In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: 185

IN THE MATTER OF THE ESTATE OF EARL ROBINSON DARRELL (Aka EARL R DARRELL), DECEASED

AND IN THE MATTER OF THE CHILDREN ACT 1998

PATRICIA ROSE ANN HILL

Applicant

-v-

SHARELL EYVETTE PHILIPS

(aka SHARELL EVETTE PHILIPS, CHERYL EVETTE PHILIPS)

1st Respondent

-and-

ANWAR CHARLES EDWARD DARRELL and DAMON ALEXANDER CHRISTOPHER DARRELL

2nd Respondents

JUDGMENT

(In Court)[1]

Date of hearing: February 19, 2016

[1] The present Judgment was circulated without a hearing to save costs.

Date of Judgment: March 4, 2016

Mr. Richard Horseman, Wakefield Quin Limited, for the Applicant
Ms. Arisha Flood, AAF & Associates, for the 1st Respondent
Mr. Taaj Jamal, Cox Hallett Wilkinson Ltd, for the 2nd Respondent

Introductory

1. By an Originating Summons issued on May 6, 2015, the Applicant sought:

> "*1. A declaration that… Earl Robinson Darrell (aka Earl R Darrell) is recognised in law to be the father of the Applicant, who was born on the 10th November 1950, pursuant to section 18E of the Children Act 1998…*"

2. The Applicant seeks this relief in order to establish her status as a beneficiary of the Deceased's estate. On April 30, 2015 in Supreme Court Civil Jurisdiction 2015: No. 136, proceedings also brought purportedly under the Children Act by the 1st Respondent for similar relief which was not opposed by the Applicant in the present proceedings, I ordered:

> "*1….It is declared that Earl Robinson Darrell, (aka Earl R Darrell), is recognized in law to be the father of Sharell Eyvette Phillips, (**aka** Cheyl Evette Phillips, Sharell Evette Phillips).*"

3. The 1st Respondent opposed the application. The 2nd Respondents claim to be grandchildren of the Deceased and supported the Applicant's application.

Jurisdiction: the Children's Act 1998

4. Ms Flood in her closing submissions submitted that the Court had no jurisdiction to grant the application under the Children Act 1998 because the following statutory provisions presented a bar:

> "*18F (1)Where there is no person recognized in law under section 18I to be the father of a child, any person may apply to the court for a declaration that a male person is his father, or any male person may apply to the court for a declaration that a person is his child.*
>
> *(2)An application shall not be made under subsection (1) unless both the persons whose relationship is sought to be established are living.*
>
> *(3)Where the court finds on the balance of probabilities that the relationship of father and child has been established, the court may make a declaratory order to that effect and, subject to section 18G, the order shall be recognized for all purposes.*" [emphasis added]

5. Mr Jamal submitted that it was clear that the Children Act did not apply to an application such as the present. Mr Horseman in his closing submissions abandoned his initial reliance on the 1998 and relied instead on the inherent jurisdiction of the Court in relation to its probate jurisdiction. He frankly conceded that he had followed the same procedure adopted in the corresponding application made last year by the 1st Respondent.

6. The 1st Respondent obtained similar relief last year, purportedly under the Children Act 1998 on a consensual basis. At that hearing, Mr Jamal was not there to ask a fundamental question the answer to which seems obvious if you look at section 18E-18M ("*ESTABLISHMENT OF PARENTAGE*") in the wider context of the Act as a whole. Does the Children Act regulate paternity applications not made in connection with children at all? The purpose of the Children Act is described as follows:

> "***Purposes of the Act***
> *5. The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children.*"

7. The foundational jurisdictional provision for statutory declarations of parentage under Part IIA the 1998 Act is the following provision in section 18E:

> "***Declaration of Parentage***
> *18E (1) Any person having an interest may apply to the Supreme Court (in this Part referred to as the "court") for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.*"

8. It is clear that declarations of parentage can only be made in respect of a parent and a child. Section 1 of the Act provides:

> "'*child' means, except in Part IX, a person who is under the age of 18 years*".

9. I accordingly find that the Court has no jurisdiction to grant the declaratory relief sought by the Applicant under the provisions of the Children Act 1998.

Inherent jurisdiction of the Court

10. It was not or not seriously disputed that the Court possessed the inherent jurisdiction, if the Children Act 1998 did not apply at all, to make a declaration of parentage for inheritance purposes. The 1st Respondent had no inclination to indirectly undermine the Order made in her own favour on April 30, 2015, while the 2nd Respondent supported the modified legal basis of the Applicant's case. Counsel nevertheless shed no real light on the precise nature and extent of the jurisdiction.

11. Under section 4 of the Wills Act ("**Application to Supreme Court for declaration that applicant is the child of the deceased**"), the following jurisdiction is conferred:

> "(1) *Where the putative father of a child dies, the child is entitled to make a claim against the father's estate but no claim shall be made after the expiry of the notice to send particulars of claims against the estate or after the expiry of three months after the grant of probate or letters of administration, whichever is the longer period.*
>
> *(2)Where the estate representative rejects a child's claim made pursuant to subsection (1) on the ground that he is not a child of the deceased, the child may apply to the Supreme Court for a declaration that he is the child of the deceased, and such application shall be made within 28 days commencing on the day he receives notification of the rejection.*
>
> *(3) Where on an application for a declaration under subsection (2) the truth of the proposition to be declared is proved to the satisfaction of the Supreme Court, the Court shall make that declaration unless to do so would manifestly be contrary to public policy…*"

12. It is a matter of record that the Deceased's estate is being administered on an intestacy basis. The Administration of Estates Act 1974 does not contain any express statutory power to determine paternity. However, section 13(1) of the 1974 Act provides:

> "*In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof…*"

13. Rule 20 of the Non-Contentious Probate Rules 1974 provides:

> "*(1) Where the deceased died on or after the 1st September, 1974, wholly intestate, the persons having a beneficial interest in the estate shall be entitled to a grant of administration in the following of order of priority:*
>
> *(i) The surviving spouse;*
>
> *(ii) <u>The children of the deceased</u>, or the issue of any such child who has died during the lifetime of the deceased;*
>
> *(iii) The father or mother of the deceased;*
>
> *(iv) Brothers and sisters of the whole blood, or the issue of any deceased brother or sister of the whole blood who has died.*" [emphasis added]

14. In the case of children, paragraph (6) of rule 20 makes it clear that the Court may be required to determine whether a child is a biological child or adopted.

15. It follows by necessary implication from, *inter alia*, the above statutory provisions that the Court must have the jurisdiction to determine whether or not any person is qualified as beneficially interested in an estate by virtue of falling into the categories of relationship (including child) set out in rule 20(1).

Approach to the evidence

16. The Applicant relied on DNA evidence as being very compelling evidence indeed and counsel did not directly address the standard of proof. I find that very clear evidence must be required to support a declaration of paternity in the inheritance context, even though proof on a balance of probability is all that is required.

17. I am guided in this respect by the evidential approach adopted by Louise Blenman J (as she then was) when considering an application made to the Anguillan High Court for a declaration of paternity for inheritance purposes under the inherent jurisdiction of the Court in *Stanley-v-Phillips* [2011] ECSC J0113-1. In that case, her Ladyship opined as follows:

> "*[64] In this regard, the court finds the approach of Rawlins JA, as he then was, in* **David Sampson (Intended Administrator of the Estate of Elisha Sampson, deceased) v David Adolphus Mc Kenzie** *very helpful, so too are the pronouncements of Saunders JA in* **Adolphus McKenzie v David Sampson** *ibid. It is clear that in circumstances where the court is required to determine the issue of paternity in circumstances in which the father is alive or there is no claim being made to the property, the Claimant merely required to satisfy the court on a balance of probabilities. Where however, the alleged father is deceased and there is a claim or a potential claim against his estate even through the standard remains one of being satisfied on a balance of probabilities, the court must take care in examining the evidence. It would be appropriate, even in the absence of the Status of Children's Act in Anguilla for the court to exercise great caution in its determination of whether or not Mrs. Hulda Stanley proven that she is the child of Mr. Cuthbert Phillips. <u>There should be the presence of very cogent proof of paternity before a person should be able to make claims against an estate.</u>*"

18. Although case was not addressed by counsel, its effect operates in favour of the 1st Respondent. No need for Ms Flood to comment on a case which supports her client's position arises. Although the principles I adopt are adverse to the Applicant's position, no need for Mr Horseman to address the Court further arises because of the conclusions I set out below based on the evidence and submissions made at trial.

Findings

19. The Applicant, in addition to her own evidence, relied on DNA evidence produced by the same local and overseas laboratories upon whose test results the April 30, 2015 declaration of paternity made in favour of the 1st Respondent was based. The 1st Respondent's attempts to discredit the Applicant's test results had an unrealistic air about them. However the motivation for her challenge seems clear. The 1st Respondent's own results were initially doubted by family members aligned with the Applicant, as the 1st Respondent complained in her own proceedings, Supreme Court Civil Jurisdiction 2015: No. 136.

20. The Director of Laboratory Corporation of America of Burlington North Carolina certified in a report sworn before a notary public on September 15, 2014 and submitted to Central Diagnostics Laboratory of Bermuda that the Applicant and the Deceased "*share genetic markers*". The central conclusion was that "*the probability of paternity is 99.9%*", with the chances of an error being 52.3 million to one (against).

21. Quinton Butterfield of Central Diagnostics was made available for cross-examination by Ms Flood. In his evidence –in-chief he confirmed that he both obtained the DNA swab samples from the Applicant (after inspecting her driver's license by way of confirmation of her identity) and obtained a DNA sample from the Deceased from Dr Keith Cunningham at the King Edward Memorial Hospital. He sealed both samples and sent them by air courier to Laboratory Corporation of America. That Laboratory provided a sworn certificate that the samples were received intact with no evidence of tampering, although this certificate was not ordinarily supplied to clients.

22. Mr Butterfield testified under cross-examination that it was not his practice to supply chain of custody reports to his customers although he could do so upon request, agreeing that he had never seen, let alone completed, a 'Deceased Party Information' form. He was also questioned about who authorised the samples to be taken from the Deceased and tested, matters which bore no identifiable connection to the reliability of the test results.

23. Under cross-examination by Mr Jamal, Mr Butterfield also explained that he took samples from various family members with their consent and no one objected to his doing so. He confirmed the obvious fact that questions of authority to take sample had no bearing on the integrity of the results. He also explained that he believed that the samples would be retained by the overseas Laboratory for seven years so that further tests could still be carried out. Before leaving the witness box, he stated that Laboratory Corporation of America had an excellent reputation and the results would not change.

24. No positive case of unreliability was put to Mr Butterfield in respect of the Applicant's test results. However, when subsequently cross-examining Ms Rosalind

Simons, the Deceased's niece, Ms Flood put to her that Ms Simons' results had initially indicated that she was a daughter rather than a niece. According to Ms Simons, an initial mistake was made but was subsequently corrected. In her closing submissions Ms Flood sought to rely on this mistake to discredit the Applicant's test results. Mr Horseman unsurprisingly suggested that counsel had deliberately avoided affording Mr Butterfield an opportunity to explain this discrepancy.

25. Mr Butterfield was an impressive witness and I have no hesitation in accepting the accuracy of the DNA evidence which concludes that the Applicant is almost certainly the Deceased's daughter. This evidence, ignoring the Applicant's own evidence, is in my judgment clearly sufficient to support the Applicant's prayer for a declaration of paternity to a high standard of civil proof.

Conclusion

26. The Applicant is entitled to a declaration that she is the child of Earl Robinson Darrell (aka Earl R. Darrell) under the inherent jurisdiction of the Court.

27. Unless any party applies within 14 days by letter to the Registrar to be heard as to costs, the 1st Respondent shall pay the Applicant's costs to be taxed if not agreed and no order shall be made as to the 2nd Respondents' costs.

Dated this 4th day of March 2016, _____

IAN RC KAWALEY CJ