

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SUIT NO: NEVHCV2014/0071

**In the matter of an Administration
Claim pursuant to CRP Part 67
brought by Errol Daniel against Edith
Gabriel.**

And

**In the matter of the Registration and
Records Act Cap 23.25 and the
Intestates Estates Act Cap 12.06 of
the 2009 Revised Laws.**

BETWEEN:

Errol Daniel

Claimant

Edith Gabriel

Defendant

Appearances:

Ms. Midge Morton with Ms. Anmarieta Staines for the Claimant
Ms. Kalisia Isaacs for the Defendant.

2015: May 1
2015: July 14

DECISION

[1] **WILLIAMS, J.:** This matter is before the Court by way of Fixed Date Claim Form.

The Claimant Errol Daniel who resides in Germany claims against the Defendant Edith
Gabriel of Roseau Dominica;

- a) A Declaration that the Claimant Errol Daniel, being the sole issue and heir to Donald Ezekiel Daniel deceased is absolutely entitled as against the Defendant Edith Gabriel to the entire legal and beneficial interest in a parcel of land situated at Hermitage Road, St. John's Parish and recorded at the Register of Deeds Nevis, as No. 6560 lodged on 9th February 1978.
- b) A Declaration that the purported Conveyance of Interests in the said land by one Esther Daniel deceased, the widow of Donald Ezekiel Daniel deceased and Administratrix of his Estate to the Defendant Edith Daniel by way of Vesting Deed No. 12587 dated 19th August 1993 in the Registry of Deeds Nevis Circuit is null and void and of no effect.
- c) Alternatively a Declaration that the Defendant Edith Gabriel holds on Trust for the Claimant as sole issue and heir of/to Donald Ezekiel Daniel deceased, a half share of the beneficial interest in the said lands held by Vesting Deed No. 12887 dated 19th August 1993 in the Registry of Deeds, Nevis Circuit and
- d) An Order directing the Defendant Edith Gabriel, to convey the half interest in the said lands held by Vesting Deed No. 12587 dated 19th August 1993 in the Registry of Deeds Nevis Circuit.

OR

- e) An Order that the Registrar of Deeds execute a conveyance in favour of the Claimant vesting the entire legal and beneficial interest in the said lands held by Vesting Deed No. 12587 dated 19th August 1993 in the Registry of Deeds, Nevis Circuit, to the Claimant herein.
- f) Costs
- g) Any further relief that this Honourable Court deems just.

- [2] The Fixed Date Claim is also supported by an Affidavit of Errol Daniel filed on the 10th July 2014 in which he avers that his late father Donald Ezekiel Daniel died intestate on the 18th March 1991; His father was married to one Esther Daniel.
- [3] On the 22nd day of October 1991 the said Esther Daniel now deceased obtained Letters of Administration to his father's Estate and the same is recorded in Liber Wills B4 Folio 2 in the Register of Wills, Nevis Circuit.
- [4] Mr. Errol Daniel avers further that at the date of his death, his father was seised in possession of a parcel of land containing 1.5 acres at Hermitage in the Parish of St. John, Nevis described in Indenture No. 6560 dated 6th February 1978 and registered in the Register of Deeds Vol. 38 Folio 125-128.
- [5] According to Mr. Daniel the said Esther Daniel obtained Letters of Administration to his Father's Estate and executed a Vesting Deed on the 5th August 1993 in the terms exhibited in "ED1".
- [6] Mr. Daniel contends that Ms. Esther Daniel erroneously and unlawfully conveyed an Interest in the land to the Defendant stating that the Defendant was the daughter of his father.
- [7] Mr. Daniel denies that the Defendant is his sister or that the Defendant was a child of his late father, and claims that the Defendant's Birth Certificate shows that one Ronald Daniel of the Commonwealth of Dominica is her father, whereas on his Birth Certificate the name Donald Ezekiel Daniel is represented as his father.
- [8] The Claimant contends that Donald Ezekiel Daniel and Ronald Daniel are two separate and distinct individuals and his father Donald Ezekiel Daniel was never know by any other names or alias.

- [9] The Defendant Edith Gabriel in her 1st Affidavit filed on the 15th October 2014 denies that the Claimant is the sole issue and heir to the Estate of Donald Ezekiel Daniel, and claims that she is also an issue and heir to the said Estate of Donald Ezekiel Daniel.
- [10] The Defendant further contends in her affidavit that the copies of her certificates extracted in 2000 and 2001 which has been corrected by the Parish Priest of La Plaine will show that Ronald Daniel was never presented as her father.
- [11] Ms. Daniel claims that she has always been treated as the daughter of Donald Ezekiel Daniel and accepted by all persons as the same, including his wife.
- [12] The Defendant has filed a Counterclaim in this matter seeking an Order directing the Claimant to execute a Deed of Partition in her favour of the land situated at Hermitage Village.
- [13] On the 11th February 2015, the Applicant/Claimant filed an Application to the Court seeking an Order that both the Applicant Errol Daniel and the Respondent Edith Gabriel be subjected to DNA testing at their own expense to settle the issue of Paternity.
- [14] The grounds of his application are set out in paragraphs 1-14 of the Application and also in the Affidavit of Ariann Maynard, Legal Assistant to Morton, Robinson L.P filed on the said 11th February 2015.
- [15] The Respondent Edith Gabriel has filed on the 30th March 2015 a second Affidavit in opposition to the Notice of Application filed by the Applicant on the 11th February 2015.
- [16] The Defendant avers again that she was born to Marguerite Bertrand and Donald Daniel on the 11th February 1972 as evidenced by her Birth Certificate issued out of the Registry of the Commonwealth of Dominica on the 26th May 2014.
- [17] The Defendant admits that her Baptism Certificate presents inconsistencies in respect of her parents but contends that similar inconsistencies are noted on the Baptismal

- Certificate of the Claimant, and the Defendant points to the Birth Certificate of the Applicant "Exhibit ED4" where the Claimant's father appears as "Danald Ezekiel Daniel" instead of "Donald Ezekiel Daniel" as he alleges.
- [18] The Defendant has exhibited "EG4" which is a letter written by the Applicant's solicitor Lindsay Grant acknowledging the Defendant as his half-sister being a child of Donald Ezekiel Daniel.
- [19] The Defendant also exhibited "EG5" which is a Power of Attorney dated 20th June 1994 which the Applicant and herself executed in favour of Lindsay Grant over 1.15 acres of land at Hermitage. The Defendant contends that the said Exhibits are evidence that she is entitled to a share in her late father's Estate.
- [20] The Defendant also avers that the Applicant always knew her to be the daughter of the late Donald Ezekiel Daniel and was introduced to him as her sister as far back as 1972 when she travelled to England; The Defendant further submits that the Applicant has never before challenged the fact that she was his sister.
- [21] In relation to the Applicant's Notice of Application filed on the 11th February 2014, the Defendant states that she is opposed to having a DNA sample taken from her for the purpose of these proceedings, and particularly to any order that she shares in the expense associated with the DNA testing.
- [22] The Defendant claims that she is 73 years old and does not have the means to afford DNA testing, and further that there are no surviving siblings of her late father from whom DNA samples can be extracted for comparison with the Applicant and herself.
- [23] In the 2nd Affidavit of Ariann Maynard (Legal Assistant to Morton, Robinson L.P) in response to Edith Gabriel's 2nd Affidavit filed on the 30th March 2015; He states that the Applicant has instructed him that the Defendant is not an issue and heir to the Estate of his

late father Donald Ezekiel Daniel and puts the Defendant Edith Gabriel to strict proof by submitting herself to scientific DNA testing.

- [24] The Applicant throughout his Affidavit denies any parental linkage to the Defendant and puts her to the strict proof thereof. The Applicant contends that his actions of contesting parental linkage is proof that he has never recognized the Defendant to be his sister during or after his father's lifetime.

The Issues

- [25] The main issues to be decided by the Court are;
- i. Whether on the evidence provided to the Court, the Claimant and the Defendant can be deemed to be Brother and Sister.
 - ii. Whether the Court should order that a Paternity test be done to determine the alleged parental linkage between the Applicant/Claimant and the Defendant/Respondent pursuant to Section 9 of the **Status of Children Act** Cap 12.4 of the Laws of St. Christopher and Nevis and CPR Part 25 & 26; Part 25 (1) (a) (b) (v) (g) (l), 26(2) (i) and (w).
 - iii. Whether the Claimant and the Defendant are the lawful issue and heirs to the Estate of the late Donald Ezekiel Daniel.
 - iv. Whether the Claimant is the sole issue and heir to Donald Ezekiel Daniel and therefore absolutely to all of the legal and beneficial Estate of Donald Ezekiel Daniel.
- [26] Counsels for the Claimant, Ms. Midge Morton and Ms. Anmarieta Staines in their oral submissions contend that the Court has the authority to grant the order on an application for DNA testing and cites **Halsbury Laws of England 5th Edition Vol. 9 at paragraph 103**, which state that the Court has a discretion to give directions on administering a

paternity test on a child unless it is satisfied that such a course of action would be against the child's interests, although the welfare of the child is not paramount in considering whether to make a direction for tests. Counsel further contends that the Court is only concerned with Minors and not Adults.

- [27] Ms. Staines submitted that there was no ulterior motive in bringing the claim before the Court, or to call into question the legitimacy of a child who had enjoyed a legitimate status, and there was no evidence to show that the Defendant had enjoyed a legitimate status as a child of the late Donald E. Daniel.

The Claimant's Application before the Court sought to ascertain whether the Defendant was the biological sister of the Claimant because if she is not, she would not be entitled to benefit from the Estate of Donald Daniel by virtue of the **Intestates Act Cap 12.06** of the Laws of St. Christopher and Nevis.

- [28] Learned Counsel Ms. Staines further contended that the aim of the test is not to satisfy curiosity, but to make a difference to the proceedings and that if the Defendant was not an issue of the late Donald Ezekiel Daniel then she would have no claim in the Deceased Estate.

- [29] Ms. Staines also submitted that there was no danger to the child's welfare of disrupting an established family unit, as the Court was only concerned with the welfare of the child and in the case at bar, the parties are adults.

Counsel referred to Section 9(8) of the **Status of the Children Act** and argued that based on the evidence the Defendant had not objected in accordance with Section 9 98) of the said Act.

[30] Ms. Staines also submitted that if the Court is satisfied that the circumstances exist for a direction to be given, then Section 10(1) provided the procedure to be followed before a blood sample could be taken.

The Court cannot force a party to give a blood sample, but can issue directions and if the Defendant does not give consent regardless of the Court Order then the Court would invoke its authority under Section 11 of **the Status of the Children Act.**

[31] According to learned Counsel Ms. Staines, the question is whether or not the Respondent has advanced very clear reasons in her evidence which can be considered just and reasonable to allow her to refuse to undergo tests.

[32] Ms. Staines contends that the Solicitor's letter dated 16th August 1993 which was exhibited in the Respondent's 2nd Affidavit in opposition to the Claimant's application, and which mentioned Ms. Gabriel as being the sister of the Claimant Errol Daniel cannot be accepted as the Claimant acknowledging the Defendant as his sister, since the Solicitor's letter only made mention of what was in the Vesting Deed, which Vesting Deed is now the subject of contention in these proceedings.

[33] Learned Counsel Ms. Staines also argued that the Power of Attorney executed in favour of Lindsay Grant by the Claimant and the Defendant and exhibited as "EG5" cannot be adduced in evidence, since it is not registered in accordance with Section 5 of the **Registration and Records Act Cap 23.25** of the Laws of St. Christopher and Nevis.

[34] Ms. Staines also submits that the Court must look at the behaviour of the Defendant since the filing of the Fixed Date Claim Form. Counsel argues that the Defendant has not exhibited any intention to assist the Court and failed to disclose the Power of Attorney and Solicitor's letter in her Affidavit in response to the Claimant's Claim.

[35] Learned Counsel Ms. Staines also posited that the Defendant would not be prejudiced if the Court ordered a DNA test, and that the Court can exercise its discretion in accordance with CPR Part 1:1 and use its Case Management powers and authority under Part 25 and Part 26.

[36] Counsel for the Defendant Ms. Kalisia Isaacs submits that while the Court has jurisdiction to deal with the Application filed by the Claimant the CPR does not give the authority to order a DNA test.

The **Status of the Children Act** refers to illegitimate children and the cases submitted to the Court by the Claimant deals with minors in circumstances where the father is not submitting to a Paternity test.

[37] Ms. Isaacs referred to the letter of Father Vrignaud and the Birth Certificate of the Defendant which states that Donald Ezekiel Daniel is the father of Edith Gabriel. Ms. Isaacs also contends that the New Birth Certificate issued on the 26th May 2014 has clarified any errors in the old Birth Certificates and the Court cannot look beyond the legitimate documents submitted by the Defendant.

[38] Learned Counsel Ms. Isaacs cites Section 154 of the **Evidence Act of St. Christopher and Nevis No. 30 of 2011** and states that the Court has no Jurisdiction to compel a person to give a DNA sample, and if a person refuses without good cause, certain inferences can be drawn.

[39] Ms. Isaacs also posed questions in relation to the 2nd Affidavit of Ariann Maynard, Legal Assistant to Morton/Robinson L.P. and contended that it was the Applicant who should prove his case and not ask the Defendant to submit herself to DNA testing.

Ms. Isaac also argues that the Applicant has failed to meet the burden in proving his case, and that the overriding objective is not for the purpose that the Claimant is using it.

[40] Learned Counsel also submitted that the cases cited by Counsel for the Applicant were not relevant to the case at Bar, and asked the Court;

- 1) Who would bear the cost of the DNA testing?
- 2) Who would collect the sample?
- 3) Who would do the testing?
- 4) Where would that testing be done?

[41] These are the facts, I now turn to the Law for a possible solution to this unhappy situation.

I have to decide whether or not Blood tests should be ordered. Section 9 of the **Status of Children Act Cap 12:14** of the Laws of St. Christopher and Nevis states as follows.

1. "In any civil proceedings in which the paternity of a person falls to be determined by the Court hearing the proceedings the Court may, on application by any party to the proceedings or of its own motion, give a direction requiring a paternity test to be carried out in relation to the person.
2. For the purposes of subsection (1) the direction shall specify the person from while the samples will be taken for the paternity test.
3. For the purposes of subsection (1) the direction shall specify the period within which the paternity test shall be conducted.
4. The Court shall, before giving a direction pursuant to subsection (1) ensures that the person to whom the issue paternity relates, if sufficiently mature has been counselled about the effects of the direction."

Under Section 9 (8) the Act states that in deciding whether to make a direction under subsection (1) the Court shall;

- a) Consider and determine all objections made by a party to the proceedings on account of Medical, Religious or other grounds.

- b) If it determines that an objection is valid, take the objection into account in arriving at its decision.

[42] Section 10 of the said Act provides as follows;

- 1) "Subject to subsections (3) and (4) and without prejudice to Section 11, a blood sample which is required to be taken from any person for giving effect to a direction under Section 8 shall not be taken except with his or her consent."

Where there is a failure to comply with directions the Act provides under Section 11 as follows;

- 2) "Where a Court gives a direction under Section 9, and any person fails to take any step required of him or her for the purpose of giving effect to the direction, the Court may draw such inference if any from that fact as appears proper in the circumstances."
- 3) "Where any person named in the direction under Section 8 fails to consent to the taking of a blood sample from himself or herself or from any person named in the direction of whom he or she has care and control, he or she shall be deemed for the purposes of this Section to have failed to take a step required of him or her for the purpose of giving effect to the direction."

[43] The Law is well settled on the matter of consent in taking a blood sample. In the case of **W vs W**¹ Willmer L.J said;

"I think that there can be no doubt that, without an order of the Court, what the Court is now being asked to order would prima facie be an unlawful act."

Danckerwits L.J in the same case said "To compel persons to submit to a blood test without their consent seems to be a very serious interference with personal liberty and

¹ (No.4) [1963] 2A11ER 84

rights; very convincing reasons would have to be shown before I could conclude that such power was within the inherent jurisdiction of the Court.”

In **S&S. W vs Official Solicitor**,² Lord Hodson observed that;

“No one doubts that as far as Adults are concerned, the Law does not permit such an operation against the wishes of the patient.”

Lord MacDermont also gave this explanation in the said case, he stated;

“I think it must be accepted that, save where Parliament has otherwise ordained, the High Court has no power to direct that a person who is Sui Juris is to have a blood test taken against his will; But this lack of power on the part of the Court to enforce its order physically, without consent does not mean that the question under discussion regarding the Court’s jurisdiction to order a blood test must be answered in the negative, for much of the jurisdiction of the High Court can only be made effective by indirect means- such as a stay of proceedings, attachment, or the treatment of a refusal to comply as evidence against the disobedient party.”

[44] In **Re L**,³ Lord Denning MR said;

“If an Adult unreasonably refuses to have a blood test ... I think that it is open to the Court in any civil proceedings... to treat his refusal as evidence against him, and may draw an Inference therefrom adverse to him; this is simply commons sense.”

[45] Counsel for the Defendant Ms. Isaacs cited the case emanating from the Supreme Court of Western Australia **Furesh vs Schor**,⁴ where the English authorities previously cited were discussed by the Justices of Appeal. Lord Reid stated in the case of **S vs S**,⁵ as follows;

² [1970] 3 A11 ER 107

³ [1968] 1A11 ER 20

⁴ [2013] WASCA 231

⁵ [1972] A.C 24,46, 47

“There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will; In my view, the reason is not that he ought not to be required to furnish evidence, which may tell against him... The real reason is that the English Law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty.”

Lord Hodson similarly distinguished the position of an Adult from that of a child; He said; “No one doubts as far as Adults are concerned that the Law does not permit blood tests to be performed against the wishes of the patient. The views of Lord Reid and Lord Hudson in **S vs S** were echoed in the case of **Secretary, Department of Health and Community Services vs JWB and SMB** ⁶by MC Hugh J where he stated;

“It is the central thesis of the Common Law doctrine of Trespass to the person that the voluntary choices and decisions of an Adult person of sound mind concerning what is or is not to be done to his or her body must be respected, and accepted, irrespective of what others may think is in the best interests of that particular person.”

[46] It has been established for a long time that a person has a right of control and self-determination in respect of his or her body; It is a substantial matter to encroach upon that fundamental Common Law right.

In **S vs S**, Lord Reid, Lord Guest and Lord Hodson considered that in light of it, the Court had no inherent power to order a person of full age and capacity to undergo a blood test.

[47] The evidence presented to the Court by the Claimant is;

1. A copy of the Vesting Deed dated the 5th August 1993 made by Esther Daniel widow of Donald Ezekiel Daniel whereby she vests as Administratrix of the Estate

⁶ [1992] 175 CLR 218

of Donald Daniel in Errol Daniel as Trustee, a one half share for herself for life and after her death the said half share in the property situated at Hermitage Village comprising of 1.15 acres, to go to Errol Daniel and Edith Gabriel in equal shares, the son and daughter respectively of the said deceased.

2. A copy of Edith Gabriel's Baptismal Certificate No. 9 of 1949 which shows the names "Ronald Daniel" and "Marguerite Bertrand" as parents of "Edith Daniel" born at La Plaine on the 11th February 1949.
3. A copy of the Birth Certificate of Edith Daniel No. 9 of 1949 which shows the names "Ronald Daniel" and "Marguerite Bertrand" as parents of "Edith Daniel" born at La Plaine on the 11th February 1949.
4. A copy of Errol Daniel's Birth Certificate No. 2677 issued out of the Commonwealth of Dominica in which the name "Donald Ezekiel Daniel" and "Justina Moses" appear as father and mother to Errol Daniel born on the 17th April 1940.

[48] The evidence presented to the Court by the Defendant Edith Gabriel is

- a) The Birth Certificate of Edith Gabriel dated 26th May 2014 where the names "Donald Daniel" and "Marguerite Bertrand" appear as parents to the said "Edith Daniel" The note on the said Birth Certificate states that "The certificate was issued in lieu of a certificate the original of which was destroyed."
- b) The Certificate of Baptism of Edith Daniel in which the names "Donald Daniel" and "Marguerite Bertrand" appears as parents of Edith Daniel.
- c) Letter from Parish Priest of the Parish of Sr. Francis Xavier Fr Louis Vrignaud and dated the 5th August 2014.

Court's Analysis

[49] I have reviewed the documentary evidence submitted by both parties to this matter and carefully considered the submissions of both Counsel for the Applicant and the Respondent and I have come down in favour of the Defendant Edith Gabriel for the following reasons;

1. Under the **Status of the Children Act** Cap 12:14 Section 9 the Court may on an application by any part to the proceedings or of its own motion, give a direction requiring an paternity test to be carried out in relation to the person under the said Act at Section 9 (8) (a) (b) it states that;

“In deciding whether to make a direction under Subsection (1) the Court shall;

- a) Consider and determine all objections made by a party to the proceedings on account of medical, religious or other grounds and;
- b) If it determines that an objection is valid, take the objection into account in arriving at its decision.

[50] In my respectful opinion the authority of the Court to order a blood test to determine paternity is discretionary under the said legislation, and the Court has no inherent jurisdiction to make such an order.

[51] Ms. Edith Gabriel in her 2nd Affidavit dated 30th March 2015 at paragraph 17 states that she is not consenting to have a DNA sample taken from her, and at paragraphs 18, 19 and 20 of the said Affidavit, she states the reasons for her objection to the request for DNA testing and these reasons must be taken into account in arriving at a decision.

[52] I have considered the reasons provided by Ms. Edith Gabriel the Defendant, for her objection to the request by the Claimant for DNA testing and I am satisfied that her

objection is valid as it relates to her age, her present retirement status, the costs associated with the DNA testing and the financial burden it would present to her.

I am not satisfied that this DNA testing would be for her benefit in any way, but designed to call into question the legitimacy, otherwise unimpeached, of a person of 73 years who had previously enjoyed a status of having a legitimate father.

[53] Further, even assuming the Court was minded to order DNA testing, there is a protocol to be followed under Section 9 of the Status of Children Act Cap 12:14 for which directions from the Court are necessary and for which no evidence has been provided by the Claimant.

I refer specifically to;

1. Who will carry out this DNA testing and provide a report?
2. Where will this testing be done and in which laboratory?
3. Which party will bear the costs of this procedure bearing in mind the objection stated by the Defendant to the taking of a DNA sample.

[54] In relation to the Documentary evidence presented by both sides, I accept the contention by learned Counsel Staines that the unsigned Vesting Deed cannot be adduced in evidence since it is not in compliance with Section 5 of the Registration and Records Act Cap 23:25 of the Laws of St. Christopher and Nevis. I therefore attach no weight to the document.

However I do not accept Errol Daniel's contention that Esther Daniel erroneously and unlawfully conveyed an Interest in the land to the Defendant, since he has not presented a shred of evidence to substantiate his contention.

[55] The other exhibits "ED2", "ED3" and "ED4" all appear to be incorrect and contradictory as the names "Ronald Daniel" and "Donald Daniel" appear as the Father of "Edith Daniel".

However I do not share the view that the obvious errors on the Birth Certificates constitute proof that “Donald Daniel” is not the father of Edith Gabriel or Errol Daniel.

- [56] I am fortified in my view that upon a perusal of Exhibits “EG1” and “EG2” that these documents are authentic and were regularly issued out of the Registry of the Commonwealth of Dominica on the 26th May 2014. In my opinion these documents provide the most cogent and compelling evidence in this matter in favour of the Defendant. I find no reason to look beyond those documents and call them into question and further hold the view that the new birth certificate issued on the 26th May 2014 from the Registry in Dominica clarified any error that may have appeared on previous Birth and Baptismal certificates and clearly show that Donald Daniel is the father of Edith Gabriel and Errol Daniel.

[57] **Conclusion**

- 1) I therefore conclude that based on the evidence, the Claimant and the Defendant are deemed to be Brother and Sister and the lawful heirs to the Estate of the late Donald E. Daniel.
- 2) The Application for a Paternity test to determine the alleged parental linkage between the Applicant and the Defendant is disallowed.
- 3) That the Claimant is **not** the sole issue and heir to Donald E. Daniel and is not the sole heir to all of the legal and beneficial Estate of Donald E. Daniel.
- 4) That based on the evidence presented Edith Gabriel is an issue of Donald E. Daniel and heir to the legal and beneficial Estate of Donald E. Daniel.

For these reasons outlined, I hereby dismiss the application by the Applicant Errol Daniel filed on the 11th February 2015,

1. That Costs to be paid to the Defendant of \$1500.00 as costs of this Application.

Lorraine Williams
High Court Judge.