[2022] JMSC Civ. 165

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV01019

BETWEEN	**PHYLLIS SHAND-CUMMINGS**	**DEFENDANT/APPLICANT**
AND	**TAGO CUMMINGS**	**CLAIMANT/RESPONDENT**

IN CHAMBERS

Mr Leroy Equiano for the Defendant/Applicant

Mr Bertram Anderson for the Claimant/Respondent

Heard: June 23, July 19 and September 22, 2022.

Application for DNA Testing -The Status of Children Act (SCA)- Section 7(1)(b) – Succession - Errors on the Birth Certificate-Whether the Presumption of Paternity is displaced – Standard of Proof – Whether there exists a higher standard of proof.

M. JACKSON, J (Ag.)

1. This is an application brought by Mrs Phyllis Shand-Cummings ("the Defendant") for an order that Mr. Tago Cummings ('the Claimant') submit himself to a deoxyribonucleic acid test ("DNA test") to confirm whether he is the biological

child of Mr Winston Cummings, her husband, who died, intestate, on September 3, 2011 ("the deceased").

2. The Defendant's application is a direct challenge to the Claimant's claim that he had brought under **The Intestates' Estates and Property Charges Act** ("**IEPCA**") against the estate of the deceased seeking certain declarations, including a declaration that the Applicant deliberately failed to include him and other children born outside her and the deceased's marriage in her application for the grant of letters of administration for the deceased's estate.

THE BACKGROUND

3. The deceased died leaving property known as Burns Run, for which he made no testamentary provision. There were seven houses located on the property which comprised 34 acres of land. The Claimant along with other tenants were in occupation of the houses.

4. On March 15, 2013, the Defendant obtained the grant of letters of administration. She then served a notice to quit on the Claimant. The Claimant refused to give up possession of the property, contending that the Defendant was aware that he is a child of the deceased and was, therefore, entitled to an interest in the property.

5. The Defendant vehemently denied the Claimant's assertions.

THE APPLICATION

The following grounds are relied on by the Defendant in pursuit of the application:

(a) That paternity is a live issue in the case;

(b) It is settled law that where the issue of paternity concerns inheritance of a deceased's estate, which affects the rights in rem of other beneficiaries, the threshold is on a higher balance of probabilities;

(c) The Claimant's mere provision of a Birth Certificate, without more, is insufficient to satisfy the higher threshold on a balance of probabilities;

(d) The deceased's purported signature on the Birth Registration Form differs from his signature on the other original documents in the Defendant's possession, raising issues of authenticity;

(e) The age and address of the "Winston Cummings", stated in the Claimant's Birth Certificate, is at odds with the deceased's known address and date of birth.

THE LEGAL CONTEXT

8. The legal context within which this application is to be determined is well-known and established within this jurisdiction and does not require much elucidation. On November 1, 1976, with the enactment of the **Status of Children Act** ("the **SCA**"), it was declared that the rights and status of a child born to an unmarried woman became indistinguishable from those born in wedlock upon the existence of certain facts. Section 3(1) of the SCA gives pre-eminence to that new platform and provides that:

> *"3. –(1) Subject to subsection (4) and the provisions of sections 4 and 7, for all the purposes of the law of Jamaica the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly."*

9. Accordingly, all children are placed on equal standing concerning the right to succession to property, construction of will and testamentary disposition once the statutory requirement is met. Section 7 of the SCA directly captures this entitlement and provides that:

> *"7. –(1) The relationship of the father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or the*

construction of any will or testamentary disposition or of any instrument creating a trust, be recognized only if –

(a) the father and the mother 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 the additional requirement that paternity has been so admitted or established during the lifetime of the child or prior 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 occurrences 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 become absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred." (Emphasis mine)

10. Section 7(1)(b), which makes the connection to section 8, adumbrates several circumstances. Section 8(1) provides:

"8. –(1) If, pursuant to section 19 of the Registration (Birth 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."

11. With respect to section 19 of the **Registration (Birth and Deaths) Act** ("the **RBDA**"), this section provides that:

19. –(1) Where the parents of a child are not married to each other at the time of the child's birth and were not married to each other at, or since, the time of its conception, the name of, and any particulars relating to, any person as the father of that child shall

be entered by the Registrar in the registration form and counterfoil in the circumstances specified hereunder and subject to subsections (2) and (3), not otherwise, that is to say –

(a) if the mother and the person acknowledging himself to be the father jointly request at the time of the registration that such an entry be made and both the mother and that person together sign the form and counterfoil:

Provided that, if the mother is dead or cannot be found. It shall be sufficient if the request is made by the father alone, and the signature of any other person required to give information as to the birth may be accepted in place of the mother's signature; or

THE ISSUES

12. In the court's view, the resolution of this application falls to be determined on the following issues:

(1) Whether paternity is a live issue in the case rendering it necessary for the DNA test to be ordered;

(2) Whether in relation to proceedings under section 7(1)(b) of the SCA, the standard of proof is on a higher balance of probabilities; and

(3) Whether the court has an inherent jurisdiction to make an order for DNA testing.

THE EVIDENCE

13. The evidence relied on by the parties is captured in their respective affidavits. Being mindful that the substantive claim is still to be determined, this court will only outline the evidence pertinent to the final determination of the application.

14. For the most part, the evidence is indisputable in respect of the following fundamental areas:

(i) The Defendant is the widow of the deceased.

(ii) There are four children between the Defendant and the deceased.

(iii) The Defendant had migrated to the United States of America, and it became the home for her and the children.

(iv) The Defendant and the four children were not living with the deceased up to the time of his death.

(v) The deceased operated a chicken farm until his death, having moved from Kingston to Saint Thomas, where he established the business.

(vi) The deceased owned two properties in Saint Thomas, the disputed property and another, the Albion property, which was jointly owned by the deceased and the Defendant.

15. The Defendant deposed that she met the deceased when she was twenty years old and got married on December 7, 1988. Together, they established themselves as chicken farmers, operating initially from Mountain View Avenue but later relocated to 69 ½ Deanery Road.

16. The Defendant said she and the deceased employed a secretary, with respect to the business, who remained employed to them until the death of the deceased.

17. With regard to the Claimant's assertions that he is a child of the deceased, the Defendant deposed:

> *"My husband died leaving four (4) children, whom we share. I have no knowledge of any other children, and I do not know if the Claimant is my husband's son. My husband, during his lifetime, never acknowledged to me that Mr Cummings was his son.*
>
> *Mr Cummings has never previously identified himself to me as a child of my husband."*

18. The Claimant staunchly rejected those assertions and respondent with his account as follows:

> *"The Defendant is of the view that I am not entitled to a share of my father's estate because, in the Defendant's view, I am illegitimate. He has acknowledged me as his child from birth, and there was never any question of paternity."*

19. He deposed that he resided with the deceased from a very young age, and after the death of his mother, the deceased took full responsibility for his well-being until the deceased's death in 2011. The Claimant further stated that he and the secretary lived with the deceased at the Albion property, and he considered the secretary as his stepmother. According to the Claimant, he and the Defendant had always enjoyed a good relationship, and it only became strained after the Defendant was appointed Administratrix of the deceased's estate and tried to remove him from the Burns Run and Albion properties.

20. The Defendant, whilst accepting that the secretary lived on the Albion property, disagreed with the Claimant that he lived at the Albion property with the deceased and the secretary. The Defendant also asserted that during the latter part of the deceased's life, she employed a full-time nurse to care for him. The Claimant refuted that account and declared that it was he and the secretary who cared for the deceased. He further declared that he had to stop attending school in order to care for the deceased.

21. The Defendant further deposed that she only became aware of the Claimant in 2010 when she saw him in the company of the secretary on the farm. She formed the view that he was either the secretary's son or some other relative.

22. The Claimant, however, stated that the Defendant was aware of him long before 2010. He provided the court with pictures which showed him with the Defendant and some of her children at a beach. He also added that the Defendant knew he had lived at the Albion property and that after the deceased's death, she asked him to leave the said property. He then moved to the Burns Run property and occupied one of the houses the deceased had given him.

23. In addition to the photographs, the Claimant also provided the following documents in opposition to the application:

(a) a copy of his birth certificate;

(b) a copy of a bank account jointly held by him and the deceased; and

(c) a copy of the deceased's funeral program.

The Photographs

24. The Claimant provided several photographs of himself at a young age, in the company of the Defendant, her children and grandchildren at a beach. This, he stated, would be indicative of the relationship between himself, the Defendant and the rest of the family prior to the death of the deceased and that they had known that he was a child of the deceased.

25. The Defendant challenged the authenticity of the photographs. She contended that the photographs appeared to be photo-shopped and denied having ever taken those pictures with the Claimant. Her daughter, Rosemarie Cummings, who was also in the picture, denied having taken photographs with the Claimant. She also contended that the photographs appeared to be photo-shopped.

The Birth Certificate

26. The Claimant's birth certificate revealed that he was born on July 8, 1993 to Audrey Williams and Winston Cummings at the Princess Margaret Hospital, Morant Bay, in the parish of Saint Thomas. Mr Winston Cummings, it showed, was 43 years old at the time of registration, with an address recorded as 16 ½ Deanery Road. His occupation was listed as a businessman. It also showed that the instrument was signed and executed in the presence of a witness, Nurse Davis.

27. The Defendant fiercely challenged the address and age noted on the birth certificate as being that of the deceased. She argued that the deceased had

never lived at 16 ½ Deanery Road but rather at 69 ½ Deanery Road. With respect to the age, she provided the court with a copy of the deceased's birth certificate, which showed that he was born on December 31, 1941 and would, therefore, have been 51 years old in July, 1993 when the Claimant was born and not 43 years old as stated on the birth certificate.

28. Accordingly, in light of those discrepancies and disparities, the Defendant argued that there was serious doubt as to whether the "Winston Cummings", whose name appears on the Claimant's birth certificate, is the same person as the deceased.

The Bank Account

29. The Claimant produced evidence of a bank account which was opened by the deceased in 1996 at the Jamaica National Building Society. The account was opened in the names of the deceased and the Claimant, who was only three years old at the time. The Claimant deposed that the deceased told him that he opened the bank account to ensure that if any should happen to him (the deceased), he (the Claimant) would be okay.

30. The Defendant has disputed the existence of the bank account and argued that it appeared to be forged.

The Funeral Program

31. The program for the deceased's funeral listed the Claimant as a pallbearer and as a son of the deceased. The Defendant stated that it was the secretary who had prepared the program and not her.

THE DEFENDANT'S SUBMISSIONS

32. The plank of Mr Equiano's submissions on behalf of the Defendant is constructed around two main areas: firstly, that paternity is a live issue in the claim, and even though the proceedings were brought under the **IEPCA**, the Claimant is actually

seeking a declaration of paternity; secondly, the standard of proof for claims of this nature is on a higher balance of probabilities because it involves the inheritance of a deceased's estate and affects the rights of other persons/beneficiaries *in rem*.

33. In elaborating on those areas, Mr Equiano submitted that even though the SCA has made drastic changes and has allowed a child born out of the wedded home to be in the same position as a child born within wedlock, those rights conferred on them are only of theoretical value, if paternity cannot be proved. In this regard, he launched an attack on the Claimant's affidavit as being the sole evidence before the court to defeat the application. He strongly contended that the court should not rely on the Claimant's affidavit alone as the evidence contained within it highlighted several discrepancies, and the court would require conclusive evidence. A DNA test, he charged, would be conclusive.

34. In support of this position, counsel highlighted and compared various discrepancies between the Claimant's affidavit evidence and the Defendant's affidavit evidence. These he highlighted as:

(i) the errors contained in the Claimant's birth certificate;

(ii) the conflicting assertions that the Defendant had prior knowledge of the Claimant as being the son of the deceased;

(iii) the Defendant's denial of ever taking any photographs with the Claimant;

(iv) the Defendant's explanation of how the Claimant's name appeared on the funeral program;

(v) the challenged existence or opening of the bank account in the joint names of the deceased and the Claimant; and

(vi) the conversations she has had with the other purported children of the deceased.

35. Mr Equiano submitted that considering, as a whole, the different contentions in the respective affidavits, the court is required to have more definitive evidence as the matter in dispute relates to one of succession which will affect the rights of others. Accordingly, he argued, a higher standard of proof is required. In this regard, counsel relied on the judgment of McIntosh, JA in **Madge Young- Lee v Zailia Young** [2012] JMCA Civ. 9, where she opined that:

> *"[11] Counsel submitted that a distinction must be drawn between an application of the kind made by the respondent and one where no inheritance rights were involved... For my part, the provision of the Act set out above make it clear that a distinction is to be made between two categories of paternity declarations, namely declarations where the applicant seeks only to establish that the relationship of father and child exists (see section 10(1)(b)) and those contemplated by section 7(1)(b) of the Act and I am fortified by the similar views expressed in the aforementioned cases, which in my humble opinion, were rightly formed.*
>
> *[12] I also share the opinion of the Court of Appeal expressed in the two cases under reference that each category of paternity declaration requires a different standard of proof with declaration contemplated by section 7 (1) (b) attracting a higher standard, as is evident from the provisions of section 8 of the Jamaican Act..."*

36. Mr. Equiano further argued that the items listed under section 8 of the SCA are not conclusive but *prima facie* evidence and that it was never the intention of parliament to have the items listed under section 8 to be conclusive. In advancing his point on this issue, he highlighted section 8(4) of the SCA, where the term conclusive is mentioned, whereas the remaining subsections of section 8 speak to *prima facie* evidence. Accordingly, he argued that the mere provision of the Claimant's birth certificate, without more, is insufficient to ground the requisite standard of proof regarding paternity that the Claimant has to establish for the purpose of inheritance of the deceased's estate. In concluding on this point, counsel urged the court to have regard to the case of **Re Cato** (Unreported), High Court of Saint Vincent and the Grenadines, Civil Suit No 43/2000, judgment delivered 3 November 2000.

37. Mr Equiano contended that in **Re Cato**, Mitchell J, at paragraph 13, opined that section 8 of the statute of St Vincent and the Grenadines Act requires a higher standard of proof, and the court may require other evidence, which makes it more likely than not that the deceased was the father of the Claimant. On this point, he further submitted that a DNA test would provide the court with definitive proof in the face of all the discrepancies in the affidavits. He further submitted that because the case is being disputed, corroboration will become relevant and, thus, invited the court to find that an order for DNA testing will be most appropriate at the end of the day.

38. Concerning whether this court has jurisdiction to order a DNA test, Mr Equiano noted that he is well aware that there is no support under the SCA for the court to make such an order. However, he urged the court to consider its inherent power to ensure justice is done. In support of this contention, he relied on paragraph 26 of the case of **Neild-Moir v Freeman** [2018] EWHC 299 (Ch). Mr Equiano further emphasized that the SCA has no mechanism to compel the Claimant to submit to DNA testing. In the absence of such a compulsory mechanism, he asked this court to make the order an unless order so that the Claimant could choose between giving the sample or having his statement of case struck out. In this regard, he also relied on the case of **Neild-Moir v Freeman**, paragraph 28.

39. Counsel further supported his position by arguing that the route of doing a DNA test is the least invasive, it is quick and painless and carries no appreciable risk to the Claimant's health or physical state. He submitted that it was less invasive than the blood test. In this regard, he relies on paragraph 36 of **Neild-Moir v Freeman** where the court held that:

> *"[36] …In my judgment, in a case such as the present, where an important issue is one of parentage, where DNA testing is likely to produce a robust conclusion one way or the other, and where the testing nowadays requires merely a saliva sample by mouth swab from one or more of the parties, the court may well have an inherent jurisdiction to order a person to consent to give such a sample so that it may be DNA tested. A failure in such a case to consent might then amount to contempt of court."*

40. Mr. Equiano submitted that for accuracy, the test could be done with one of the Defendant's sons or on a brother of the deceased. He asserts they are both available and submitted that the result can be a high degree of probability and will be sufficiently accurate to determine the issue in the instant case for the purpose of succession. In support of this argument, he relied on paragraph 12 of **Neild-Moir v Freeman**.

41. Finally, he argued that the application is not a fishing expedition, and the Claimant would have no good reason for not consenting to DNA testing if, as he is contending, the deceased was his father.

THE CLAIMANT'S SUBMISSIONS

42. Mr Anderson was equally forceful in his submissions on behalf of the Claimant, and urged this court not to grant the application as prayed. He contended that there is no legal basis for the court to grant such an application and that in the circumstances of the case, it would not be fair and just to make such an order.

43. He commenced by agreeing with counsel that the SCA has no provision to authorise a DNA test and further submitted that there would be no need to order such a test where, as in this case, the Claimant has satisfied the requirement of the SCA. Counsel went on to submit that section 7(1)(b) of the SCA read along with section 8, lists several ways in which proof of paternity can be had in relation to succession, inheritance or testamentary disposition. He argued that the Claimant is only required to satisfy one of those ways as the subsections of section 8 are not conjunctive.

44. Mr Anderson submitted that the birth certificate provided by the Claimant, which contained the name of the deceased and was signed by him, is *prima facie evidence* that the deceased had admitted paternity at the birth of the Claimant. He argued that there is a difference between a declaration of paternity simpliciter under section 10 of the SCA and a declaration of paternity for the purposes of inheritance under section 7. Counsel submitted that the birth registration

certificate stands as *prima facie* evidence to establish paternity for the purposes of section 7(1)(b) and that the Claimant, by producing his birth certificate, had met the evidential threshold. It would, therefore, be for the Defendant to provide evidence to rebut the presumption of paternity. He further submitted that other acts, such as the opening of the bank account by the deceased in the joint names of the deceased and the Claimant, demonstrated that paternity had been admitted by the deceased during his lifetime.

45. In relation to the errors on the Applicant's birth certificate, Mr Anderson contended that when considered as a whole, the errors are not material to displace the presumption of paternity. He argued that the primary concern is whether paternity was established during the deceased's lifetime. A DNA test, in any event, will only prove a biological relationship which was never contemplated under the provision of section 7(1)(b). He submitted that if the court were to grant the Applicant's application, the court would suggest that proof of biological relations between a father and a child overrides the other means stated in section 8, which would be contrary to the explicit wording of the statute.

46. Mr Anderson also submitted that the Claimant being listed on the deceased's funeral program as a son of the deceased is also a clear indication that the Defendant and other family members had accepted the Claimant as a child of the deceased and that this would have come to the Defendant's attention during the lifetime of the deceased.

47. Regarding the photographs and the Defendant's contention that the photographs were photo-shopped, Mr Anderson argued that the Defendant presented no evidence to support her contention.

48. Counsel further submitted that the court, in making its assessment, should consider the quality and strength of the evidence as presented by the Claimant and that a request to have a child submit to a DNA test after the death of the putative father was never contemplated by the SCA.

DISCUSSION

49. The circumstances attendant upon this application are not new to this jurisdiction. This case represents one of the many cases that traverse these courts, where in many instances, the issue of paternity and succession arises only after the death of the putative father.

50. In assessing the merits of this application, I will deal separately with the issues I identified as arising from it.

Issue (1) – Whether paternity is a live issue in the case

51. Section 7(1)(b) of the SCA read in conjunction with section 8 provides several means of evidence by which paternity can be established for the purposes of succession. The section specifically provides, among other things, that the relationship of father and child for any purposes related to the succession to property shall be recognised only if (1) the father and mother are married to each other at the time of conception or at some subsequent time to the conception; or (2) paternity has been admitted by or established during the lifetime of the father by one or more of the types of evidence specified in section 8 or otherwise.

52. Section 8 lists four types of evidence which may be relied upon as proof of paternity:

(i) Where, pursuant to section 19 of the Registration (Births and Deaths) Act, the father's name appears on the child's birth certificate (see section 8(1) of the SCA).

(ii) Where the mother of a child and any person acknowledging that he is the father of the child executed a deed in the presence of any of the list of persons referred to in section 8(2) of the SCA (see section 8(2) of the SCA).

(iii) A declaration made by the court under section 10 of the SCA (see section 8(4) of the SCA).

(iv) An order made in any country outside Jamaica declaring a person to be the father or putative father of a child, subject to subsection (6) (see section 8(5) of the SCA.

53. Accordingly, section 8 of the SCA contemplates two distinct categories of evidence. The first category is derived from a written acknowledgement of paternity on the part of the father. The second category is based on an order or declaration of a court.

54. Except for a declaration of paternity under section 10, which shall be treated as conclusive proof of paternity, the production of any of the other forms of evidence listed under section 8, will be *prima facie* evidence that the person named or declared as the father is the father of the child. The Claimant provided a copy of his birth certificate, which was duly executed and signed by the deceased at the birth of the Claimant. In the court's view, this is *prima facie* evidence that paternity had been admitted by the deceased during his lifetime and that he is the father of the Claimant.

55. The court will note, at this juncture, that it is clear the parties are not speaking about a different Winston Cummings despite the Defendant's identification of errors on the Claimant's birth certificate relating to the age and address of the deceased. The "Winston Cummings" to whom both parties refer is the same Winston Cummings:

(i) who owned the Burns Run and Albion properties;

(ii) who operated a chicken farm, the same chicken farm of which both parties gave evidence;

(iii) who was married to the Defendant;

(iv) who employed the same lady identified as the secretary of the deceased;

(v) whose funeral program listed the Claimant as a pallbearer and son of the deceased.

56. Given the presence of the deceased's name on the birth certificate of the Claimant, it must be accepted as prima facie evidence establishing the paternity of the deceased unless and until evidence has been presented by the Defendant in rebuttal. In the court's view, since the Defendant is challenging the evidence as to paternity, she must place evidence before the court of the type to displace the presumption of paternity. No such evidence was provided before this court.

57. Accordingly, I cannot agree with the robust submissions of Mr Equiano that paternity is a live issue in this case and for that reason, without more, a DNA test should be ordered.

Issue (2) – Whether in relation to proceedings under section 7 (1)(b) of the SCA, the standard of proof is on a higher balance of probabilities

58. The question of whether there exists a higher standard of proof with respect to the recognition of paternity under section 7(1)(b), was thoroughly explored by Morrison P in **Winston Leiba and ors v Beverly Valetta Warren** [2020] JMCA Civ 19. ("**Winston Leiba**").

59. I find the authority of **Winston Leiba** to be pertinent. In that case, the respondent was born to the deceased, Charles Leopold Leiba, on April 11 1946. Her mother was not married to Mr Leiba. The respondent's name was not registered with the surname "Leiba" but with the surname "Wong", and so Mr Leiba's name did not appear in the relevant entry in the Register of Births, only the mother's name. The mother, who was deceased at the time of the application, was never married or involved in a relationship with any person with the last name, Wong. By a fixed date claim form the respondent brought a claim pursuant to sections 7(1)(b) of the SCA for a declaration that she is the daughter of the deceased on the basis

that, during his lifetime, the deceased had admitted that he was the respondent's father. She was successful in her application and the appellant appealed.

60. On appeal, the appellant contended, among other things that the trial judge, misinterpreted the provisions of the SCA in relation to the appropriate standard of proof to be applied in applications for declarations of paternity under section 7(1)(b) of the Act. In addressing this contention, Morrison P carefully examined and analysed several authorities, including those relied on by Mr Equiano before me, and concluded that no such higher standard of proof exists. He opined as follows:

> *"[78] All of the cases which we have been shown have thrown up different formulations of the standard of proof applicable to proceedings under section 7(1)(b). Thus, in **Re Cato**, Mitchell J said that, '[a]lthough the standard of proof in the High Court in applications for paternity declarations is the civil standard of proof on a balance of probabilities, the Legislature has provided that the High Court must look for a higher level of evidence than is acceptable in the Magistrate's Court in affiliation proceedings'. In **McKenzie v Sampson**, Saunders JA observed that 'sections 7, 8 and 10 provide for two different standards of proof', referring approvingly to Mitchell J's view that the standard of proof for a declaration of paternity simpliciter is 'much lower' than would be acceptable in affiliation proceedings. In **Sampson v McKenzie**, Rawlins JA did not in terms mention the standard of proof, but he stated instead that '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. In **Young-Lee v Young, McIntosh** JA stated unequivocally that 'each category of paternity declaration requires a different standard of proof. And, finally, in this case, the judge said that 'the standard could be described as on a high balance of probabilities.'*
>
> *"[79] The problem with these formulations, as it seems to me, is that while they reflect some kind of consensus that the standard of proof required in proceedings under section 7(1)(b) is 'higher' and 'different', they gave no indication of precisely what that might entail.*
>
> *[80] As Lord Carswell reiterated in **Re Doherty**, '[i]t is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt'. Generally speaking, the latter standard is that required by the criminal law and in analogous proceedings, while the former is the general standard applicable to all other civil proceedings. It is unnecessary for present purposes to explore this very well-known distinction any further, save to say that, in a civil case, a court will be satisfied that an event occurred, 'if*

the court considers that, on the evidence, the occurrence of the event was more likely than not'.

[81] It is equally indisputable that proceedings under the Act are civil proceedings. ***For this reason, I think that Mr Small's submission that the standard of proof applicable to proceedings under the Act is proof on a balance of probabilities is plainly right****…"*

"[82] The difficulty with distinct – lesser or greater - standards of proof under the general rubric of proof on the balance of probabilities lies, in my view, in its clear potential for uncertainty and confusion. It seems to me that it certainly must make life difficult for triers of fact in this area of the law, who are told that, on the one hand, the standard of proof is on the balance of probabilities; but, on the other hand, depending on the issues involved in the particular case, it can also be on a higher balance of probabilities.

[83] The problem is neither new nor peculiar to this region. The difficulties were highlighted by Lord Nicholls of Birkenhead in ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** *as follows:*

> *'If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond a reasonable doubt, what would it be?'*

…

[87] ***On the basis of these authoritative statements, I, therefore, venture to suggest that the true position is that (i) the standard of proof in proceedings under the Act, as in civil proceedings generally, is always proof on the balance of probabilities****; (ii) the standard, although fixed, is flexible in its application, depending on the issues involved in particular cases; (iii) the more serious the consequences if the allegation is proved, or the less probable the allegation may on the face of it appear to be, the stronger must be the evidence required to prove it; and (iv) the important thing in every case will therefore be the strength or quality of the evidence that is proffered in proof of the allegation****." (Emphasis mine)*

61. I stand by the guidance provided by the learned President of the Court of Appeal on this issue, and I am in agreement that proceedings under the SCA, in general, are civil proceedings. I also agree that instead of there being a different standard of proof, the answer is to be found in the manner of the court's approach to the

consideration of whether a particular case has been proved on a balance of probabilities.

62. The court is appreciative of the fact that in **Winston Leiba,** the court dealt specifically with the "otherwise in section 8 of the SCA; nonetheless, the guidance provided is of general application and useful to these proceedings.

63. Accordingly, I find that the standard of proof applicable in proceedings brought pursuant to section 7(1)(b) of the SCA is proof on a balance of probabilities and not proof of any higher standard as argued by counsel for the Defendant. The Defendant will, therefore, be required to present convincing and highly persuasive evidence to displace the presumption of paternity.

Issue (3) – Whether the court has an inherent jurisdiction to make an order for DNA testing

64. The parties commonly accepted that the court has no jurisdiction under the **SCA** to make an order for DNA testing. However, counsel for the Defendant argued that the court has an inherent jurisdiction to make such an order. This was opposed by counsel for the Claimant.

65. The issue of whether the court has an inherent jurisdiction to make an order for DNA testing in a case involving the determination of paternity was addressed by Straw JA in the case of **HA-P v AK** JMCA [2020] Civ. 25. At paragraph [41] of her judgment, she acknowledged that the Supreme Court would have an inherent jurisdiction to consider whether to make certain orders deemed to be in the best interests of the child. However, it should be noted that a case where the court is exercising *parens patriae* jurisdiction is different from a case involving the determination of paternity. It was for this reason that Straw JA made it clear at paragraph [43] that the SCA, as it now stands, provides the only statutory framework for determining paternity and shows "the plain intention of Parliament to codify legal rights and remedies in relation to establishing paternity by scientific means''. In this regard, she referred to section 11 of the SCA which

empowers the court to require the use of blood tests for the purpose of declaring paternity. The learned judge also made reference to the DNA Evidence Act, 2016 and noted that this Act has not changed or affected the SCA. She concluded at paragraph [44] that:

> *"[44] …In my opinion, therefore, the court would have no power to rely on its inherent jurisdiction in order to make orders in relation to applications for blood tests in the present circumstances."*

66. A similar finding was made in the case **Re O and J (Paternity: Blood Tests)** [2000] 1 FLR 418 where the Family Division of the English High Court examined certain provisions of the UK Family Law Reform Act 1969 which were similar to the provisions in the SCA regarding the use of "blood tests" in establishing paternity. In that case, the court agreed with the submissions of counsel that where an Act sets out specific remedies, penalties or procedures, it is presumed that other remedies, penalties or procedures are by implication excluded. This was supported by the speech of Lord Hailsham LC in **Richards v Richards** [1984] 1 AC 174, where the Lord Chancellor said:

> *"[I]n my opinion, where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to litigants to bypass the special Act nor to the courts to disregard its provisions by restoring to the earlier procedure and thus choose to apply a different jurisprudence from that which the Act prescribes."*

67. The court further agreed with counsel that the unfortunate but clear consequence of the UK Family Law Reform Act 1969 was to restrict the power to direct the taking of blood from children for the purpose of establishing paternity to orders within the format of the Act and that any power under the inherent jurisdiction has been abrogated. The court also accepted that while the inherent jurisdiction of the court remained available to fill lacunae in any statutory scheme, the statutory scheme of the UK Family Law Reform Act left no lacuna (see pages 429 to 430 of the reported judgment). This led Wall J to conclude that:

> *"I find myself in complete, albeit reluctant, agreement with these submissions. In my judgment, unattractive as the proposition remains, both the inherent jurisdiction to direct the testing of a child's blood for the*

> *purpose of determining paternity and any consequential power to enforce that direction is entirely overridden by the statutory scheme under Part III of the Family Law Act 1969. If a remedy is to be provided, it is, accordingly, for Parliament to provide it."*

68. Accordingly, I am of the view that this court does not have the inherent jurisdiction to order the Claimant to submit to DNA testing for the purposes of establishing paternity. The only scientific means provided for in the SCA with respect to the establishment of paternity is the power given to the court to require the use of blood tests. There is no wide-scale power to order DNA testing. Neither is there any inherent jurisdiction of the court to do so.

69. In the event that I am wrong, I have also considered Mr Equiano's reliance on the case of **Neild-Moir v Freeman** as persuasive authority that the court has an inherent jurisdiction to make an order for DNA testing. In that case, the claimant made an application for an order that the defendant submits to DNA testing to establish whether she was the biological daughter of the late Colin Wilson Birtles. The claimant and the defendant were both born to Mr Birtles' late wife, Veronica, in 1961 and 1962, respectively. This was during Mr Birtles' marriage to Veronica. The claimant and the defendant were, therefore, at least half-sisters. However, the claimant denied that the defendant was the biological daughter of Mr Birtles.

70. Similar to the instant case, the defendant in **Neild-Moir v Freeman** provided a copy of her birth certificate, which stated that the deceased was her father. However, several witnesses provided evidence by way of statements that the deceased had denied paternity of the defendant during his lifetime. There was also evidence from the defendant, herself, that the putative father refused to discuss the matter of the rumours that she was not his biological child when she confronted him. The court, in granting the order for the DNA testing, noted at paragraph 50 the following:

> *"50 But I do not think this case is a fishing expedition. The claimant has a number of witness statements from third parties, who say that they were told by the deceased that the defendant was not his daughter. Of course, I cannot and do not say at this stage that those statements are correct. They can and will be tested at trial. The defendant's own witness*

> *statement, made for the purposes of resisting this application, says that, about 18 months before his death, the defendant asked him about what she called 'rumours' that she was not his biological daughter. Her own evidence is that, instead of putting her mind at rest, which would have been far easy for him to do, the deceased simply told her that he did not want to discuss it, because he had a new life now. On any view, the evidence raises an issue to be tried. And DNA evidence would be highly relevant to this issue…"*

71. It is apparent that in **Neild-Moir v Freeman,** the court's decision in granting the order for the DNA testing was based on the evidence before the court that prior to the death of the decision, the issue of whether the defendant was the biological daughter of the deceased had arisen. In the instant case, there was no such evidence before the court.

72. Mr Equiano submitted that the errors contained in the Claimant's birth certificate go to the root of the application. The court accepts that the age of the deceased is not reflected accurately on the birth certificate, and neither is his known address. There is, however, no dispute that the birth certificate and the birth registration form were issued by the Registrar General's Department. This is important as the Defendant is not contending that the document was forged. The main challenge is with the accuracy of the information provided or contained in it.

73. In the court's view, once there is no challenge that the document was forged, then the errors will have to be assessed against the background of the information provided by the informants or may have been heard by the recipient of the information at the registration of the birth to determine whether they are clerical errors or not. Such evidence, the court accepts, can only be proved or disproved by evidence coming from either the informant or the person who recorded the information. It is evident that, at this stage, such evidence is no longer available.

74. Additionally, as I have already indicated, despite the error regarding the deceased's age and address, it is clear to the court from the evidence that the parties are referring to the same "Winston Cummings".

75. The Defendant took issue with the signature of the putative father on the Claimant's Birth Registration Form. She deposed that there are vast differences between the signature on the Birth Registration Form and the deceased's signature on their marriage certificate. However, the Defendant did not provide expert evidence or any other evidence to support her contention. This kind of allegation is significant and must not be made without unequivocal evidence, given that the application seeks to affect the rights and status of the Claimant.

76. The Defendant also contended that the evidence of the bank account in the joint names of the deceased and the Claimant was forged. Again, no evidence was provided by the Defendant to support this contention. Such an allegation requires evidential support. It cannot be baseless.

77. Equally, the court considers the opening of the bank account at a time when the Claimant was three years old, to be a significant step taken by the deceased to establish paternity during his lifetime. The Defendant has not provided any evidence to rebut it.

78. With respect to the funeral program, the court finds it noteworthy that within weeks of the deceased death, the Claimant was listed on the funeral program as a son of the deceased. In refuting that evidence, the Defendant merely indicated that the program was prepared by the secretary but provided no evidence that she had disapproved of it. In the court's view, the presence of the Claimant's name on the deceased's funeral program as his son is crucial in demonstrating that prior to the deceased death, there was a common understanding and acceptance that the deceased had established that he was the father of the Claimant.

79. As it relates to the photograph evidence, while I do not find them to be suggestive of proof of paternity, it is nonetheless supporting evidence that the Claimant was accepted as a child of the deceased. While the Defendant has asserted that the photographs are photo-shopped, these were bald assertions.

The court was not provided with any scientific evidence to prove that the photographs were photo-shopped.

80. The distinction between the current case and the case of **Neild-Moir v Freeman** is, therefore, clear on the evidence.

81. Additionally, it must be noted that at the time **Neild-Moir v Freeman** was decided, section 20 of the Family Law Reform Act 1969, which is the equivalent to section 11 of our SCA, was amended. The reference to "blood tests" was amended to read "scientific tests" and the reference to "blood samples" was amended to read "bodily samples". Section 20(1) (as substituted in 2001 by the Family Law Reform Act 1987) states that:

> *"In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—*
>
> *(a) for the use of **scientific tests** to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and*
>
> *(b) for the taking, within a period specified in the direction, of **bodily samples** from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;*
>
> *and the court may at any time revoke or vary a direction previously given by it under this subsection." (Emphasis mine)*

82. Section 11 of our SCA still maintains a restriction to the use of "blood tests" and the taking of "blood samples". As I have already discussed, this has restricted the power of the court in the kind of scientific testing that it can order for the purpose of establishing paternity. This power is restricted to directing the use of blood tests and the taking of blood samples. For this additional reason, I do not find the case of **Neild-Moir v Freeman** to be useful or persuasive.

83. In any event, even if this court had the power to make an order for DNA testing, the Defendant's application for such an order would still fail as the evidence before the court is sufficient to establish to its satisfaction that paternity had been

established during the lifetime of the deceased pursuant to section 7(1)(b) of the SCA.

CONCLUSION

84. The evidence proffered by the Defendant in support of her application to displace the prima facie evidence of paternity does not rise to the requisite standard of proof on a balance of probabilities. I consider the evidence of the Defendant to be mere bald assertions that lack the requisite cogency to warrant this court making the order for the Claimant to submit himself for DNA testing. Such an order would go against the clear intention and conduct of the deceased during his lifetime in admitting paternity of the Claimant. In the Court's view, the evidence relied on to rebut any prima facie evidence of paternity must be direct, clear and convincing as the order, if granted, could have grave consequences.

85. I am also guided by the words of Lord MacDermott in **S v S; W v Official Solicitor** [1972] 1 AC 24**,** where he stated as follows:

> *"… if the court had reason to believe that the application for a blood test was a fishing nature, designed for some ulterior motive to call into question the legitimacy, otherwise unimpeached, of a child who had enjoyed a legitimate status, it may well be that the court, acting under its protective rather than ancillary jurisdiction, would be justified in refusing the application." (My Emphasis).*

DISPOSITION

86. In regard to the preceding paragraphs, the order of the court is as follows:

(i) The Application is refused.

(ii) Cost of the Application to the Claimant, to be taxed, if not agreed.

(iii) Leave to appeal is granted.