

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0195

IN THE MATTER OF AN APPLICATION UNDER SECTION 8 OF THE STATUS OF CHILDREN ACT, NO.
21 of 2011

AND

IN THE MATTER OF THE REGISTRATION OF BIRTHS AND DEATHS ACT CAP. 242 OF THE REVISED
EDITION OF THE LAWS OF SAINT VINCENT AND THE GRENADINES, 2009

AND

IN THE MATTER OF A POSTHUMOUS APPLICATION FOR A DECLARATION OF PATERNITY BY
KENISHA NOEL TO HAVE THE NAME CHARLES WYLLIE INSERTED ON HER BIRTH CERTIFICATE
BETWEEN MILLAN

APPLICANT

and

REGISTRAR OF THE HIGH COURT

RESPONDENT

Appearances:

Mrs. Maferne Mayers-Oliver for the claimant.

Mr. J'Lany Williams for the defendant.

2019: Jan. 30
Feb. 7
Feb. 13

JUDGMENT

INTRODUCTION

[1] **Henry, J.:** Ms. Kenisha Noel has applied to the court for an order declaring that she is the natural

child of Charles Wyllie deceased. She claimed that his name was not entered on her birth record during his lifetime, due to her parents' negligence, inadvertence or for other reason. Ms. Noel averred that Charles Wyllie accepted and acknowledged her as his daughter from the date of her birth. She asserted further that he maintained her financially and treated her as his natural child throughout his lifetime. She also sought an order that his name be inserted as father, in her birth record.

- [2] Ms. Noel has brought this claim¹ against the Registrar of the High Court who is also the Registrar of Births and Deaths ('the Registrar') in the State of Saint Vincent and the Grenadines. The Registrar neither denied nor admitted the claim. In her Defence², she referred to the affidavits filed by and on behalf of Ms. Noel and pleaded that she neither denied nor admitted the substantive allegations made in them. She indicated that the court may join an interested party to represent the interest of the deceased's estate. The Registrar pleaded further that she was a neutral party and was ready to assist the court as necessary.
- [3] At the first hearing on 23rd January 2019, the court inquired of Ms. Noel through her legal practitioner whether she wished to join someone to represent Charles Wyllie's estate. She declined to do and elected to proceed with summary trial of the claim. She presented her first witnesses and the matter was adjourned due to the absence of one of the witnesses – Mrs. Sandra John.
- [4] Mrs. John's testimony was received on February 7th 2019. She testified that she and Charles Wyllie deceased were brother and sister. No documentary evidence in support of this assertion was presented to the court. No birth or death record was produced in respect of Charles Wyllie. At the end of the hearing, Ms. Noel and the Registrar submitted that enough evidence had been adduced to prove that Charles Wyllie is Kenisha Noel's natural father. I have found that this is not the case. The claim is dismissed.

ISSUE

- [5] The issue is whether Kenisha Noel has established that Charles Wyllie deceased was her natural father.

¹ Which was filed on 11th December 2018.

² Filed on 10th January 2019.

ANALYSIS

Issue – Has Kenisha Noel established that Charles Wyllie deceased was her natural father?

- [6] Ms. Noel's testimony was very brief as summarized above. Her witnesses Susan Noel and Sandra John provided similar affidavit evidence. They were all cross-examined by learned counsel Mr. J'Lany Williams. Susan Noel averred that she is Kenisha Noel's mother and that Charles Wyllie is her father. She said that she was involved in a common law relationship with Charles Wyllie around the time of and leading up to Kenisha's birth. Mrs. John testified that she was aware of the intimate relationship between them. She recalled that it lasted 'for a number of years.' Susan Noel averred that Kenisha was born on 30th September 1991. No birth record for Kenisha Noel was produced.
- [7] She testified that Charles Wyllie supported Kenisha financially throughout her school years and was involved in her nurturing and upbringing. Mrs. John and Kenisha Noel made similar statements. Mrs. John added that the deceased 'always spoke of his daughter' and further that all their relatives accepted her into their family. She attested that Charles Wyllie accepted Kenisha Noel as his child at the time of his death on 10th March 2014.
- [8] Mrs. John revealed that she has extracted no probate or Letters of Administration in the estate of Charles Wyllie. She indicated that she was not aware if anyone else had done so. She did not say whether Charles Wyllie's parents survived him, whether he had a spouse or other persons whom the law would deem to be his heirs, and who would be entitled to a grant of administration of his estate. Kenisha Noel submitted that the court should rely on the oral testimony and find that Sandra John is Charles Wyllie's sister. I am of the considered opinion that something more than her say so is required to establish such fact on a balance of probabilities.
- [9] In the absence of a birth or death record of Charles Wyllie, this court is unable to find that the details of his death have been established on a balance of probabilities or that such a person existed and by extension whether such person is deceased. More fundamentally, neither Charles Wyllie nor his estate was represented in the proceedings. This means that the interests of an integral party in the proceedings were not voiced. Sandra John did not have the necessary legal capacity to do so. Neither did the Registrar. Significantly, neither of them sought to make such representations on his behalf. Interestingly, the Registrar's legal practitioner seemed keen to

support the application by Kenisha Noel notwithstanding the obvious irregularities. For the foregoing reasons, I make no finding that Sandra John is related to or authorized to represent Charles Wyllie.

[10] Kenisha Noel submitted that section 5 (1) (d) of the Status of Children Act³ ('the Act') creates a presumption of paternity in respect of a person who was cohabiting with the mother at the time of the birth of a child to that mother. It states:

'5 (1) Unless there is proof to the contrary, on a balance of probabilities, there is a presumption that a person is, and shall be recognized in law to be, the natural father in any one of the following circumstances:

(a) ...

(b) ...

(c) ...

(d) the person was a cohabitant with the mother of the child at the time of birth of the child, or the child was born within ten months after hey ceased to be cohabitants;'

[11] Ms. Noel contended that the evidence of Sandra John and Susan Noel establishes that a common law relationship existed between Susan Noel and Charles Wyllie at the relevant time. I agree that their testimony is to this effect. Mr. Wyllie's position was not presented to the court. In the premises, the court is hampered in making the finding for which Ms. Noel contends. Essentially, the court is being invited to make a substantial finding on an *ex parte* application relative to Charles Wyllie. No legal authorities were advanced which supported such a departure from established law.

[12] Ms. Noel relied on section 8 of the Act. She argued that 'it is reasonably practicable' that the evidence proved that Charles Wyllie is her father. She contended that the court is empowered by the Civil Procedure Rules 2000 rule 21.4 (2) ('CPR') to appoint one or more persons to represent a deceased person's estate. CPR 21.4 (2) states:

³ No. 21 of 2011.

'21. 4 (2) The court **may** appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (whether presently or for any future, contingent or unascertained interest) where –

- (a) the person, or the class or some member of it, cannot be ascertained or cannot
- (b) readily be ascertained;
- (c) the person, or the class or some member of it, though ascertained cannot be found; or
- (d) it is expedient to do so for any other reason.' (bold added)

[13] Ms. Noel submitted further that use of the word 'may' creates discretion. She contended that it was not mandatory for the court to make such order as would be the case if the word 'shall' was employed. In this regard, she argued that the court should have regard to Sandra John's testimony that no one was appointed to represent Charles Wyllie's estate.

[14] She argued further that CPR 21.7 (1) authorizes the court to appoint a representative for the purposes of these proceedings. She submitted that even in the absence of such an appointee, the court may nonetheless make a declaration that Charles Wyllie is Kenisha Noel's natural father. that the use of the word 'may'

[15] On the Registrar's behalf, learned counsel Mr. J'Lany Williams submitted that the oral testimony before the court was not contradicted. He argued that Charles Wyllie's estate is not represented in the case. He contended that the court may invoke its powers under CPR 21.4 (2) and 21.7 (2) and appoint someone to represent his estate. He submitted that it would be desirable for the court to consider whether any person might have an interest adverse to any class of persons who might be directly affected by the making of the declaration of paternity.

[16] Learned counsel Mr. Williams submitted further that there is no documentary evidence which supports the assertions that Charles Wyllie was Kenisha Noel's father. He invited the court to treat the evidence as factual and consider joining the Registrar General as an interested party for

purposes of the Administration of Estates Act⁴. Unfortunately, learned counsel Mr. Williams was unable to elaborate on how this could be accomplished in the context of the present factual and legal parameters. I am not aware of any mechanism for doing so in present circumstances.

[17] Learned counsel Mr. Williams also submitted that the court may make an order for a parentage testing procedure pursuant to section 9 (1) of the Act. That provision empowers the court to make such an order after considering a number of matters⁵ including any objection made by a party to the proceedings on account of medical, religious or other grounds. Although the Act is silent on the timing of such an exercise, it is expected to be incorporated as part of the pre-trial proceedings, because provision is made for the resultant report to be received in evidence at the trial⁶. Learned counsel added that the Registrar relies on section 8 (1) (b) of the Act, in support of Ms. Noel's claim.

[18] Section 8 (1) of the Act provides:

'8. (1) A person who:

- (a) alleges that any named person is a parent of a child;
- (b) alleges that the relationship of father and child exists between him and another person;
- (c) alleges that the relationship of mother and child exists between her and another named person; or
- (d) having a proper interest in the result, wishes to have determined the question whether the relationship of parent and child exists between two named persons;

may apply to the Court for a declaration of parentage and the Court may, if satisfied that the relationship exists, make such declaration whether or not the mother, father or child is, or all of them are, living or dead.

⁴ Cap. 485 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

⁵ As outlined in section 10 of the Act.

⁶ Pursuant to section 11 of the Act.

[19] The Act provides that where a man by his conduct implicitly and consistently acknowledges that he is a child's father, such conduct gives rise to a legal presumption that he is that child's natural father⁷. In such a case, the court may make a declaration of parentage, even if the father is dead.⁸ Kenisha Noel's and her witnesses' evidence support a finding that Charles Wyllie made such acknowledgements in relation to her. However, those bald averments by themselves, do not establish on a balance of probabilities that Charles Wyllie implicitly and consistently acknowledged himself to be her father.

[20] No suitable and competent person was afforded an opportunity to speak for him. In addition, the lack of documentary evidence on critical factual underpinnings cannot be ignored. The court cannot fabricate a human being on the say so of a witness. It strikes me that in matters pertaining to the court's function to make declarations of parentage, the evidence must at least establish the existence of the relevant individuals. Those details are missing in the case at bar. Accordingly, I am not satisfied on a balance of probabilities that a man named Charles Wyllie did make such acknowledgements. I therefore make no declaration that Charles Wyllie deceased is Kenisha Noel's natural father.

ORDER

[21] It is ordered:

1. Kenisha Noel's claim for an order that Charles Wyllie deceased is her natural father is dismissed.
2. Kenisha Noel's claim for an order that the Registrar of Births be authorized to insert the name 'Charles Wyllie' as father in her birth record is dismissed.

⁷ Section 5 (1) (j) of the Act.

⁸ Section 8 (1) of the Act.

3. No order as to costs.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar