that Mr. O'Farrell has indicated his desire, at the request of the Claimant, to testify to matters within his knowledge pointing to the fact of the Claimant's paternity and to his familial blood connection to the Claimant.
- [9] The Defendant opposes both the application for paternity and the application for the Letter of Request. The Defendant avers that he is a businessman and that he is the sole surviving administrator of the Estate of Mr. Amory Senior. The Defendant also avers that the Claimant's true name is Austin Emmanuel James born on 19 December 1951 and that the birth certificate of the Claimant does not disclose the name and surname of a father. The Defendant states that the Claimant's name was changed to the name which now appears in this application

via Deed Poll dated 6 April 1992. The Defendant also states that this change was made when the Claimant was 41 years old and 23 years after he became an adult.

[10] The Defendant avers that the Claimant is not the son of Mr. Amory Senior, and that the Claimant was never recognized and accepted as the child of Mr. Amory Senior. The Defendant also avers that Mr. Amory Senior had four (4) children in wedlock and had two (2) outside children. The Defendant states that Mr. Amory Senior recognized those two (2) outside children and give them his name and provided for them in his Last Will and Testament. The Defendant also states that Mr. Amory Senior did not put his name on the birth certificate of the Claimant as he did with the two (2) outside children and that the Claimant was not included in the Last Will and Testament of Mr. Amory Senior. The Defendant avers that Mr. Amory Senior made two (2) wills and in them he made provision for all of his children and in neither of those wills did he include the name of the Claimant as a beneficiary.

[11] The matter came before the court on 26 September 2019 where the court give directions for the hearing of the application to take place on 12 December 2019. The Claimant filed (but did not serve) submissions, as ordered by the court, on 31 October 2019.

The Status of Children Act

[12] The applicable provision of the Status of Children Act is as follows

12. Declaration of paternity.

(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 or herself and any other person; or
- (c)** being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons;

may apply to the High Court in the prescribed manner 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) An application for a declaration under this section may be made to the Magistrate's Court and if the Magistrate is satisfied there are no issues which are in dispute, the Magistrate may make a declaration and such a declaration shall be in effect the same as if it had been made by the High Court.
- (3) Where a declaration of paternity under subsection (1) or (2) 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 paragraph (b) of subsection (1) of section 5, whether any of the requirements of that paragraph have been satisfied.
- (4) The Chief Justice may make rules prescribing the manner (including the prescription of fees and forms) in which applications may be made to the High Court under section 11 and providing for such matters as are necessary to give full effect thereto.

[13] The other relevant sections are as follows:

6. Recognition of paternity required.

- (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 or to the construction of a will or other testamentary disposition or of an instrument creating a trust, be recognized only if
 - (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
 - (b) 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 6 or otherwise):

Provided that, if such purpose is for the benefit of the father, there shall be the additional requirement that paternity has been so admitted or established during the lifetime of the child or prior to its birth.

- (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 act, event or conduct which enables that 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.

7. Evidence and proof of paternity.

- (1) Where, pursuant to section 14 of the Registration of Births, Deaths and Marriages Act, Cap. 12:09 or to the corresponding provisions of any former enactment, 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 given in accordance with section 13 of that Act shall be prima facie evidence that the person named as the father is the father of the child.
- (2) 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 or by each of those persons in the presence of a barrister and solicitor, Justice of the Peace, magistrate, registered medical practitioner, minister of the Christian religion, marriage officer, registered midwife or headmaster of a public school as defined in the Education Act, Cap. 13:01 be prima facie evidence that the person named as the father is the father of the child.
- (3) An order made under section 124 of the Magistrate's Code of Procedure Act, Cap. 3:17 shall be prima facie evidence of paternity in any subsequent proceedings, whether or not between the same parties.
- (4) Subject to subsection (1) of section 6, a declaration made under section 12 shall, for all purposes be conclusive proof of the matters contained in it.
- (5) An order made in any country outside Saint Christopher and Nevis declaring a person to be the father of a child, being an order to which this subsection applies pursuant to subsection (6), shall be prima facie evidence that the person declared the father is the father of the child.
- (6) The Attorney-General may, by Order, declare that subsection (5) applies with respect to orders made by any court or public authority in any specified country outside Saint Christopher and Nevis or by any specified court or public authority in any such country.
- (7) A child whether born in or out of wedlock shall use the surname of his or her father on any document obtained by the child where
 - (a) the name of the father is entered in the register of births in accordance with the provisions of sections 14 and 15,

of the Registration of Births, Deaths and Marriages Act, Cap. 12:13; or

(b) a court makes an order as to the paternity of the child.

- [14] Section 12(3) of the Status of Children Act makes reference to section 5 but it seems that this is not correct and that the correct section is section 6.

The Submissions of the Parties

- [15] Counsel for the Claimant submits that the law relating to the declaration of the status of an illegitimate child who wishes to be included as a beneficiary of the estate of the deceased who died intestate is contained in the Status of Children Act and the decision of **Re Cato** (St. Vincent no. 43 of 2000) which was accepted as correct by the Court of Appeal in **McKenzie v Sampson** (Civ App No. 12 of 2003 dated 29 March 2004). Counsel for the Claimant relies on **Re Cato**, submitting that it stands for the proposition that the only ways in which a child born out of wedlock can succeed to be named as a beneficiary of the estate of a person who died intestate are as follows. First, if he or she was acknowledged by the deceased during the lifetime of the deceased. Second, if there is a document signed by both the mother and father acknowledging the relationship of father and child of that individual. Third, DNA testing is the only conclusive method recognized by the Status of Children Act.
- [16] Counsel for the Claimant accepts that the Claimant has provided no evidence or proof of the matters required by the Status of Children Act. Consequently, Counsel for the Claimant submitted that the Claimant had “therefore pinned his claim to a request for exhumation of the body of [Mr. Amory Senior] to prove his claim”.
- [17] Counsel for the Defendant submits that, to succeed in his application, the Claimant must satisfy the provisions of section 6 of the Status of Children Act, and must prove to the required legal standard that not only is he the child of Mr. Amory Senior but that such a relationship was established in the lifetime of Mr. Amory Senior. The Defendant further submits as follows. First, since there is no evidence that Mr. Amory Senior and the mother of the Claimant were ever married, section 6(1)(a) of the Status of Children Act does not apply. Second, the Claimant must

therefore satisfy the requirements of section 6(1)(b) of the Status of Children Act that paternity had been admitted in the lifetime of Mr. Amory Senior. Third, there is no evidence in the Claimant's affidavit that, after his birth, Mr. Amory Senior took any positive steps and or entered his name in the Register of Births as the Claimant's father pursuant to section 7(1) of the Status of Children Act. Fourth, there is no evidence in the Claimant's affidavit that his mother and Mr. Amory Senior signed an instrument being a deed or any other document in the presence of any person recognized by the Status of Children Act as a witness naming Mr. Amory Senior as the father of the Claimant pursuant to section 7(2) of the Status of Children Act.

- [18] Sixth, no court has made any declaration stating conclusively or otherwise that the Mr. Amory Senior was the father of the Claimant. Seventh, there has been no order under section 124 of the Magistrate's Code of Procedures Act in respect of the paternity of the Claimant pursuant to section 7(3) of the Status of Children Act. Eighth, no order has been made in any country outside Saint Christopher and Nevis declaring Mr. Amory Senior to be the Claimant's father pursuant to section 7(5) of the Status of Children Act which means that section 7(6) of the Act is not applicable. Counsel for the Defendant, therefore, concludes that the Claimant has failed to satisfy any of the principal evidential requirements for a declaration of paternity under the Status of Children Act.

Analysis

- [19] The Letter of Request: CPR 33.15 governs applications for Letters of Request. It provides as follows:

Where person to be examined is out of the jurisdiction – letter of request

33.15(1) If a party wishes to take a deposition from a party outside the jurisdiction, the court may direct the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.

(2) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.

(3) If the government of the country to which the letter is sent allows a person appointed by the court to examine a person in that country, the court may make an order appointing an examiner for that purpose.

(4) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.

(5) If the court makes an order for the issue of a letter of request, the party who sought the order must file –

(a) the following documents and, except where paragraph (6) applies, a translation of them –

(i) a draft letter of request

(ii) a list of questions or the subject matter of questions to be put to the person to be examined; and

(iii) a statement of the issues relevant to the proceedings; and

(b) an undertaking to be responsible for the expenses of the minister with responsibility for foreign affairs in relation to the request.

(6) There is no need to file a translation if English is one of the official languages of the country where the examination is to take place.

[20] In relation to the application for the Letter of Request, the only evidence that the Claimant has provided to support the Letter of Request is the bald statement is that Mr. O'Farrell, the only brother of Mr. Amory Senior, is now advanced in age and bedridden from a recent stroke and other illnesses. Counsel for the Defendant submits that: (1) the Claimant has not provided any basis for, or evidence justifying, the application for the Letter of Request; (2) the Claimant has not indicated the relevance of any testimony of Mr. O'Farrell in respect of the matter before the court; (3) there is no evidence that Mr. O'Farrell has consented to providing this evidence; (4) there is no evidence of the residence of Mr. O'Farrell or whether the judicial authorities in that jurisdiction are amenable to any such Letter of Request if issued by the court; and (5) there is no evidence of the age, medical and mental condition or competency of Mr. O'Farrell.

[21] In the application for the Letter of Request, the Claimant does actually state that the application is for the issuance of a Letter of Request to the Judicial Authorities

of St. Croix, United States Virgin Islands. With that exception, the court accepts the submissions of Counsel for the Defendant that the Claimant has not provided any basis, supported by evidence, for the court to issue the Letter of Request as prayed. Also, the Letter of Request fails to comply with CPR 33.15(5)(a)(ii) and (iii) in that it neither contains a list of questions or the subject matter of questions to be put to the person to be examined nor a statement of the issues relevant to the proceedings.

- [22] Declaration of Paternity: In relation to the declaration of paternity, it must be noted that the Claimant merely seeks this declaration only. While the purpose of seeking this declaration, as Counsel for the Claimant submits, namely, to “prove his lineage and so obtain standing on his projected plans for challenging the issue of Letters of Administration with the will annexed and the revocation of the Letters of Administration”, this is not a matter relevant to the issue of paternity before the court.
- [23] Section 10(1)(c) of the Status of Children Act provides that a person who being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons may apply to the High Court in the prescribed manner 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. To make an application pursuant to section 10(1)(c), a person must, first, provide evidence that he or she is a person having a proper interest in the result, and second, apply to the court in the prescribed manner for a declaration of paternity. Once the person provides sufficient information to the satisfaction of the court that the relationship of father and child exists, the court may make a declaration of paternity. This declaration may be made whether or not the father or the child or both of them are living or dead.
- [24] The decision of the Court of Appeal in **Sampson** concerned a declaration of paternity under section 10(1) of the Status of Children Act of Saint Vincent and the Grenadines and concerned essentially who should inherit the estate of the

deceased. The Court of Appeal in **Sampson** accepted the observation of Mitchel J. in **Re Cato** that the standard of proof for a declaration of paternity simpliciter is much lower than would be acceptable in affiliation proceedings.

- [25] The instant application is still in the preliminary stages and this judgment does not deal with the substantive application for a declaration of paternity for reasons articulated by the Court of Appeal in **Sampson** as follows:

[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-examination. ...

[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.

- [26] The court is here also faced with serious factual disputes on the affidavits and agrees with the Court of Appeal in **Sampson** that examination and cross-examination at trial is the best method of resolving such disputes. The matter will therefore be listed for trial directions.
- [27] The DNA Evidence Issue: In the application for a declaration, the Claimant in the grounds of the application states that "DNA test and analysis of the same of the body of [Mr. Amory Senior] as well as blood or other tissue from the Applicant will confirm the Applicant's status as a child of [Mr. Amory Senior]". In the affidavit in support of the application for a declaration of paternity, the Claimant avers that "I am therefore asking [the court] for an Order to exhume the body of [Mr. Amory Senior] so that (sic) proper DNA test could be done by competent authorities to determine [the Claimant's] paternity".
- [28] In the affidavit of the Claimant in support of the application for a declaration of paternity by the introduction of DNA evidence of siblings of the Claimant with the consent of the Respondent filed on 16 July 2019, the Claimant repeats his averments in respect of the exhumation of the body of Mr. Amory Senior. The Claimant filed no application to which this affidavit relates. It arguably relates to one of the "grounds" on which the Claimant alleged that he based his application for a declaration of paternity, as mentioned before, namely, "DNA test and analysis of the same of the body of [Mr. Amory Senior] as well as blood or other tissue from the Applicant will confirm the Applicant's status as a child of [Mr. Amory Senior]". The draft order dated 16 July 2019 relating to the affidavit filed on the same day seeks an order that "The Applicant is at liberty to make arrangements with the authorities concerned for the exhumation of the body of [Mr. Amory Senior], for the sole purpose of removing samples of tissue and/or

bones and/or nails and/or hair and/or teeth or other material which in the opinion of an expert may be capable of providing sufficient material for the purpose of this application and the court".

- [29] However, at the hearing Counsel for the Claimant indicated that he was no longer pursuing this option contained in the affidavit filed on 16 July 2019. In any event, the Claimant did not have before the court an application for the exhumation of the body of Mr. Amory Senior. The affidavit filed on 16 July 2019 and the draft order could not be evidence in support of the "DNA test and analysis of the same of the body of [Mr. Amory Senior] as well as blood or other tissue from the Applicant will confirm the Applicant's status as a child of [Mr. Amory Senior]" mentioned by the Claimant as a ground of his application for paternity. Consequently, I make no decision or order in relation to the DNA evidence issue.

Disposition

- [30] For the reasons explained above, I make the following orders:
- (1) The application for a Letter of Request is hereby dismissed.
 - (2) The matter is set for 29 June 2020 for trial directions.
 - (3) Costs in the sum of \$1,500.00 to be paid by the Claimant to the Defendant within 28 days of today's date unless agreed.

Eddy D. Ventose
High Court Judge

By the Court


Registrar