[2024] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2023PCCV00006

BETWEEN	**L A B**	**APPELLANT**
AND	**K D E**	**RESPONDENT**

Duncan Roye and Ms Stevie Spence instructed by Williams, McKoy & Palmer for the appellant

Orville Morgan instructed by Orville C Morgan & Company for the respondent

27, 31 May and 14 June 2024

Family Law - Family Court jurisdiction - Application for declaration of paternity by respondent - Order for blood samples of children to be taken for DNA analysis - Children adopted by appellant - Whether jurisdiction to make such an order in the case of adopted children - Whether such an order is in the best interest of the adopted children - Status of Children Act ss 10, 11, 12, 13 - Adoption Act ss 15, 16

EDWARDS JA

Introduction and background

[1] We heard submissions in this matter on 27 May 2024, and on 31 May 2024 we made the decision to allow the appeal and set aside the order for DNA testing made by a Judge of the Family Court ('the Judge of the Family Court') on 17 May 2022, with costs to the appellant to be agreed or taxed. At that time, we promised to put our reasons for the decision in writing, and this is in fulfilment of that promise.

[2] Due to the nature of the case and the parties involved, reference, in this judgment, will be made to them only by their initials. This appeal is brought by L A B ('the appellant') challenging the decision of the Judge of the Family Court for the parishes of Kingston and Saint Andrew, made on 17 May 2022, to entertain a petition for a declaration of paternity brought by K D E ('the respondent') with respect to two children, and to order DNA testing to be done on one child, K B, named in the order.

[3] The order, which is endorsed by the Judge of the Family Court on the back of the respondent's petition, is in the following terms:

> "Upon Application by Applicant an order is made for DNA test to be done to determine whether the applicant is excluded as father of child [K B]… costs to be borne by Applicant."

Verbal notice of appeal against this order was given by the appellant's attorney in the Family Court, on the same day.

[4] The record of proceedings in the Family Court which was submitted to this court, concerned only one petition naming one child, and an order only with respect to that one child. Curiously, there is a letter addressed to a named laboratory over the signature of the Clerk of Court of the Family Court which names two children, K B being one, but which indicates that the direction for a DNA test to be conducted on the "said child" is by consent. The reference to consent being given is incorrect. There was no such consent given. The letter also asked that the result state whether "the Applicant is not excluded from being the father of the subject child". This seems to suggest one of two things: that there was a recognition that the order was made in regard to only one child, or that the documents with respect to the second child were never forwarded to this court. This, however, though noted, did not affect the outcome of this appeal.

[5] The petition for declaration of paternity was made under section 10 of the Status of Children Act 1976. This petition, filed 9 March 2022, was made by the respondent, in respect of the two children (twins) that the respondent claimed are his biological children.

[6] The appellant is the maternal grandfather of the children, as well as their legal parent, having adopted them on 14 December 2011. There is no dispute that the children were legally adopted by their grandfather. The children were born to the appellant's daughter, who died a month after the children's birth, as a result of complications from childbirth. She was only 17 years old at the time, having become pregnant at 16. The respondent claims to be the biological father but he was not registered as such at the time of the birth.

[7] After the death of the children's mother, the children were taken home by the appellant and his wife, who took custody and control of them and looked after their welfare. The children were registered with the surname of their biological mother. The appellant's wife died sometime in August 2011, prior to the grant of the adoption orders on 14 December 2011.

[8] The petition in the Family Court for a declaration of paternity was supported by the affidavit of the respondent, dated 8 March 2022, in which he spoke to the intimate relationship he had had with the appellant's 16-year-old daughter, claiming that she had come to live with him during her pregnancy after being put out of her father's house. He also claimed that he had supported her emotionally and financially during her pregnancy, but after her death when the grandparents took custody of the children, and after the appellant's wife's death, the appellant began to exclude him from the children's lives and barred him from bonding with them. He further deposed that he had commenced proceedings previously in relation to the children, but discontinued them due to financial constraints. He is now financially stable.

[9] The respondent who was living overseas at the time of the application, deposed that he was seeking declarations of paternity to prove that the children were his biological children, and that he wished to have his name placed on their birth certificates and to have the opportunity for himself, his wife and his other children, with whom he lived in the United States, to bond with them. He has been allowed, by the children's aunt, to see them by way of video calls, despite being restricted by the appellant.

[10] S B, the sister of the children's mother, and the older daughter of the appellant, filed an affidavit on 10 July 2022 in support of the respondent's petition. That affidavit was filed after the judge's order for the DNA test had been made and the notice of appeal filed, but was, nonetheless, referenced by the Judge of the Family Court in her reasons for decision. S B deponed to her knowledge of the relationship between the respondent and her sister, and that her sister had gone to live with the respondent during her pregnancy, after their father had put her out of his house.

[11] When the matter came before the Family Court, on 15 March 2022, counsel for the appellant raised a preliminary objection to the petition on the basis that the respondent had no standing, and that the court had no power to make the orders sought, as any parental rights the respondent may have had, would have been extinguished by the adoption orders. It was also submitted that it was not in the best interest of the children to determine any biological relationship between the children and the respondent, and that any such exercise would be academic, would not change any status or legal position in relation to the children, and would only be to satisfy the respondent's curiosity.

[12] Counsel for the respondent asserted that the court was empowered to make a declaration of paternity and that the "statutory scheme" showed that Parliament intended to codify "legal rights and remedies in relation to establishing paternity by scientific means".

[13] Following submissions by counsel for both parties, the Judge of the Family Court ruled, on 17 May 2022, that notwithstanding the existence of an adoption order, the court did in fact have the power to entertain an application for declaration of paternity and to grant that order. She subsequently provided written reasons for her decision. In her reasons for decision the Judge of the Family Court indicated that her conclusions were based on her interpretation of section 10(1)(b) of the Status of Children Act, and section 15(1) of the Children (Adoption of) Act (hereinafter referred to as the 'Adoption Act'). The Adoption Act, she said, only extinguished "the rights, duties, obligations and liabilities of

the parents or guardians of a child in relation to the specific areas of custody, maintenance and education of the child and all rights to appoint a guardian and consent or dissent to marriage". The Judge of the Family Court found that the section did not extinguish all rights, duties, obligations and liabilities, and particularly, did not extinguish the right of the respondent under section 10(1)(b) of the Status of Children Act to apply for a declaration of paternity. In coming to that finding, she had regard to the words in section 10(1) of that Act that permit the application "whether or not the father of the child or both of them are living or dead", which she said demonstrated that there may be many reasons why the court would entertain an application for declaration of paternity which had nothing to do with custody, maintenance or education and that may subsist beyond the life of the parent or child.

[14] Having so found, the Judge of the Family Court went on to consider whether the court should exercise its discretion to order a blood test by virtue of sections 11 and 12 of the Status of Children Act, to assist her with determining whether to make a declaration of paternity, in all the circumstances. She considered and rejected the appellant's arguments that to order a DNA test would be purely academic and only to satisfy the respondent's curiosity. She also distinguished the cases of **re F (A Minor) (Blood Tests: Parental Rights)** [1993] Fam 314 ('**re F**') and **Hodgkiss v Hodgkiss and Another** [1984] FLR 563 ('**Hodgkiss v Hodgkiss**'), relied on by the appellant, finding that it would be in the best interests of the children to know who their only surviving biological parent is. She further rejected the argument that this knowledge would be disruptive to the children's lives, as there had been no suggestion before her that the children did not know that they were adopted, that their biological mother had died, or that the person who was raising them was their grandfather. This she found, meant that there was no danger in their "present belief as to their status" being disturbed, as was the danger in **Hodgkiss v Hodgkiss**. She also determined that there would be no danger of illegitimating the children by the making of the orders which would outweigh the "parental rights of the putative father", as in the case of **re F**.

[15] The Judge of the Family Court also took account of what she found were the "very real risks of future medical conditions and procedures and the avoidance of marrying within the prohibited degrees, risks which [could] only be mitigated against by persons knowing their blood lineage". On those bases, she found that she was satisfied that the court should exercise its discretion in making an order for a blood test to be conducted. In making the order, the Judge of the Family Court relied on this court's decision in **HA-P v AK** [2020] JMCA Civ 25, in which **re F** was referenced, for the view that the respondent was entitled to have the best evidence before the court in respect of his application for declaration of paternity.

[16] Before this court, the appellant challenged the orders of the Judge of the Family Court on the same bases as he did in the court below, primarily that the adoption orders had extinguished all rights the respondent may have had as biological father of the children, all of which now lie with the appellant, and that the Judge of the Family Court, therefore, had no jurisdiction to make the orders she did. The appellant also sought to challenge the orders on the basis that they are not in the best interest of the children.

The role of this court

[17] An appeal from the order of the Judge of the Family Court lies to this court by virtue of section 10 of the Judicature (Family Court) Act. In **Eric Graham v Miriam Salmon** (1983) 20 JLR 142, which considered section 10 of the Judicature (Family Court) Act, it was highlighted that the jurisdiction of the Family Court is the same as that exercised by the Resident Magistrate's Court (now Parish Court), and the appeals process is governed by similar considerations. By virtue of section 4(4), the procedures, processes, and practice in the Family Court are the same as in the Parish Court. The right of appeal is the same as that from the Parish Court. Where the proceedings in the Family Court are civil, the procedure relating to civil appeals will be applicable. Accordingly, appeals from the Family Court are also governed by section 256 of the Judicature (Parish Court) Act.

[18] The order for blood to be taken for testing in the determination of paternity is a matter for the discretion of the judge. However, that discretion has to be judicially exercised on settled principles. This court will not interfere with the exercise of such discretion where it is so properly exercised (see **Hadmor Production Ltd and Others v Hamilton and Another** [1983] 1 AC 191). However, where the judge makes an error of law, misinterprets or misapplies facts used in the exercise of that discretion, takes into account irrelevant factors or fails to consider relevant factors in deciding whether or how to exercise that discretion, or makes an order that is so aberrant, being one which no reasonable judge mindful of her duty would have made, this court will set it aside.

The grounds of appeal

[19] The appellant seeks to rely on the following grounds of appeal filed 25 May 2022:

i. "The Judge erred in law and in fact in finding that the Applicant has the right to apply for a declaration of paternity solely for the purposes of a declaration of paternity and entering his name on the children's birth certificate.

ii. The Learned Judge erred in exercising her discretion under **The Status of Children Act** in ordering a DNA test to be done in the aforementioned children as against the Respondent to determine whether the Respondent can be excluded as the father of the Children, where the Respondent is applying solely for a declaration of paternity as the declaration of paternity, without more, would not alter any arrangements relating to custody of the children.

iii. The Judge erred in law and in fact in finding that it was in the best interest of the child to know their lineage to avoid a possibility of marrying someone within the prohibited degrees of relationship and the potential to develop some medical condition and that this outweighed the children's long-standing belief/notion of their family structure that the Appellant and his late wife had put in place and potential knowledge of abandonment by their purported biological father.

i. Further, the Learned Judge failed to give any or any due consideration to the delay in making the application by the Respondent, being more than twelve (12) years since the birth of the children.

iv. The Learned Judge failed to give any or any due consideration to **Sections 15 and 16 of the Children (Adoption of) Act**."

Submissions

[20] The crux of the submissions by counsel on behalf of the appellant, is that, by virtue of section 15 of the Adoption Act, the effect of the adoption orders is such that all rights of the respondent to the children have been extinguished, and therefore, the respondent had no right to make the application he did, nor did the Judge of the Family Court have the jurisdiction to consider the application and make the orders that she did.

[21] Counsel further submitted that the respondent did not seek to challenge the adoption order, and that:

a. a declaration of paternity will have no legal effect on the position of the parties in relation to the children;
b. paternity is not in issue (as required by section 11 of the Status of Children Act), and so the court has no authority to order any DNA test;
c. the ordering of DNA tests is not in the best interests of the children; and
d. the results of the DNA tests will serve no purpose other than to satisfy the curiosity of the respondent regarding the biological relationship between himself and the children.

[22] With respect to the effect of an adoption order, the appellant relied on the following cases: **In re B (Adoption: Jurisdiction to Set Aside)** [1995] Fam 239, **Re: Application for Guardianship of a Minor Child F** [2016] JMSC Civ 193 and **In the**

Matter of an Appeal Against the Decision of the Adoption Board ('the Adoption Board case') 2015] JMSC Civ 185. The appellant also relied on the cases of **Hodgkiss v Hodgkiss** and **re F**.

[23] Counsel for the respondent, indicated that the respondent knew nothing about the adoption, had not been consulted, and had not given his consent to it. Counsel averred that it was only after the respondent had filed for the declaration of paternity, that he learnt that the children had been adopted.

[24] Counsel argued that what the Judge of the Family Court had to consider, on the application for declaration for paternity, was how to exercise her discretion in the light of the application before her and the relevant statute. Counsel argued that the appellant's reliance on section 15(1) of the Adoption Act was misconceived, as no application had been made for custody or access. Counsel maintained that section 10 of the Status of Children Act empowered the court to make the declaration, and that the respondent was entitled to have the best evidence placed before the court considering his application.

[25] Counsel argued further that section 15 did not extinguish the right provided under section 10(1)(b), and that the right to a declaration of paternity had nothing to do with the custody, maintenance and education of the children. Therefore, he said, the Judge of the Family Court was correct to entertain the application and order the DNA test. The order, he said, was fair and just despite the existence of the adoption order.

[26] Counsel maintained that the case of **Hodgkiss v Hodgkiss** was distinguishable, as the children knew that the respondent was their natural father and that their natural mother had died. They also knew that their grandfather had adopted them and were already interacting with the respondent. Counsel argued that all that was required was to apply the science to remove all doubt. He also sought to distinguish **Re F***.* He submitted that the respondent had had a relationship with the children's natural mother up until her death and had no doubt that he was the father of her children, but needed confirmation in order that a bond may be formed with him, their siblings and their stepmother. The

blood test, he said, would not be disruptive as the children already knew the truth. He argued that the order of the Judge of the Family Court subsisted and ought to be obeyed.

Issues

[27] The sole issue for this court to determine is whether the judge was correct to make the order she did.

The law

[28] Section 10(1) of the Status of Children Act provides:

> "10.-(1) Any person who –
>
> (a) being a woman, alleges that any named person is the father of her child; or
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> (b) alleges that the relationship of father and child exists between himself and any other person; or
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> (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,
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> 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."

[29] Section 11(1) provides:

> "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."

[30] By virtue of section 10, therefore, the court has the power to make a declaration of paternity, and by virtue of section 11, it may order a blood test to aid it in its decision whether to make the declaration of paternity, in civil proceedings where paternity is in issue. Section 12(1) provides that a blood sample directed to be taken from any person by virtue of section 11 shall not be taken without consent. A minor over the age of 16 years can give effective consent to a sample being taken from him or her. Section 12(3) provides that a blood sample can only be taken from a minor under the age of 16 years old if the person with custody and control consents. Section 13 (1) provides that where a direction is given under section 11 and a person fails to take the necessary steps to give effect to it the court may draw such inferences, if any, from it as it thinks proper in the circumstances. Section 13(3) is in similar vein where the failure to consent to a sample being taken from the person or anyone named in the direction over whom he has custody and control is deemed to be a failure to take steps for the purpose of giving effect to the direction. That means adverse inferences can be drawn.

[31] With respect to the effect of an adoption order, sections 15(1), 16(1), 17 and 18(1) of the Adoption Act provide as follows:

> "15.-(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the child were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid the child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."
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> "16.-(1) Where an adoption order is made in respect of a child who is not born in lawful wedlock, then, subject to the provisions of this section, any affiliation order or decree of affiliation in force with respect to the child, and any agreement whereby the father of the child has undertaken to make payments specifically for the benefit of the child, shall cease to have effect, but without prejudice to the recovery of any arrears

which are due under the order, decree or agreement at the date of the adoption order.

"17.-(1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(2) In any disposition of real or personal property made, whether by instrument *inter vivos* or by will (including codicil), after the date of an adoption order-

(a) any reference (whether express or implied) to a child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;

(b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and

(c) any reference (whether express or implied) to a person related to the adopted person in any degree related to the adopted person in any degree shall, unless the contrary intention appears be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person.

18.- (1) For the purposes of the devolution of any property in accordance with the provisions of section 17, and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child of the adopter or (in the case of a joint adoption) of either of the adopters…"

Application of the law

[32] Due to the fact that there was an adoption order in place at the time of the respondent's application, and that the children had been adopted for almost 14 years, I will begin with the Adoption Act and the effect of an adoption order. Thereafter, I will consider what, if any, effect it had on the jurisdiction of the Judge of the Family Court to make the order she did, and whether in coming to her decision she took into account irrelevant factors and failed to consider those which would have been relevant to her decision.

[33] Adoption is "the process by which a child's legal parentage is entirely and irrevocably transferred from one set of adults, usually the birth parents, and vested in other adults, namely the adoptive parents" (see Bromley's Family Law, tenth edition, page 817). Adoption, it has been said, involves the "complete severance of the legal relationship between parents and child and the establishment of a new one between the child and the adoptive parent" (see Bromley's Family Law, tenth edition, page 817 referencing the Houghton Committee's report Cmnd 5107, 1972 at para. 14). After an adoption, any reference to the term "parent" is a reference to the adoptive parent.

[34] In the **Adoption Board case** at paras. [8] to [9], at first instance, Sykes J (as he then was) rehearsed the history and policy behind the Adoption Act and the effect of an Adoption Order. This is what he said:

> "[8] What is an adoption? The starting point is to recall that adoption was unknown to the common law. It was not until the twentieth century that adoption was introduced into English law by the Adoption of Children Act 1926. There were some changes effected by the Adoption Act 1950. There was further development in the Adoption Act 1958. These statutes introduced a statutory scheme that regulated the process of adoption. Adoption is therefore a statutory scheme under which the child receives new parents by way of court order and those new parents stand in place of the biological parents as if they were the biological parents of the child.

[9] Jamaica introduced its own statute, the Children (Adoption of) Act in 1958 ('the Act') which copied some sections from the English Adoption Act of 1958. The adoption order erases the rights and obligations of the biological parents and substitutes the new parents for the biological ones. The new parents are treated in all respects as if they were the biological parents. The essence of what an adoption is and what it does was captured in the dictum of Lord Simon **O'Connor v A and B** [1971] 1 WLR 1227 at pages 1235 – 1236:

> The upbringing of its members until they are in a position to assume independent membership must be the concern of any society. Nevertheless, for a number of reasons societies generally delegate the main responsibility for the upbringing of their infant members to the natural parents. Hence arises a reciprocal primary right in the natural parents to bring up their own child. The right of the child to be decently brought up to adult membership of the society needs no analysis or expatiation. But there will be some natural parents who do not wish to enjoy the rights, with their concomitant obligations of bringing up their natural child – indeed, wish to surrender such rights and obligations. On the other hand, there will be people who, for various reasons, will wish to enjoy such rights and assume such obligations in respect of a child who is not their natural child. **Adoption is the procedure whereby the two classes of adults – those who wish to surrender their rights and obligations in respect of a child and those who wish to assume them – are brought together, so that the latter are legally substituted for the former in relation to the child in question.** The legal metamorphosis finds its quintessential expression in Section 13 (1) of the Adoption Act 1958 whereby:
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> > "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents … of the infant in relation to the future custody, maintenance and education of the infant,… shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the

> matter aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.""

[35] The consequences of an adoption order and the cumulative effect of sections 15 to 18 of the Adoption Act are that the legal rights and duties of the natural parent cease and are immediately vested in the adoptive parents as though the child had been born to them in lawful wedlock. It extinguishes all existing biological parental rights and duties. Any affiliation order, decree of affiliation or maintenance agreement with respect to the adopted child ceases to have any legal effect, except for the purpose of recovery of any outstanding arrears under the order, decree or agreement.

[36] In **re B (Adoption: Jurisdiction to Set Aside)**, an adopted child applied to set aside the adoption order made in respect to him, more than 35 years after the order was made, on the grounds of fundamental mistake of fact in respect of his placement. He had been placed with a Jewish family in the mistaken belief that he was Jewish. The court, at first instance, refused the application on the basis that it had no power to set aside the adoption order on such a ground. The applicant appealed. The English Court of Appeal refused the appeal holding that the adoption order was final and that it had effected a permanent change in the status of the child and the parties. It also held that the adoption order provided for no general challenge to an adoption order, which can only be challenged on an appeal. The court explained the effect of an adoption order in this way at, page 245:

> "An adoption order has a quite different standing to almost every other order made by a court. It provides the status of the adopted child and of the adoptive parents. The effect of an adoption order is to extinguish any parental responsibility of the natural parents. Once an adoption order has been made, the adoptive parents stand to one another and the child in precisely the same relationship as if they were his legitimate parents, and the child stands in the same relationship to them as to legitimate parents. Once an adoption order has been made the adopted child ceases to be the child of his previous parent and

> becomes the child for all purposes of the adopters as though he were their legitimate child."

[37] The effect of the adoption order was also recognised in the case of **Re: Application for Guardianship of a Minor Child F**, per Batts J, at first instance, where, in making the distinction between the Children (Guardianship and Custody) Act and the Adoption Act, it was stated at para. [3] that an "[a]doption…permanently relinquishes the rights of the parent who may or may not be alive."

[38] For the purpose of all other statutes and laws, the child is now to be regarded as the child of the adopters, so, for example, that child will take under the laws of intestacy if the adopter dies without a will (see section 17 of the Adoption Act). The adopted child has no claims under the laws of intestacy to the estate of his or her natural parents. Any reference to a child or children of the adopter in any deed or will or *inter vivos* instrument, to dispose of any real or personal property, after the date of adoption, is construed as a reference to include the adopted child. The converse is true of the adopted child's natural parents, and the reference to child or children in such deeds, wills or *inter vivos* instruments made by the natural parents to dispose of real or personal property will not be construed as a reference to the child who has been adopted. Another legal consequence of an adoption order, as set out in section 18 of the Adoption act, is that the adopter's children become the brother or sister of the adopted child, either of the whole blood or the half blood, as the case may be, for the purpose of any devolution of property in accordance with the provisions of section 17.

[39] It is a requirement that an adoption order be lodged with the Registrar General, where, upon receipt, an entry is to be made in the Register of Births with the word "Adopted" and an entry is also to be made in the Adopted Children's Register (see section 25(4) of the Adoption Act and rule 14 of the Adoption of Children Rules in the Second Schedule of the Adoption Act). The adoption order itself carries that express direction to the Registrar General to make an entry and record of the adoption in the Adopted Children Register, enter the child's birth date, and mark the entry with the word "adopted". By virtue of section 25(3)(b) the name of the child can be changed from that in which the

child was originally registered before the adoption order was made and the entry must be made of the new name.

[40] Any person may apply for and obtain a certificate of birth from the Adopted Children Register which will contain the name, surname, date of birth and age of the child but not the name of the parents or the fact of adoption (see section 25(6) of the Adoption Act). Section 25(7), however, provides for an index of the Adopted Children Register to be kept which any person can search and apply for a certified copy of any entry in the adopted Children Register, in the same manner and on the same terms as an application for a certified copy of any entry from the Register of Births, Deaths and Marriages. Section 25(8) provides, however, that any register or books kept by the Registrar General and any entries made therein, which might be necessary to record and make traceable the connection between any entry in the Register of Births which has been marked adopted and the corresponding entry in the Adopted Children Register, must be kept under seal and no extract can be made from them, except by court order.

[41] What then is the effect of an adoption order on any application for a declaration of paternity? It is difficult to see in what circumstances a biological father or putative father who has lost all parental rights to a child by virtue of the child being adopted, could properly acquire, by court order, a declaration of paternity. Especially one who desires, by virtue of such a declaration, to have his name registered on that child's birth certificate. Not only would this be a collateral attack on the lawful adoption order, but it would be inconsistent with the order of adoption and the concurrent directions to the Registrar General. In **Re C (A minor) (adoption order: condition)** [1986] 1 FLR 315, it was held that a condition placed on an adoption order that the adoptive parents should report to the natural father was inconsistent with an adoption order.

[42] The order for DNA testing to be done in furtherance of the application for the declaration of paternity is tantamount to an order of a court of concurrent jurisdiction reinstituting legal rights which have been extinguished by a previous court order. It has been seen that, by virtue of section 16 of the Adoption Act, all affiliation orders, decrees

and agreements for maintenance with respect to the adopted child and the natural father cease upon the adoption order being made. If any such existing orders, decrees and agreements cease upon the making of an adoption order, it would follow that no new ones ought to be made. The Adoption Act does not speak to a declaration of paternity, no doubt due to the fact that the Adoption Act is a much older legislation than the Status of Children Act, however, the effect that the extinguishing of parental rights would have on an affiliation order, is the same effect it ought to have on a declaration of paternity.

[43] The Judge of the Family Court was wrong in her assessment that the adoption order does not erase all familial rights. She did not indicate what rights remained in the natural parents as regards the children. I can think of none. The adoptive parents are the legal parents for all intents and purposes, as if they had given birth in lawful wedlock. The respondent's rights are those which the law allows in section 20A, to challenge the orders, but he has no rights remaining, as parent, in regard to the children. Even under the laws of succession, the children have no claim on their natural parents' estates, and vice versa, but they do have all rights and interests in their adoptive parents' estates.

[44] In ordering the DNA test, the Judge of the Family Court was purporting to exercise jurisdiction under section 11(1) of the Status of Children Act. That requires there to be in existence civil proceedings in which the paternity of a person "falls" to be determined. In such a case the court may direct the use of blood tests to aid in that determination. Counsel for the appellant argued that there was no such civil proceeding because at the time the application for the declaration of paternity was made, the paternity of the children did not fall to be determined, as by the adoption order the appellant had already been declared their father. The logic of that submission is unassailable. I cannot but agree. In this case, it was not shown that the test was necessary in any civil proceedings where paternity falls to be determined, as the declaration was being sought from mere curiosity by a person who had lost all paternal rights to the children and where the court had already determined who the children's parent was.

[45] The Judge of the Family Court, in exercising her discretion to order testing, made two errors. The first error lay in her failure to consider that a test to determine whether the respondent could be excluded from being the father of the children was inimical to the existing order that the appellant was the father of the children. The second error was in ordering a DNA test without ordering the taking of blood samples for such a test to be done, as the section speaks specifically to a direction for the use of blood tests and for the taking 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". My conclusion that the Judge of the Family Court made those two errors with regard to her discretion to order testing finds support in the cases of **Re F** and **HA-P v AK**.

[46] In **Re F**, a child had been conceived by the wife during an extra-marital affair. The affair ended before the child was born and the child was brought up as a child of the marriage. The applicant (the man with whom the wife had had an affair), believing himself to be the father of the child, applied for orders under sections 41(a) and 10 of the Children Act 1989 of the United Kingdom, for the making of parental responsibility and contact orders. The question arose as to whether a blood test should be ordered to ascertain whether the applicant was the natural father of the child. That question was determined in the negative by a judge of the High Court from a referral of the question by a district judge. The judge of the High Court took the view that since the applicant's association with the mother had ceased before the birth of the child, parental responsibility or contact orders were unlikely to be made, and therefore the order for a blood test would result in nothing more than a theoretical order, the benefit of which would be outweighed by the risk of disruption to the child's family unit as a result of such tests. The applicant's appeal of that decision was dismissed. The court's decision was based on the following reasoning:

> (1) The court was entitled to take account of the probable outcome of the case in which the issue of the blood tests arose;

(2) That the judge was correct to consider the question in the context of the likelihood of a refusal of a parental responsibility and contact order;

(3) The court would not order blood tests against the will of the parent who had sole responsibility for bringing up the child since birth; and

(4) It had not been shown that any positive benefit would outweigh the possible detrimental effects on the child's welfare of ordering the blood tests.

[47] The respondent agreed with the Judge of the Family Court that this case was distinguishable. I also agree that the case is distinguishable on the facts. In the first place, in that case, a declaration of paternity, though unlikely because of the circumstances of that case, was still a possibility as it could be made without it being inconsistent with any other order. In the instant case, no declaration of paternity could properly be made as long as the adoption order subsisted, as no court could make an order which would result in a child having two legal fathers.

[48] Secondly, the Judge of the Family Court distinguished the cases on the basis that in the instant case, unlike in **Re F**, the respondent and the children's biological mother lived together and were in a relationship when the children were born, and that after the biological mother's death, having not known their biological mother, the children only had one surviving biological parent. She considered that the respondent having come forward as the putative father "wishes to confirm that position legally and also to develop a relationship with the children and bond with them and have them bond with their putative siblings and step mother". This reasoning by the Judge of the Family Court shows that she took into account irrelevant factors whilst failing to take account of relevant factors which also caused her to make an error of law with regards to the effect of a subsisting adoption order.

[49] In considering whether to make an order for blood testing, the Judge of the Family Court ought to have taken into account the possible outcome of any subsequent declaration of paternity. In this case, the Judge of the Family Court seemed to have done so and seemed to have concluded that if the result of the test was in the applicant's favour, there would be no barrier to her making the order "as the science would put the matter beyond doubt". However, she did not go on to consider that if the test was positive and a declaration of paternity was made, it would be an empty declaration, as no custody, maintenance, access or any other order could be made in relation to it. She did not consider that the applicant had no parental rights which could cause his name to be legally endorsed on the children's original birth certificate by the Registrar General. His name could also not be endorsed on the children's certificates of adoption. Furthermore, she did not consider the circumstances which usually give rise to such declarations, which normally involve the desire to apply for custody and control, maintenance claims, and claims under the laws of intestacy. The respondent could make none of these applications whilst the adoption order subsists.

[50] The Judge of the Family Court found that it was in the interest of the children to know their biological father for reasons having to do with the risk of possible future medical conditions and the avoidance of marrying within the prohibited degrees, which, she said, could only be mitigated by the children knowing their blood lineage. However, this was hardly a real concern in this case, since both the respondent and the children's aunt have deponed that they have told the children who their mother is and that the respondent is their biological father. That risk, therefore, is not a real risk. I am also not even sure that is a proper concern of the Judge of the Family Court, where there is an existing adoption order. Even so, having raised it as a risk, the Judge of the Family Court failed to balance it in order to determine whether that risk was outweighed by the risk of harm that would be caused to the children in the confusion and disruption likely to be caused by an order from the court that they have two legal fathers, or the possibility of them interpreting the order to mean that the appellant is no longer their father.

Therefore, she did not demonstrate any positive benefit which would outweigh the fallout from such tests and any subsequent declaration.

[51] One pertinent question is what then is the purpose of the DNA test to see if the respondent is excluded as the father? Even if he is not excluded, that fact could not disturb the adoption order, neither could it give the appellant any rights with respect to the children. Therefore, its only purpose would be to disrupt the settled family life of the children with their adoptive parent and to cause disruption and confusion in the children's minds and lives.

[52] I see no difference between disrupting the life of a child who is settled as a legitimate child of the family, as in **Re F**, and disrupting the lives of children in their settled adopted family, as in this case. No family unit has ever existed between the respondent and these children, and it would be unthinkable that the court by these orders would aid in fostering the inevitable risk of damage to the family life the appellant has made with these children. As an aside, it is of concern that these children are already being exposed to a narrative by their aunt and the respondent, over which the appellant, as their legal parent, has no control. He has not had the opportunity to steer the narrative of the death of the children's natural mother and their adoption, with the assistance of professional help, which is often needed in these situations. No one knows the psychological damage that may have been caused to these children by the unauthorized and unstructured exposure of sensitive information, by the aunt and the respondent, which was not their right to share.

[53] It is true that in some jurisdictions, there exists what some refer to as "open adoption" where adopted children are encouraged to have a concurrent relationship with their biological parent as well as their adoptive parents, but that is not the position in this jurisdiction. Furthermore, that position is usually attempted in an informal agreed circumstance and is not usually made an order of the court. Attempts have been made in some jurisdictions for conditional adoption orders to be declared (as provided for by statute) but there is no provision for such orders in this jurisdiction. This judgment is not

intended to be a statement on the propriety of such orders. Suffice it to say, the adoption order is irrevocable unless set aside on appeal, even after the children reach majority.

[54] I adopt the statement by the High Court judge in **Re F** that "the desire to establish his possible paternity…should not just stand as an object of an abstract theoretical declaration by a court". In this case, that is exactly what it would be.

[55] If the Judge of the Family Court had properly considered the effect of an adoption order she would have concluded that the applicant having lost all rights and duties to the children as stated in the section, did not have any rights remaining which could attach to a declaration of paternity. A declaration of paternity would be improper, as it would be a declaration that the applicant was the children's parent, when a court had already ordered that the parent of the children was the appellant.

[56] In matters of adoption, the best interest of the child is the first consideration. The Judge of the Family Court failed to demonstrate that it would be in the best interest of adopted children to make an order for DNA tests to determine if another man could not be excluded as father, whilst a valid adoption order subsists. This is especially so where it would serve no purpose other than to disrupt the children's lives.

[57] In **Hodgkiss v Hodgkiss**, the court considered the statutory power to order blood tests under section 20 of the Family Law Reform Act 1969 in divorce proceedings. The court held that since the children had been accepted as children of the marriage, and that the respondent/husband had taken no issue with the paternity of the children, the issue of paternity did not arise and was not relevant to the arrangement of the care and upbringing of the children. The court found that there was, therefore, no jurisdiction to order blood tests. Even if there was such a jurisdiction, the court found that it would not have been in the best interest of the children to exercise it. The court considered that the husband's desire to know the truth would not have been sufficient to counterbalance the children's interest not to have their current status disturbed.

[58] The respondent relies on the case of **HA-P v AK** where Straw JA seems to have suggested that the interest of the child is irrelevant to any consideration whether to order a blood test in an application for declaration of paternity and that the applicant is entitled to have the best evidence put before the court. Straw JA also recited with approval the statement of Balcombe LJ in **Re F** that "the interest of justice will normally require that available evidence not be suppressed and that the truth be ascertained wherever possible". Be that as it may, this is not an ordinary case of an application for paternity as in **HA-P v AK**. No issue of adoption arose in that case involving, as the first consideration, the best interest of the child. No parental rights were extinguished in that or any of the cases relied on by the respondent. Therefore, in my view, consideration would have to be given to what is in the best interest of these adopted children.

[59] As I have said before, even though the order was made in a petition for a declaration of paternity, it was not a civil proceeding where the paternity of anyone was called to be determined by the court. That was already determined by the court on 14 December 2011, when the adoption order was made. There is no issue before the court relevant to the question of who the children's parent is, as it has already been determined, by court order, that their parent is their adopted father. The respondent's interests in knowing whether he is the natural father, and cementing a relationship with the children, if he turns out to be the natural father, are not an interests that can be countenanced in a situation of adoption. If the Judge of the Family Court retained any discretion to order a blood test and to make a declaration of paternity in the case of children who have been adopted by a person other than a biological parent, in the circumstances of this case, she would have erred in exercising it.

[60] One of the issues the respondent identified in his submissions, in the court below, is whether he should be granted an order to have his name placed on the children's birth certificates, if the paternity test proved he was their father. This is an order the court could not make as the children's original birth certificates ought to have been sealed, and although a court could order it unsealed, the circumstances of having the biological

father's name inserted would not be a valid reason for unsealing them, whilst the adoption order subsisted.

[61] Although no submission was made on this point, the order made by the Judge of the Parish Court for a DNA test was not in keeping with the orders section 11(1) of the Status of Children Act empowered her to make. Furthermore, there was no indication in the order that it was contingent on the consent of the appellant. Both these issues also arose in **HA-P v AK**. In that case, this court found that the judge had erred in making an order directing the use of blood tests to show that the claimant was not excluded as the father without specifying that it was contingent on the consent of the defendant, whose consent was required by law. This court also found that the judge in that case was bound by the statutory provisions, and had no power to order the taking of saliva samples for DNA testing as an alternative to the blood tests. In this case, the order was for DNA test to be conducted and made no reference whatsoever to the taking of blood samples for such testing. In my view, on that basis, too, the order of the Judge of the Family Court could not stand.

[62] It was for this reason that we made the orders we did, as outlined at para. [1] of this judgment.

DUNBAR-GREEN JA

[63] I have read the draft reasons for judgment of Edwards JA, I agree and have nothing further to add.

G FRASER JA (AG)

[64] I too agree with the reasoning and conclusions arrived at by Edwards JA and have nothing I wish to add.