[2020] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00025

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**HA-P**	**APPELLANT**
AND	**AK**	**RESPONDENT**

Written submissions filed by Chambers, Bunny & Steer for the appellant

Written submissions filed by Nigel Jones & Company for the respondent

15 June 2020

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules, 2002)

F WILLIAMS JA

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Straw JA and agree with her reasoning and conclusion.

STRAW JA

[3] This is an appeal and counter-appeal from the orders of Graham-Allen J. Given the nature of this matter the parties shall be referred to by their initials. The respondent and counter-appellant, AK, had filed an amended notice of application for court orders on 9 July 2018 seeking orders from the court below in the following terms:

> "1. That the Claimant [AK] be granted permission to rely on the DNA Parentage Test Report dated April 9, 2015 at the Trial of the Claim herein to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as **JP** born July 13, 2014.
>
> 2. Alternatively, an Order for a DNA Parentage Test to be done at Caribbean Genetics (Carigen) using saliva samples of the Claimant and **JP** to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as **JP** born July 13, 2014.
>
> 3. That the Defendant [HA-P] presents **JP** to Caribbean Genetics (Carigen) for his saliva sample to be taken for the purpose of facilitating the DNA test.
>
> 4. A direction for the use of blood tests to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as **JP** born July 13, 2014;
>
> 5. That the blood tests should be done at Caribbean Genetics (Carigen) within 30 days of the date of this order and that the Defendant gives access to **JP** for the purpose of facilitating the blood test.
>
> 6. That the costs of the blood tests should be shared equally between the Claimant and the Defendant.
>
> 7. Costs to be costs in the claim;
>
> 8. Such further and other relief as this Honourable Court deems fit."

[4] The learned judge heard the application and granted the following orders on the 4 March 2019:

> "1. The Court hereby gives a direction for the use of blood tests to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as JP born July 13, 2014;
>
> 2. That the blood tests should be done at Caribbean Genetic (Carigen) within 30 days of the date of this order and the Defendant gives access to JP for the purpose of facilitating the blood tests;
>
> 3. That the costs of the blood tests should be shared equally by the Claimant and the Defendant;
>
> 4. The trial dates of March 4 and 5, 2019 are hereby vacated;
>
> 5. Trial is set for 2 days – June 25th and 26th, 2019;
>
> 6. Trial in chambers;
>
> 7. Leave to appeal is granted;
>
> 8. Costs for the Application is to be costs in the Claim;
>
> 9. Claimant's Attorneys-at-Law to be [sic] file and serve order."

[5] This court is not aware of any written reasons provided by the learned judge in relation to these orders.

[6] Both AK and the appellant and counter-respondent, HA-P, are dissatisfied with the orders of Graham-Allen J and have mounted challenges to the learned judge's exercise of her discretion in making the orders in the terms as she did.

The grounds of appeal

[7] HA-P has challenged the orders on the following grounds:

> "(i) The learned trial judge erred in exercising her discretion in making the said orders which are not in the best interest of the child.
>
> (ii) The learned trial judge did not have the jurisdiction under the Status of Children Act to compel the Defendant [HA-P] to have blood samples taken from the child.
>
> (iii) the learned trail [sic] judge erred in ordering that the costs of the blood test be borne equally by the parties."

The counter-appeal

[8] AK's grounds of appeal are set out below:

> "a. The learned judge in chamber [sic] erred in failing to order a DNA parentage test to be done at Caribbean Genetics (Carigen) using saliva samples of the Respondent [AK] and JP to ascertain whether such test show that the Respondent is or is not thereby excluded from being the father of the child known as JP born July 13, 2014 in circumstances where the Respondent and the Appellant [HA-P] had previously agreed and it is otherwise in the best interest of the child to so order.
>
> b. In the alternative the learned judge failed to order that the DNA parentage Test Report dated April 9, 2015 could be relied on at the trial of the Claim herein to ascertain whether such tests show that the Respondent is or is not hereby excluded from being the father of the child known as JP born on July 13, 2014."

Background

[9] AK filed a fixed date claim form on 3 January 2017 under the Status of Children Act, 1976 and the Children (Guardianship and Custody) Act, as well as the Registration (Births and Deaths) Act seeking, *inter alia,* an order for declaration of paternity in

relation to JP, the child of HA-P. He is seeking also for his name to be added to or substituted on records of the birth registration form as the father of JP and requesting joint custody together with HA-P of JP with primary care and control to the mother along with orders for access to the child.

[10] On 3 April 2017, AK filed an amended fixed date claim form which sought the following orders:

> "1. An Order for a Declaration of Paternity in relation to **JP** born July 13, 2014;
>
> 2. An Order that the DNA Parentage Report dated April 9, 2015 is to be used to determine whether the Claimant is conclusively the father of the child known as **JP** 3. Alternatively, a direction for the use of blood tests to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as **JP** born July 13, 2014;
>
> 4. An Order that the Registrar General be directed to amend the records of the Birth Registration Form of **JP** born July 13, 2014 to add or substitute the Claimant as father of the said **JP** born July 13, 2014;
>
> 5. An Order that the Registrar General be directed to amend the records of the Birth Registration Form of **JP** born July 13, 2014 to change the child's last name from '[redacted]' to '[redacted]';
>
> 6. Alternatively, an Order directing the Registrar General Department to issue a new Birth Registration Form of **JP** born July 13, 2014 with the Claimant's name inserted as the father and inserting the name [redacted] as the child's last name.
>
> 7. An Order that joint custody of the relevant child, **JP** born July 13, 2014 be granted to the Claimant and the Defendant;

> 8. An Order that primary care and control be granted to the Defendant;
>
> 9. An Order that the Claimant have access to the relevant child one half of all major school holidays;
>
> 10. An Order that the Claimant have access to the relevant child for one weekend per month outside of the school holiday period;
>
> 11. Costs to the Claimant;
>
> 12. Such further and other relief as this Honourable Court deems fit."

[11] Both AK and HA-P were involved in an intimate relationship before her marriage in 2006 to her present husband, and also, at some point after her marriage, including the month of October 2013. She became pregnant in 2013 and gave birth to JP on 13 July 2014. Her husband has been registered as the father on the child's birth certificate. At some point, after the birth of JP, HA-P sent AK a picture of the child and when he commented on the resemblance of the child to himself, she admitted that he might be the father. According to AK, in his affidavit filed on 3 January 2017 in support of the fixed date claim form, they both agreed to do a DNA parentage test to determine if he was or was not the father of JP.

[12] In the above-mentioned affidavit, AK stated that sometime in March 2015, he attended the Central Medical Labs located at Oxford Medical Centre, 22h Old Hope Road, Kingston 5 and submitted his saliva sample for the DNA parentage test; that HA-P also collected saliva sample from JP and gave it to him, which he also submitted to the said laboratory. It is also his evidence that she had requested that the name of the child not be used in the report in order to protect his actual identity. The child was

therefore referred to as the son being "AK (Jnr)" and himself as the alleged father "AK (Snr)". He thereafter received the DNA parentage test report dated 9 April 2015 from Caribbean Genetics (Carigen). A copy of this report was attached to the affidavit which indicates that the alleged father, AK (Snr), cannot be excluded as the biological father of the child, AK (Jnr) and that the "probability of paternity is 99.9998%".

[13] According to AK, he was excited to learn that he was a father and stated that he has spent time with JP on about eight occasions which were facilitated by HA-P; that he has developed a deep love and connection to JP; and that he has bought clothing, baby formula and other recreational/educational material for JP. He further stated that it is his fervent wish to be a part of JP's life and that it would be detrimental in the long run to JP if he were excluded from his life. He complained that he filed the fixed date claim form as HA-P has not allowed him to see the child since March 2016 and has refused to give him any information about the child's well-being and development.

[14] HA-P has not contradicted AK's assertions that he is or may be the father of JP. She has also not denied that she gave a saliva sample of JP to AK. She merely indicated, in her affidavit filed on 10 April 2017, that she has seen the DNA test results but notes that the child is referred to as AK (Jnr) and not JP. However, in a further affidavit filed on 1 May 2017, she stated that she denies the assertions made by AK in relation to the reason given for the use of the name AK (Jnr) and that she further discredits the authenticity of the DNA report. She also asserts that AK only saw the child on about five occasions but his real interest was in trying to further pursue a

relationship with her. She indicated further that AK has not had any time to bond with JP and that JP has bonded with the entire family, that he regards her husband as his father and it would not be in the best interests of the child for AK to be granted joint custody.

[15] The trial in relation to the fixed date claim form was originally set for 25 and 26 June 2019. It is not clear from the records whether a new trial date has been set.

The issues

[16] The grounds of appeal will be dealt with as issues 1 to 3. In relation to the counter-appeal, the grounds will be treated as issue 4. The issues are set out below:

1) Did the learned judge have the power to order the blood tests in the manner that she did? **(ground ii)**

2) Should the learned judge have considered what is in the best interests of the child in all the circumstances before making any such orders? **(ground i)**

3) Did the learned judge err in ordering that both parties should bear the costs associated with the blood tests? **(ground iii)**

4) Did the learned judge exercise her discretion wrongly in failing to make additional or alternative orders in relation to the test of paternity as requested by AK in his amended

notice of application for court orders? **(grounds (a) and (b) of the counter-appeal)**

[17] The submissions in relation to the appeal and counter-appeal will be considered jointly in relation to the four issues as there is some overlap of the material applicable to both sets of grounds.

Submissions of counsel for the appellant/counter-respondent

Issues 1 and 2

[18] In written submissions, counsel has contended that the learned judge erred in ordering the blood tests in the manner she did as she has no jurisdiction to do so. He submitted that, based on the provisions of the Status of Children Act, 1976 ('Status of Children Act'), the consent of HA-P is required as JP is a minor. Counsel referred the court to sections 10, 11, 12 and 13 of the said Act.

[19] Counsel also submitted that, in any event, the learned judge erred in the exercise of her discretion as it would not be in the best interests of the child to order such blood tests based on the evidence that was before her. He is contending that this evidence speaks to the trauma and disruptive effect that the proceedings for the determination of paternity and any subsequent events would have on JP who considers HA-P's husband to be his father. He has referred this court to **Re H & A (Children)** [2002] EWCA Civ 383, and asked that the approach of that court be adopted.

Issue 3

[20] Counsel submitted that the learned judge erred in ordering that the costs be shared equally between the parties as this is not in accordance with section 11(6) of the Status of Children Act.

Issue 4

[21] In relation to this issue (raised on the counter-appeal), counsel submitted that the Status of Children Act has not been amended at this point to include other scientific tests apart from blood tests to determine paternity. He compared section 11 of the Status of Children Act to section 20(1) of the Law Reform Family Act, 1969 of the United Kingdom ('UK Act') where such an amendment was effected in 2001.

[22] Counsel relied on **Re O and J (Paternity: Blood Tests)** [2000] 1 FLR 418, a decision of the Family Division of the English High Court decided prior to the amendment of the UK Act. The provisions prior to the amendment were similar to the provisions in the Jamaican Act as regards the use of the words "blood tests". The court in **Re O and J** held that the relevant amendment at section 20(1) of the UK Act had not yet been brought into force to replace the use of the words "blood tests" with the words "scientific tests" and "bodily samples" in relation to determining paternity.

[23] Counsel referred to Wall J's statement in that case, that, for the present purposes before him, the use of blood samples therefore effectively remained the law. Reference was also made to Wall J's assessment of the statutory provision of the said

UK Act and his conclusion that there was no inherent jurisdiction in the court to order DNA tests for paternity purposes.

Submissions of counsel for the respondent/counter-appellant

Issues 1

[24] Counsel made no submissions pertinent to issue 1.

Issue 2

[25] In relation to whether it was in the best interests of the child that the court should grant an order relevant to the determination of paternity, counsel referred the court to **Re F (A Minor) (Blood Tests: Parental Rights)** [1993] 3 WLR 369. Counsel submitted that in many cases, the best interests of the child are best served where truth is ascertained.

Issue 3

[26] No submissions were made in relation to this issue.

Issue 4

[27] Counsel referred this court to the position adopted by Jones J in **CB v CAM** TT 2005 HC 14, a case from the Trinidadian High Court. Jones J had to consider that jurisdiction's Status of Children Act (with a similar provision to section 11 of the Jamaican Act) which speaks only to the use of blood tests. Jones J opined that there seemed to be no prohibition on the court receiving the results of tests conducted by means of bodily samples (apart from blood tests) where the tests were conducted by consent.

[28] Counsel contended therefore that the court has the power to receive the results of a DNA test conducted by virtue of saliva samples, once the test was conducted by consent; that this would obtain in spite of the absence of legislation passed in Parliament governing the treatment of DNA by bodily samples (apart from blood tests) in applications for the determination of paternity.

[29] Counsel submitted therefore that the learned judge ought to have considered making an order for saliva samples to be given in order to determine the issue of paternity, especially in light of the evidence suggesting that HA-P had consented previously to such a test.

[30] In the alternative, counsel submitted that, since this evidence of previous consent (relevant to the test dated 9 April 2015) was before the learned judge, she ought to have made an order permitting reliance on this DNA parentage test. In support of this aspect of the submission, counsel also referred the court to the evidence of AK (in his affidavit filed 18 May 2017) that HA-P was the one that had requested that JP be named as 'AK (Jnr)' on the above-mentioned test in order to ensure confidentiality.

[31] Counsel submitted that in light of all the above, the learned judge was wrong when she failed to make these additional/alternative orders; that this court should therefore grant an order for a saliva based DNA test to be done to determine whether AK is excluded from being the relevant child's father. In the alternative, an order should

be made granting AK permission to rely on the DNA parentage test report (dated 9 April 2015) at the subsequent trial of the fixed date claim form.

Discussion and analysis

[32] It is necessary to succinctly state the basis on which an appellate court will interfere with the exercise of a judge's discretion. This court is generally unwilling to disturb a decision, which is the result of an exercise of a discretion given to the judge at first instance. It will only do so if it is shown that the judge made an error of law, or misinterpreted or misapplied the facts involved in that exercise or made an order that is so aberrant that no reasonable judge would have made, in the circumstances of the case (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, 1046).

[33] It is also expedient to set out sections 10(1), 11(1), (2) and (6), 12 and 13(1) of the Status of Children Act which are all relevant to the determination of the appeal. These sections are set out below:

> "10 (1) Any person who –
>
> (a) being a woman, alleges that any named person is the father of her child; or
>
> (b) alleges that the relationship of father and child exists between himself 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 in such other manner as may be prescribed by rules of court 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."

Blood Tests

"11 (1) In any civil proceedings in which the paternity of any person (hereinafter referred to as "the subject") falls to be determined by the court hearing the proceedings, **the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of the subject** and for the taking, within a period to be specified in the direction, of blood samples from the subject, the mother of the subject and any party alleged to be the father of the subject or from any, or any two, of those persons.

(2) A court may at time revoke or vary a direction previously given by it under this section.

(3) …

(4) …

(5) …

(6) Where a direction is given under this section the party on whose application the direction is given shall pay the cost of taking and testing blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for the purpose), and of making a report to the court under this section, but the amount paid shall be treated as costs incurred by him in the proceedings.

12 (1) Subject to the provisions of subsections (3) and (4) and without prejudice to section 13, **a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section**

11 shall not be taken from that person except with his consent.

(2) The consent of a minor who has attained the age of sixteen years to the taking from himself of a blood sample shall be as effective as it would be if he were of full age; and where a minor has by virtue of this subsection given an effective consent to the taking of a blood sample it shall not be necessary to obtain any consent for it from any other person.

(3) **A blood sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4), if the person who has the care and control of him consents**.

(4) A blood sample may be taken from a person who is suffering from mental disorder and is incapable of understanding the nature and purposes of blood tests if the person who has the care and control of him consents and the medical practitioner in whose care he is has certified that the taking of a blood sample from him will not be prejudicial to his proper care and treatment.

13(1) Where a court gives a direction under section 11 and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances." (Emphasis supplied)

[34] Section 20(1) of the UK Act, as amended in 2001, reads as follows:

"In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—

(a) **for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person**; and

(b) for the taking, within a period specified in the direction, of **bodily samples** from all or

> any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;
>
> and the court may at any time revoke or vary a direction previously given by it under this subsection." (Emphasis supplied)

[35] Section 20(1), prior to the above-mentioned amendment, referred only to the use of blood tests as does the Status of Children Act. It is to be noted also that section 21 of the UK Act had similar provisions in relation to the issue of consent as is presently found, in particular at section 12(3) of the Status of Children Act. However, section 21 of the UK Act, and in particular sub-section (3), was also amended to read as follows:

> "**21 Consents, etc., required for taking of bodily sample.**
>
> (1) Subject to the provisions of subsections (3) and (4) of this section, a bodily sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent.
>
> (2) The consent of a minor who has attained the age of sixteen years to the taking from himself of a bodily sample shall be as effective as it would be if he were of full age; and where a minor has by virtue of this subsection given an effective consent to the taking of a bodily sample it shall not be necessary to obtain any consent for it from any other person.
>
> (3) A bodily sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4) of this section,.
>
> (a) if the person who has the care and control of him consents; or

> **(b) where that person does not consent, if the court considers that it would be in his best interests for the sample to be taken.**
>
> …"
>
> (Emphasis added)

[36] In **Re O and J**, one of the issues that fell to be considered by Wall J was whether section 21(3) (as it stood prior to the amendment) was to be construed as giving the person with the care and control of a child the absolute right to refuse a sample of blood to be taken from the child. A secondary issue was whether the statutory scheme under Part III of the 1969 UK Act ousted the inherent jurisdiction of the court to order that a sample of blood be taken from a child in the absence of this consent. In relation to the first issue, Wall J concluded that the section could only be construed to read that Parliament had indeed empowered a parent with the care and control of the child to refuse to permit a sample of blood to be taken from the child for the purposes of determining paternity.

[37] I am inclined towards the same conclusion in construing section 12 of the Status of Children Act. Once the child is under 16 years old, the consent of the parent or guardian is required. Counsel for HA-P is correct that the consent of HA-P (the person who has the care and control of JP) would have to be obtained in order for any blood test to be carried out on JP (per section 12(3) of the Status of Children Act). The learned judge clearly erred therefore in making the orders at paragraphs 1(a), (b) and (c) as she did, without specifying that the order at paragraph 1(a) would be contingent

on the consent of HA-P. In that regard, issue 1, which relates to ground (ii) of the appeal is successful.

[38] Counsel for AK has not sought to argue that the court has an inherent jurisdiction to order blood tests in the absence of the relevant consent in matters such as the present application. The issue does not fall to be considered by this court. However, it would be useful to consider whether such an inherent jurisdiction exists in the Supreme Court. In **Re O and J**, submissions had been made before Wall J that the court would have had an inherent jurisdiction to order blood tests where a child was the subject and the parent or guardian did not consent. Counsel in that case, had sought to rely on a passage in the judgment of Lord Donaldson MR in **Re J (a minor) (wardship: medical treatment)** [1990] 3 All ER 930 at page 934 where he stated:

> "The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests.
>
> The court when exercising the parens patriae jurisdiction takes over the rights and duties of the parents, although this is not to say that the parents will be excluded from the decision-making process. Nevertheless in the end the responsibility for the decision whether to give or to withhold consent is that of the court alone."

[39] Wall J reviewed some authorities where the court had exercised this inherent jurisdiction. He found that these were basically "treatment" cases in which the court had ordered medical treatment and blood tests of a child despite parental opposition. He drew a sharp distinction between the inherent jurisdiction of the court to order blood tests in these types of cases as compared to cases involving the determination of

paternity. He concluded that "a blood test taken for the purpose of determining paternity cannot be said to be either curative or prophylactic, nor is it designed to facilitate diagnosis of any medical condition".

[40] He went on to conclude, however, that even if he were wrong in that regard, the statutory scheme under Part III of the 1969 Act (the UK Act) ousted any residual power in the court to exercise its inherent jurisdiction to order a child to be blood tested for the purposes of determining paternity. He accepted that the statutory scheme of the Act demonstrated that the plain intention of Parliament had been to codify legal rights and remedies in relation to establishing paternity by scientific means; and that an application of the correct principles of statutory construction led to the inevitable conclusion that inherent jurisdiction was ousted.

[41] It is acknowledged that the Supreme Court would have an inherent jurisdiction to consider whether to make certain orders deemed to be in the best interests of the child. This is usually invoked, for example, in relation to the appointment and removal of guardians. In **B and C** [2016] JMCA Civ 48 Brooks JA stated:

> "[19] The Supreme Court does have an inherent jurisdiction to appoint and remove guardians for children. The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as *parens patriae*.

> [20] The term *parens patriae* is defined in the ninth edition of Black's Law Dictionary as meaning:
>
> > '...parent of his or her country'…The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…'
>
> Based on that doctrine, the Sovereign was regarded as having the right to make decisions concerning people who were not able to take care of themselves."

[42] The principle of *parens patriae* could also be relied upon, in appropriate cases, to empower the Supreme Court to order medical treatment for minors as may be required in the absence of consent of a parent or guardian as part of the court's inherent jurisdiction.

[43] But when one examines the statutory scheme of the Status of Children Act, I arrived at the same conclusion as Wall J in **Re O and J**. Section 10 of the above-mentioned Act empowers the court to make a declaration of paternity. Section 11 empowers the court to require the use of blood tests for the above-mentioned purpose. This Act, as it now stands, provides the only statutory framework for determining paternity and, in the words of Wall J, shows "the plain intention of Parliament to codify legal rights and remedies in relation to establishing paternity by scientific means".

[44] The recently passed DNA Evidence Act, 2016, which speaks to bodily samples, empowers the court under various circumstances to order relevant tests without the consent of the subject. However, this Act deals with the establishment of a DNA database for purposes relating to criminal investigations or for identification of missing or unknown deceased persons. It has not changed or affected the Status of Children

Act. In my opinion therefore, the court would have no power to rely on its inherent jurisdiction in order to make orders in relation to applications for blood tests in the present circumstances.

[45] In relation to issue 2 (ground (i)) it appears counsel is suggesting that the learned judge erred in exercising her discretion in making orders to facilitate the determination of paternity as such orders were not in the best interest of JP.

[46] In **Re H & A**, the court had to consider whether it was in the best interest of twins to order blood tests in order to determine the issue of paternity. By then section 21 of the UK Act had been amended to allow the court to order these tests where the relevant person does not consent, if the courts considered that it would be in the best interests of the child.

[47] As indicated previously, the UK Act, as it stood before that amendment, had similar provisions to the Status of Children Act in relation to the issue of consent. Section 12(3) of the Status of Children Act has no proviso which would empower the court to order blood tests in the best interest of the child without the consent of the relevant parent or guardian. In that regard and more to the point, there is also no express requirement that the court is to consider whether it would be in the best interest of a child to order such tests.

[48] The court is empowered under section 18 of the Children (Guardianship and Custody) Act to make decisions in the best interest of the child in proceedings regarding the custody, upbringing and property related to children. However, this submission by

counsel for HA-P, in the context of our jurisprudence, seems to be blurring the boundaries between the actual application for the DNA test and the trial for declaration of paternity including any ensuing orders that ought to be made if the paternity of AK is established.

[49] AK would be entitled to have the best evidence put before the trial court for the consideration of his fixed date claim form. I would therefore agree with the submissions of counsel for AK on this point. As stated succinctly by Balcombe LJ in **Re F**, the interest of justice will normally require that available evidence not be suppressed and that the truth be ascertained whenever possible.

[50] In any event, based on the circumstances that were before Graham-Allen J, there is no basis to suggest that orders made in relation to the declaration of paternity would not have been made in the best interest of the child. Prima facie, the evidence suggests AK may be the father, that HA-P conducted herself towards AK on that basis, allowing him to see the child on some occasions, and sending him a picture of the child. This court cannot conclude at this preliminary stage that AK's request for joint custody and access would be detrimental to JP. What the learned judge had to consider was how to exercise her discretion in light of the fixed date claim form and the evidence before her, as well as the relevant statutes applicable to the application for her determination. Issue 2 (which relates to ground i) is therefore found to be without merit.

[51] In relation to issue 3 (ground iii), section 11(6) of the Status of Children Act makes it clear that the party who has applied for the blood tests to be done should be the party paying the cost of the exercise and that the amount should be treated as costs incurred in the proceedings. The learned judge also erred therefore in requiring that the costs of the blood tests should be shared equally between AK and HA-P. Issue 3 also has merit.

Issue 4

[52] What remains to be determined, in light of issue 4, is whether Graham-Allen J would have been empowered to order that saliva samples be taken as an alternative to blood in order to determine if AK is excluded from being the father.

[53] As stated previously, section 11(1) of the Status of Children Act provides that the court may consider giving directions for blood tests to be done on a relevant application. At this point in time, Parliament has made no provision to include bodily samples such as saliva in order to determine whether a person is or is not excluded from being the father. Graham-Allen J would therefore be bound by the statutory provision. There would have been no legal basis for her to make an order for saliva samples to be taken in relation to determining paternity.

[54] However, I do accept the submissions of counsel for AK that an alternative order could have been made by the learned judge, in relation to the DNA parentage test conducted on 9 April 2015, in light of the applicable law and the circumstances that existed. Section 10(1)(b) of the Status of Children Act enables a person who alleges to

be the father of a child to apply to the Supreme Court, Parish Court or Family Court for a declaration of paternity. That section further states that if this relationship is proved to the satisfaction of the court, the court may make a declaration of paternity.

[55] Any relevant and admissible evidence in relation to that issue should therefore be considered by the court. An order for a test conducted by means of saliva sample would fall into such a category, albeit the absence of legislation allowing for its consideration as a means of establishing paternity.

[56] A DNA parentage test based on saliva samples is scientific evidence and would be one of several pieces of evidence that could be considered by the trial court. Any such DNA test, similar to ones conducted on blood samples, would have to be cogent, satisfy the requirements necessary to establish authenticity and must be taken together with an assessment by the trial judge of all the other pieces of evidence. The failure of HA-P to consent to the blood test would also be a relevant fact for the trial court to consider. Based on the provisions of section 13(1) of the Status of Children Act, the trial judge would be entitled to draw inferences from the failure of any party to take the steps required for the purpose of giving effect to the direction made by the court.

[57] I would therefore agree with the observations of Jones J in **CB v CAM,** wherein he accepted the veracity of the saliva tests having considered all the evidence relating to the integrity of the samples. Jones J also considered that the tests were done with the consent of the relevant parties. He expressed thus at paragraphs 19 and 20:

> "19. It is clear on the evidence before the Court that once I accept the results of the DNA test I must find that the applicant is not the biological father of the child. Despite the fact that the Act regulates the taking and testing of blood samples it does not provide for either the testing of bodily samples other than blood or for DNA testing.
>
> 20. The Deoxyribonucleic Acid (DNA) Identification Act, 2000 although passed in Parliament was not, at the time of the order made by consent, proclaimed. **There seems to be however no prohibition on the Court receiving the results of such tests where, as in this case, the test was conducted by consent**." (Emphasis supplied)

[58] Counsel for AK has submitted that, based on the evidence, HA-P did consent to that DNA test conducted previously. It would be a matter for the trial judge to decide whether this is so and whether the integrity of the samples and the process of testing is sound.

[59] AK should therefore have the benefit of having the evidence of such a test placed before the trial judge along with all the other evidence in order for it to be determined whether it is proved to the satisfaction of the court that the relationship of father and child exists between himself and JP. Such an order could have been appropriately made by Graham-Allen J. Issue 4 as it relates to the ground (b) on the counter-appeal is found to have merit.

Conclusion

[60] In light of the above, therefore, the learned judge erred in the exercise of her discretion in making the orders as she did. While there would have been no bar to her ordering the blood tests be done, the order should have contained a proviso that it is only to be done with the consent of HA-P. The learned judge ought also to have made

an alternative order for the DNA parentage test conducted on 9 April 2015 to be relied on at the trial, failing the consent of HA-P to the blood test. Both the appeal and the counter-appeal should be allowed in part.

[61] Paragraphs 1, 2 and 3 of the order of the learned judge, made on 4 March 2019, should therefore be varied to reflect the determination of this court.

[62] While there has been no challenge to paragraphs 4 to 9 of the order, it is recognised that it is necessary for a new trial date to be set, as the dates in paragraph 5 have since passed. Having regard to the circumstances, it is recommended that the matter be set for a case management conference as expeditiously as possible for a new trial date to be set and any subsequent orders relevant to the trial be made. In relation to paragraph 8 which deals with costs, no challenge was made by either party and should remain undisturbed. As it relates to the costs of the appeal and counter-appeal, bearing in mind the nature of the matter and that both parties had some success on their appeals, there should be no order as to costs.

F WILLIAMS JA

ORDER

1) The appeal is allowed in part.

2) The counter-appeal is allowed in part.

3) The order of Graham-Allen J made on 4 March 2019 is varied in that paragraphs 1, 2 and 3 of the said order are deleted; and substituted therefor are the following:

> "1. The Court hereby gives a direction for the use of blood tests with the consent of HA-P, to ascertain whether such tests show that the Claimant is or is not thereby excluded from being the father of the child known as JP born July 13, 2014.
>
> 2. (a) In the event that HA-P consents, the blood tests should be done at Caribbean Genetic (Carigen) within 30 days of the date of this order and HA-P is to give access to JP for the purpose of facilitating the blood tests.
>
> (b) In the event that HA-P fails to consent, the DNA parentage test report, dated 9 April 2015, can be relied on at the trial to ascertain whether such tests along with other pieces of evidence show that AK is or is not excluded from being the father of the child.
>
> 3. That the costs of the blood tests should be borne by the applicant, AK."

4) The Registrar of the Supreme Court is to fix a date for a case management conference expeditiously, in consultation with the parties.

5) No order as to costs on the appeal and counter-appeal.