[2013] JMSC CIV 94

**IN THE SUPREME COURT OF JAMAICA**

**CLAIM NO. 2011/HCV 07344**

**IN THE MATTER** of the Estate of CHARLES LEOPOLD LEIBA late of Lot 7, 3 Liguanea Avenue in the parish of Saint Andrew, Barrister, deceased, Intestate.

**AND**

**IN THE MATTER** of an Application by BEVERLEY VALLETA WARREN to be declared the daughter of CHARLES LEOPOLD LEIBA, Attorney at Law, deceased, intestate.

**Application for Declaration of Paternity – reputed father deceased – Status of Children's Act – burden and standard of proof required.**

**Heard:** **18th & 19th, 20th March 2013, 11th April 2013 and 19th July 2013**

**Simone Mayhew and Debbie Wilmot instructed by William Hogarth & Co. for the Applicant.**

**Emile Leiba & Sabrina Cross instructed by Dunn Cox for the Interveners**

**Coram:** **Justice David Batts, Q.C.**

[1] Charles Leopold Leiba (deceased) appears to have been an interesting but very private person who during his years on earth acquired significant assets. The Interveners Winston Leiba, Blanche Bailey, Inez Bernard, Lucilda Kurland and Lurline Leiba contend that Charles Leiba had no progeny. The Claimant in these

proceedings Beverley Valletta Warren, asserts that she is his daughter. This court is charged with a duty to resolve that issue.

[2] At the commencement of the hearing Counsel for the interveners submitted that Paragraphs 3 – 9 and 10 of the Affidavit of Yvonne Tillica Carty dated 16th September 2012 were inadmissible as being irrelevant and/or in breach of the hearsay rule. Having heard extensive submissions from both parties I ruled that the evidence was admissible. I further dispensed with and/or curtailed the requirement of notice under Section 31E and admitted the same as hearsay evidence pursuant to these provisions.

[3] I promised then to state my reasons when giving judgment and this I now do. The affidavit in question had been served on the interveners since October 2012. Therefore they had notice since then of the intention to rely on the evidence in the affidavit. In those circumstances I dispensed with the requirement of notice pursuant to section 31 E (6) of the Evidence Act. Mr. Leiba for the intervener also relied on Sections 7 and 8 of the Status of Children's Act which he submitted limits the type of evidence upon which reliance can be placed. In response Miss Mayhew said the evidence is not required for truth of the content but as proof it was said. Further it is evidence of an admission by the father pursuant to Section 7 (1) (b). I agreed with her submissions. Section 10 of the Status of Children Act established a discrete regime and on application, whether the father is dead or not, the court is to consider the issue of paternity. The evidence it considers is not limited by Section 7 (1) (b) which in any event is restricted in its application where paternity is established "during the lifetime of the father." This application is made after the reputed father has died and the applicant seeks to prove that the father admitted paternity. The court is therefore governed by the established rules of evidence. The challenged paragraphs of the affidavit were therefore not struck out.

[4] Miss Yvonne Tillica Carty was sworn and her affidavit admitted into evidence as her evidence in chief. In her affidavit she says that Mr. Charles Leopold Leiba was her Landlord, and she his tenant of #70 Campview Apartments. She

is a 64 year old pastry chef. She became his tenant in 1981. She stated that over the years she interacted with him frequently and often collected rent for him from the other tenants. She often baked pudding for him. She states that during her interactions he told her that he goes to Canada every summer as he has a daughter who lives there. When cross examined she stated that she was 'Miss Carty'. She was asked how often she spoke to Mr. Charles Leopold Leiba and indicated about once every 2 months. She said he spent summers in Canada. The following exchange occurred,

Q. Do you recall, did Mr. Leiba speak about family frequently

A. He spoke about his family in Canada and not with any degree of frequency.

Q. Did he speak about his brother Winston Leiba

A. "No he has not"

[5] The witness was asked and was able to give details of the rent payable as well as the number of Campview Apartments owned by Mr. Leiba. Upon completion I must say I was impressed with this witness who gave evidence carefully in a thoughtful way.

[6] Mr. Newton George Gooden was the next witness. In his affidavit he stated he is a resident of Campview Apartments and is a 53 year old advertising consultant. He became a tenant by sublease. He stated that 4 – 5 years ago himself and Mr. Leiba shared a memorable conversation which lasted for about 1.5 hours. Mr. Leiba told him he was a lawyer and a shareholder of Scotia Bank. He also told him he often travelled to Canada where he had a daughter. He also gave investment and financial advice to the witness. He described Mr. Leiba's white hatchback Chevrolet.

[7]. When cross examined he stated he sometimes spoke to Mr. Leiba on the phone approximately 3 times per year. He paid rent to his account. He paid no

maintenance. He had not heard Mr. Leiba speak of his brothers or sisters. Nor had he met any member of Mr. Leiba's family prior to his death.

[8] At this juncture in the proceedings I noticed that Miss Carty was not in the room and enquired of counsel. I was told she was in the next room sitting with the other witnesses. I therefore sent for Miss Carty placed her in the witness box and had her sworn. She admitted that while in the room she indicated to the others some of the questions she had been asked. The interveners' counsel was allowed to ask Mrs. Carty some questions. She stated that she told them she had been asked about the rent she paid, but did not tell them what answer she gave. She told them that she was asked if Mr. Leiba spent time in Canada. She told them she responded that he spent summers. She also told them that Mr. Leiba mentioned he had family in Canada. She said she was speaking to Mr. Gary Williams but she could not say if the others had heard. Miss Carty appeared to be genuinely apologetic.

[9] I do not regard what transpired as being fatal to the proceedings. Ms. Carty was asked to sit in court. We resumed proceedings and Mr. Gooden returned to the witness box.

[10]. At the completion of his cross examination I asked him what was the occasion of the conversation with Mr. Leiba. He said it was the termination of his sublease and commencement of a lease with Mr. Leiba.

[11] The next witness called was Jean Forde. In her affidavit she stated that she resides in Toronto Canada. She is 68 years of age and knew Mr. Charles Leopold Leiba for over 25 years, she was his friend and confidante. She stated that on the 12 December 2011 she accompanied Gary Williams to Mr. Charles Leopold Leiba's last place of abode at Lot 7 - 3 Liguanea Avenue Kingston 6. She says in her presence Gary Williams found several documents among the personal belongings of Mr. Charles Leopold Leiba during the visit to his premises.

[12] Counsel for the Interveners objected to the documents which were attached to the affidavit of Jean Forde. Miss Mayhew submitted that what was important was not the truth of the contents of the documents but whether they were found among the personal possessions of the deceased Charles Leopold Leiba. I ruled that the documents were admissible.

[13] When cross examined Mrs. Forde admitted she was in the room when Mrs. Carty entered having completed her evidence. She said she was unable to hear clearly what was said to Mr. Williams. The witness was unable to say whether while in Canada Mr. Charles Leiba lived at a hostel. She described the car which Mr. Charles Leiba drove her around in 2005 as a white car in dilapidated condition. She said he told her anecdotes of a sister in Spanish Town who was married to a Chinese man and had a son Frankie. She could not recall the names. She says he also mentioned a younger brother Buddy. She had never met members of his family prior to his death. He also told her about his daughter and grandson. She had visited his house in Canada once, but never met his daughter. She knew he gave to the Salvation Army. The witness stated she came to Jamaica at least once each year. In 2004 she stayed at Mr. Charles Leiba's house in Jamaica. She arrived 14 November 2004 and stayed until the end of the year. She was asked whether in December 2011 she had gone through his personal belongings. She denied that and said that they were scattered on the floor of his house. She admitted she could not identify any handwriting on any of the documents and the first time she met Bev and Jim were at his funeral. She stated she had written nothing on the photos and they were found in a garbage bag at Charles Leiba's home. She was unable to say whose handwriting was on all the documents found. She explained that herself and Gary Williams gained entry to the house by using the services of a locksmith.

[14] The witness said she knew Mr. Charles Leiba was an investor with a great interest in Stocks and Shares. She met him at the Jamaica Stock Exchange. She did not know whether he had a joint account holder as she described him as

"reticent"; about personal matters. In reexamination the Claimant's Counsel sought permission to put in evidence the originals of the documents referred to in the affidavit. Mr. Leiba indicated he had no objection provided it is limited to identification of the original of the copies already exhibited. The originals were put in and marked Exhibits JF11 to 30.

[15] Mr. Emile Leiba was allowed to further cross examine. She said the documents were in a garbage bag. She could not recall if it was Gary William's or her idea to search the garbage bag. The photos were taped together by Gary Williams as she has tendonitis in both wrists.

[16] The next witness was Beverley Warren. She swore two affidavits one dated 1st November 2011 and the other dated 18th February 2013, the paragraphs numbered 10 (a) and (b), 11 (a) (b) and (c) were by consent struck from her affidavit of the 1st November 2011.

[17] The Claimant's attorney sought permission to tender certain documents through the witness. The witness identified a document as a letter received from her father on his letterhead. She was familiar with his handwriting. Prior to receiving the letter she had a discussion with him about it. He had called her before sending it and told her the form of identification she needed to send. She remembers him also telling her the terms of the investment and if she cashed it before the term she would lose value on it. She received the letter in the mail. Mr. Leiba objected to its being admitted as:

a). There was no foundation as Mrs. Warren had only seen one piece of correspondence so would not be sufficient to recognize his handwriting.

b). There was no indication that the reference to her father was to Charles Leopold Leiba.

(c) The signature at the foot of the document had not been identified.

(d) Also it was hearsay and irrelevant.

[18] I overruled the objections and admitted the document as exhibit BVW 17 (being the original of BVW 9).

I am satisfied there was enough evidence to demonstrate authenticity and to connect the document to the deceased Charles Leopold Leiba. That letter Exhibit BVW 17 is handwritten and reads as follows:

> "30/5/2000
>
> Dear Bev,
>
> As discussed here is the card for your signature. This is held for five years. You can terminate it if and when you must but if it terminated before five years it will lose its tax free status. You are to send me a photo copy of your I.D.
>
> Please send me the name and address of your bank and its routing or ABA number, and the number of your bank account.
>
> Daddy."

[19] In the top right corner of the letter in type is

> "Chambers
> 66a Duke Street, Kingston"

and a line is crossed through that address.

[20] The witness identified another document as the original of BVW 10 it was admitted without objection as Ex. BVW 18. Exhibit BVW 19 was admitted after objection. The witness recognized the handwriting of her daughter by marriage on it.

[21] Mrs. Beveley Warren states in her affidavit that she was born on the 11th April 1946 at the Public General Hospital in St. Mary. She grew up with her mother at 2a D'Aguilar Road in Kingston. Her mother died on the 6th October 1997. She moved to Canada when 22 years of age and has lived there ever since. She lives in Canada with her husband James Warren and 3 children Michelle

Atkinson, Sean Warren and Gary Williams. She states further that her father Charles Leopold Leiba died of a heart attack at the Trillum Health Care Centre Mississauga Canada on the 27th August 2011 while visiting with herself and her family in Canada. She made the arrangements for his funeral. She recalls meeting her father when she was 5 years old and developed a close relationship with him up to the time of his death. She recalls her father visiting during her childhood years and recalled spending time with her father and his parents at his parents' home. She says he openly acknowledged her as his child. In her second affidavit she states that she knew and maintained contact with her father's cousin Ici Leiba while she lived in Canada.

[22] During cross-examination she was shown the birth certificate of her son Gary Williams. Williams was the surname of her son's father Lloyd Williams. She said her mother's name was Ena Johnson. Ena was 5 feet 2 inches tall with a complexion similar to hers. She admitted that the surname she was given at birth was "Wong." She had never attempted to change her surname. She acknowledged that on her birth certificate the portion for father's name was left blank. Her first recollection of her father she was about 5 years old. She says there were gaps between his visits. She said her grandmother was Isabel Leiba but was called Ma Bell. Her grandfather's name was spelt JESUS. She described Isabella as dark, did not recall if she was tall or short. She said JESUS Leiba was very fair with blue eyes and straight hair. She could not say if he was tall or short. She recalls they operated a bar and lived upstairs. She recalls going to a different house to visit at a different time. After moving to Canada she resumed communication with her father in 1971. She sent him an invitation to her wedding. He replied saying he could not attend due to a scheduling conflict. She was present when he died. She was friendly with one of his siblings Lurline Leiba. The following exchange –

"Q. you requested a blood test.

A. Yes but with stress of death and he had not insurance and bills going higher and higher that was reason they did not perform the test."

[23] In answer to the court she said:

"J: Why did you request blood test of Mr. Leiba

A: Because with my last name not being Leiba I was anticipating I would have problems proving I was his daughter."

I also showed her several of the exhibits allegedly found at Charles Leiba's residence. She identified various persons and documents she recognized. JEF11 for example was a Christmas card and she recognized the handwriting inside it as her own. JEF 30 she recognized as her letterhead. Exhibit JEF 22 she identifies as something she mailed to Mr. Charles Leiba.

[24] The next witness was Gary Williams. The Interveners' counsel applied to strike out the affidavit sworn to on the 19th February 2013 on the basis that it did not comply with the provisions of the Evidence Act and contained statements of opinion. Having heard the submissions I decided to allow the affidavit to stand. I ruled that the witness himself had used the equipment to do the audio recording and in any event was in a position to say whether what was recorded accurately reproduced the conversation he had been involved in. Counsel also objected to the Affidavit of 19 October 2012 as being self serving. I similarly refused that application.

[25] In his first affidavit Gary Williams states that he is 51 years of age and describes himself as a consultant. He first met Charles Leopold Leiba in 1971 and he introduced himself as his grandfather. His grandfather told him that his daughter, the witness's mother, named him Charles after his grandfather. In 2002 when his grandfather decided to buy a house he entrusted the witness with the responsibility of assisting him including identifying a suitable house. The witness further stated that they developed a close relationship. He introduced him to

others as his grandson. This included an introduction to Mr. Crafton Miller. He remembers a visit when he was picked up at the hotel by his grandfather in an old white Chevy Chevette. His grandfather shared information with him about his investments. He knew Winston Leiba as his grandfather's brother. Their first contact was in 2004 or 2005 when Winston called the witness' house trying to get in touch with Charles Leiba who was in Canada at the time. He said that during that conversation the following occurred,

> "Winston Leiba introduced himself saying "I'm Winston, Charles brother." Not understanding, I replied "Charles", to which he responded "your grandfather."

[26] Gary Williams further deponed that on the 11 December 2011 he, at his mother's request, called Winston Leiba to inform him among other things that his mother had retained Counsel to apply for probate and/or letters of administration for Charles Leiba's estate. During the conversation he asked Winston whether he knew how many children his grandfather had and Winston replied –

> "I have no idea to tell you the truth." He then asked if his grandfather had mentioned his mother and Winston replied "well that's the only person really."

The witness also deponed to the visit to his grandfather's house in the company of Jean Forde on the 12 December 2011. They did not find a last will and testament but found other documents.

[27] In his second affidavit the witness responded to the affidavit of Winston Leiba. He stated that when talking to Winston on the 11th October 2011 he made a tape recording of the conversation. He used a Sony IC recorder. He subsequently connected it to the computer and transferred the data to his computer. He did not alter the file in any way. He submitted the audio recording. The transcript of the recording is attached to the affidavit of Winnifred Vidal-Manahan dated 4th March 2013. At the trial both counsel agreed that the

transcript was an accurate record of the recording which need not be played. The transcript has the following:

> "Gary: To your knowledge how many kids did my grandfather have.
>
> Winston: I have no idea to tell you the truth. I have never heard him mentioned anyone, you nuh. That's the plain truth.
>
> Gary: He has never mentioned my mother
>
> Winston: Well, that's the only person really, right, that's right.
>
> Gary: right
>
> Winston: We are excluding her we are talking about others."

[28] When cross examined Mr. Williams stated he was born in Jamaica. He migrated to Canada on September 29 1973. He had never met while in Jamaica, anyone purporting to be his mother's father. He had never lived in the house in Canada for which he said Charles Leiba had provided the entire purchase price. The witness however currently resides there now. Mr. Charles Leiba has sent funds to him to maintain the house and pay bills in Canada. The witness was asked whether it was his habit to record telephone conversations. He answered in the negative.

> "if the matter is important enough, but if I need a record."

He had spoken to Winston some 2 or 3 times after the death of Charles Leiba. The following exchange occurred,

> Q. The purpose of these conversations was to bolster the case regarding your mother's application.
>
> A. I wanted to have them in the event it was needed in the administration of my grandfather's estate."

It was suggested to the witness that what is on the CD and transcribed is a compilation of more than one conversation and this was denied.

[30] In re examination Mr. Gary Williams stated that the purpose of contacting Mr. Winston Leiba was also to assure his grandfather's sibling there would be a share for them in the estate.

[31] In answer to the court he said he was 50 years old when his grandfather died. He also said,

> "J: But you taped 2 conversations.
>
> A: I wanted something if I took it to the police re Chester.
>
> The other reason to tape fact that I told Winston my mother was applying for probate and fact that a share in the estate."

[32] The Interveners' attorney indicated he did not require Mr. Crafton Miller, Mr. Enos Forrest or Winnifred Vidal-Manhanan for cross-examination. In those affidavits the following evidence is contained. Mr. Crafton Miller said he knew Charles Leopold Leiba for over 50 years. They first met in 1961. It was Charles Leopold Leiba who presented him to the bar on 28th August 1972. In 2006 Charles Leiba visited his offices and introduced him to Gary Williams as his grandson who was visiting Jamaica from abroad. Since 2006 Gary had been a client of his firm. Mr. Enos Forrest a retired officer of the Jamaica Defence Force stated he is 80 years of age and Charles Leopold Leiba was his friend. Charles Leiba often visited with him at Camp View Apartments where he lived. He said Charles told him that he had a daughter in Canada and spoke of his daughter and her children frequently. The affidavit of Winnifred Vidal Manhanan attaches the transcript of the tape recording which I have already reviewed. The case for the Claimant was then closed.

[33] The Interveners' sole witness, Mr. Winston Leiba then gave evidence. His affidavit was sworn to on the 23rd January 2013. Miss Mayhew for the Claimant took objection to paragraphs 12, 14, 15 and 20 of the Affidavit as being opinion argument and speculation. I dismissed the objections and allowed the paragraphs to stand. It is my view that when regard is had to the nature of

these proceedings it would be unfair to prevent the Intervener from stating his view of the matter.

[34] In his affidavit the Intervener stated that he was responding to several affidavits filed in the matter. He described his relationship to his brother Charles as being very close and described the fact that they had lived together for many years. Charles was the best man at his wedding in 1990; he took Charles to the airport on his yearly visits to Canada. He often did assignments for Charles while he was away and these were detailed. He said when Charles was ill he was contacted by the Claimant and asked to provide money for his medical expenses. Upon Charle's death he gave directions that the body be cremated and the ashes returned to Jamaica. He stated that himself and Charles were investors he an Economist and Charles a lawyer. He had given Charles advice re buying a house in Canada. He said Charles told him he had a "lady client/social friend" who lived in Canada and who had a daughter and family in Canada who could check on the house in Canada.

[35] He expressed disbelief with what was stated in a number of the affidavits. As regards the telephone conversation with Gary Williams he denied the account given. He denied having a discussion about the number of children Charles had. He said,

> "In response to Mr. Williams' question I told him that if the Claimant was the daughter of Charles, she should not have a problem proving it."

He said Charles never mentioned the Claimant to him as being his daughter or being his niece. With reference to the several affidavits which stated that Charles had told them of his daughter, Winston states that Charles had "god children" and informally adopted children and that he had never married. Charles had never told him of a biological child but where his relationship with someone became close he referred to such persons as "sons" and "daughters." He denied some allegations in Miss Carty's affidavit and described her as hostile and evasive when he visited the Camp View Apartments. He said he was

informed by Charles that the Claimant and her family were enthusiastic friends to him because of their belief that he was wealthy.

[36] Mr. Winston Leiba was asked further questions in chief. He denied knowing anyone by the name of Icy Leiba. He described Isabella Leiba as very tall hardly less than 6 feet. He said he did not recall having a telephone conversation with Gary Williams on the 11th October, 2011. He did not recall ever having met Beverley Warren. He said he had been to Charles Leiba's townhouse at Liguanea Avenue "a few times." He had not been there in 2011.

[37] When cross-examined he admitted that he found out his brother had died "when Mrs. Warren called me." He said it was the very last time he had spoken to her. Prior to Charles death said he, he had never spoken to Gary Williams. He spoke to Gary on 4 occasions subsequent to Charles death. The witness was asked in detail about the conversations and general aspects of it put to him. Some he denied some he admitted. He admitted that his brother's ashes were still in Canada and there was no memorial service held in Jamaica for him. He did not attend the memorial service in Canada. He had never been to Canada with his brother. He had made no contribution to Charles' medical expenses in Canada. He had not contributed to the cost of cremation, nor to the funeral expenses. He said when his brother was a lawyer his office was at 66 Duke Street. He had 8 brothers and one sister. He knew one brother had 2 children and another had 3. He did not know if his sister had children. He denied that the recorded conversation was accurate and said it was a compilation of different conversations to create an effect.

[38] In reexamination he explained why he felt it necessary to reassure Mrs. Warren. To the court he said having been shown Exhibits BVW 17, BVW19, JEF 14, JEF 13, JEF 11, JEF 26 and asked whether he could explain the existence of any of them he said (with reference to BVW 17),

> "Not quite his handwriting. It seems to be an attempt to copy his handwriting."

He had no explanation for any of the others.

[39] The case of the Intervener then closed and the parties were directed to file and exchange written submissions on or before the 3rd April 2013. Oral submissions in which each would speak to the written submissions of the other were to be heard on the 11th April 2013 at 9:00 a.m.

[40] I have considered the submissions made, both written and oral. I mean no disrespect to the parties when I say that I do not find it necessary in the course of this judgment to repeat these submissions.

[41] Suffice it to say that I find that the evidence supports the fact that Charles Leopold Leiba had in his lifetime acknowledged the applicant as his child. There is a plethora of documentary evidence to support this as well as oral evidence from several persons to whom he spoke. I accept that some of these documents were found at the premises being the last residence of Charles Leiba. The presence at his home of these photographs and greeting cards can only be explained by the fact that Charles Leiba was the applicant's father. I accept also that the tape recorded conversation accurately reflects what was stated in that telephone conversation. I accept as authentic the handwritten letter dated 30th May 2000 and, find that it was written by Charles Leopold Leiba to the Applicant. I find as a fact that Charles Leopold Leiba was the Applicant's biological father and that he acknowledged her as such in his lifetime.

[42] The interveners' counsel argued that the requirements for a declaration of paternity differ in accordance with whether the purpose is for succession or for other purposes, such as maintenance. In succession matters or matters with such consequences the test, submits counsel, is higher and the type of evidence allowable for such purpose is restricted. The intervener submitted that,

> "23. In circumstances where the effect of the declaration being granted would be to operate to the prejudice of the estate and/or undisputed family of the deceased, with the deceased, having passed from this mortal soil, not being present at court to refute the allegations being made, it is

submitted that a court should be very reluctant to issue declarations of paternity for succession purposes, unless the court is absolutely sure, by virtue of almost indisputable evidence of paternity, such as those set out in Section 8 of the Act and DNA evidence."

[43] I do not agree with that submission. The Status of Children's Act provides:

**Section 7 -**

> **"7(1)** The relationship of father and child and any other relationship traced in any degree through that relationship shall for any purpose related to succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, be recognized only if –
>
> (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
>
> (b) paternity has been admitted by or established during the lifetime of the father (whether by one or more of the types of evidence specified by section 8 or otherwise):
>
> Provided that, if the purpose aforesaid is for the benefit of the father, there shall be additional requirement that paternity has been so admitted or established during the lifetime of the child or prior to its birth.
>
> (2) In any case where by reason of subsection (1) the relationship of father and child is not recognized for certain purposes at the time the child is born, the occurrence of any act, event, or conduct which enables that relationship, and any other relationship traced in any degree through it, to be recognized shall not affect any estate, right, or interest in any real or personal property to which any person has been absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred.

**Section 8:**

> **"8(1)** If pursuant to section 29 of the Registration (Births and Deaths) Act or to the corresponding provisions of any former enactment, the name of the father of the child to whom the

entry relates has been entered in the register of births (whether before or after the 1st day of November 1976), a certified copy of the entry made or given in accordance with Section 55 of that Act or sealed in accordance with Section 57 of the said Act shall be prima facie evidence that the person named as the father is the father of the child.

(2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of these persons in the presence of an attorney at law or a Justice of the Peace or a Clerk of the Courts or a registered medical practitioner or a Minister of Religion, Officer or a midwife or the Headmaster of any, public educational institution as defined in the Education Act be prima facie evidence that the person named as the father is the father of the child.

(3) [Deleted by Act 30 of 2005 S28 (2)]

(4) Subject to subsection (1) of Section 7, a declaration made under Section 10 shall, for all purposes, be conclusive proof of the matters contained in it.

(5) An order made in any country outside Jamaica declaring a person to be the father or putative father of a child, being an order to which this subsection applies pursuant to subsection (6), shall be prima facie evidence that the person declared the father or putative father, as the case may be, is the father of the child.

(6) The Minister may from time to time by order, declare that subsection (5) applies with respect to orders made by any court, or public authority in any specified country outside Jamaica or by any specified court or public authority in any such country.

**Section 9,**

**"9(1)** Any instrument of the kind described in subsection (2) of Section 8, or a duplicate or attested copy of any such instrument, may in the prescribed manner and an payment of the prescribed fee (if any) be filed in the office of the Registrar General, but it shall not be necessary to file any such instrument.

(2) The registrar – general shall cause indices of all instruments and duplicates and copies of instruments

filed with him under subsection (1) to be made and kept in his office, and shall upon the request of any person and on receipt of the prescribed fee (if any) cause a search of any index to be made, and shall permit any such person to inspect any such instrument or any such duplicate or copy.

**Section 10**

**10(1)** Any person whom -

(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, 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 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.

(2) Where a declaration of paternity under subsection (1) is made after the death of the father or of the child, the court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of Section 7, whether any of the requirements of that paragraph have been satisfied.

(3) An application under subsection (1) (a) may be made by a woman who is with child, before the birth of the child.

(4) An application may be made under Subsection (1) to –

(a) the Resident Magistrate's Court for the parish in which any of the parties may be, the Family Court, or by the Supreme Court.

[44] The statute is therefore to my mind quite clear.

Where persons claiming or interested in an estate have within their possession the proof specified in Section 8 paternity may

be recognized for succession purposes and the relevant authorities may treat with such persons. That is prima facie and in the absence of any challenge or allegation to the contrary. (See Section 7). A Declaration by a court pursuant to Section 10 is one of the "proofs" specified in Section 8 but is conclusive proof.

The phrase "subject to Section 7 (1)" which appears in Section 8 (4)" is alerting the reader that any such Declaratory Judgment must bear in mind the stipulation in Section 7 that for succession purposes the court ought to be satisfied that either (a) the father and mother were married or (b) paternity was either admitted or established doing the lifetime of the father. It is for this reason also that Section 10 (2) authorizes the Court to state whether the requirements of Section 7 (1 (b) have been satisfied.

[45] I am fortified in my construction of the relevant sections by the approach of the Court of Appeal of St. Vincent and the Grenadines in ***McKenzie v Sampson (Intended Administrator of Estate Elisa Sampson deceased)*** Civil Appeal no. 12 of 2003. At paragraph 23 of his Judgment (delivered on 29 March 2004) Saunders JA stated,

> ***One has to bear in mind that , in practice, given prevailing levels of literacy and oral tradition in Caribbean societies and in light of the relative lack of attention to form paid by large sections of society, few applicants for an order under Section 10(2) might be in a position to provide the types of evidence specified in Section 8. This is what makes the standard of proof required for a Section 10 (2) declaration so troubling. Many applicants for such a declaration would be seeking to persuade a court to grant the declaration on the basis of some evidence that is other, though not less convincing, than the types of evidence specified in section 8. Section 7 (1) (b) permits this. In fact, it was this "other" type of evidence that held sway in Re Cato. The evidence for the successful applicant in that case was the sworn support for the application by the widow of the deceased who corroborated the evidence of the applicant. I think that case illustrates the point that in matters such as these, it is better to err on the side of hearing all the evidence. Moreover, the court here was faced with serious factual disputes on the affidavits filed and oral examination and cross-examination is the best method of resolving such disputes. In all the circumstances I am of the view that, in lieu of a peremptory***

***dismissal of the application under Section 10 (2) a trial should be held.'***

[46] The Court therefore recognizes that there can be other types of evidence which might attain the requisite standard albeit not formally witnessed in the manner prescribed in section 8. These include as in the present case, letters, greeting cards, and the words of the deceased as reported by witnesses of quality and truth. I agree that the standard could be described as on a high balance of probabilities.

[47] The view is further supported by the words of Rawlins JA on appeal from the subsequent trial ***Sampson v McKenzie*** Civil Appeal of 2005 judgment delivered 5 December 2005,

> ***"26 – I do not doubt that the evidence that was adduced on behalf of Mr. McKenzie was cogent and credible. However, a declaration of paternity for the purpose of succession to property must not only be cogent and credible, it must also be of the quality that would satisfy the requirement under Section 7 (1) (b) of the Act. Although it is a question of sufficiency of the evidence to meet the statutory requirement, which is within the purview of this court. On the authority of David Adelphus McKenzie what Section 7 (1) (b) of the Act requires is some evidence that is other than the types of evidence specified in Section 8 of the Act, though not less convincing, which shows that the deceased admitted paternity of Mr. McKenzie, or that paternity was established, during the lifetime of the deceased. Unfortunately it is particularly onerous requirement given the oral tradition that there is in the Caribbean. So that although there are members of the family who are of the view that the relationship between the deceased and Mr. Mckenzie was similar to the relationship of father and son, this was not sufficient for the purposes of Section 7 (1) (b) of the Act."***

[48] Rawlins JA therefore whilst not expressly departing from, has clarified the earlier judgment of Saunders JA which had in part suggested that the court could only have regard to the types of evidence specified in Section 8 (See Para 15 of Saunders JA's judgment). Rawlins JA it seems agrees that there are 2

standards of proof but that the court is equipped to decide if the evidence meets the high standard required for a Section 7 (1) (b) declaration. It is not the type of evidence that is limited but it is its cogency.

[49] The decisions of the Court of Appeal of St. Vincent and the Grenadines is to be accorded the highest respect. They are however not binding on this court. Further more although the wording of Section 7 (1) (b) and Section 10 are identical other sections of the Statute are not. If necessary, I therefore respectfully disagree with the construction placed on Sections 7, 8 and 10 by Saunders JA to the extent he suggests that Section 8 limits the type of evidence to which a court when considering an application under Section 10, can have regard. This is because Section 8 allows persons to act in succession that is, treat with the estate and officials, without an Order Declaring paternity. That is why a Declaration of the court is one of several ways paternity can be established for the purpose and to the satisfaction of Section 7 (1) (b). It really would be odd if the court were therefore limited to considering the same items that Section 8 already says are sufficient. In addition to which Section 7 (1) (b) does say "or otherwise" and I hold that there is no reason to apply the *ejusdem generis* rule. To do so would create the absurd situation noted above. I do not think that was Parliament's intention.

[50] The statute could not have intended to say that one must have evidence the absence of which precipitates the need for an application before the court. That is why in Section 8 an Order of the court is one of several other ways Section 7 (1) (b) can be satisfied. I do agree however and as is understood in the judgment of Rawlins JA, that where the putative father is deceased the court must be very wary. The evidence must be such as to satisfy the court on a high balance of probabilities.

[51] As indicated earlier the evidence oral and documentary is overwhelming. I, prefer the evidence of the applicant and her witness to that of Mr. Winston Leiba. I am satisfied that Mr. Charles Leopold Leiba did acknowledge Beverley Valleta

Warren as his daughter during his lifetime and that therefore paternity was admitted within the meaning and for the purposes of Section 7 (1) (b) of the Status of Children's Act.

[52] I therefore grant the following Declarations and Orders:

a. That Beverley Valleta Warren is the daughter of Charles Leopold Leiba deceased

b. Paternity had been admitted by her father Charles Leopold Leiba during his lifetime. This declaration is made for the purposes of Section 7(1) (b) of the Status of Children's Act.

c. Costs to the applicant against the Interveners such costs to be taxed if not agreed.