In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CIVIL APPEAL 2011: NO. 47

IN THE MATTER OF THE CHILDREN ACT 1998

AND IN THE MATTER OF CASE NO 10FS0199

(RE C: A CHILD)

REASONS
(In Court)[1]

Date of hearing: October 30, 2012

Date of Reasons: November 9, 2012

Ms Victoria Pearman, Juris Law Chambers, for the Appellant
Mr Larry Mussenden, Mussenden Subair Ltd, for the Respondent

Introductory

1. By Notice of Appeal dated August 29, 2011, the Appellants, the married parents of the Child ("C") appealed the decision of the Family Court (Worshipful Nicole Stoneham and Panel) on August 26, 2011 requiring them to submit to blood tests to determine the paternity of C whom the Respondent claimed to be the father of.

2. The Appeal Record was not completed until in or about July 2012 for reasons which were not clear. Unexplained, the delay appears to be an unacceptable one, leaving the parties in limbo in relation to a sensitive issue for far too long.

[1] The Judgment was handed down without a hearing as foreshadowed at the conclusion of the appeal.

3. I allowed the appeal and set aside the impugned decision (awarding costs to the Appellants) on two grounds. The first ground, and the primary basis of the appeal, was that the statutory scheme did not empower the Court to order blood tests at all. It merely permitted the Court to grant leave for the blood tests to be taken and, in the event of any party refusing to submit to the tests, the Court would proceed to consider the application for a paternity declaration drawing such inferences as it considered to be appropriate.

4. The second ground, which was identified by the Bench in the course of the hearing of the appeal, although it had clearly been previously raised by counsel in the Court below, was an even more fundamental jurisdictional point. This was that that the statutory scheme conferred exclusive jurisdiction on the Supreme Court rather than the Magistrates' Court/Family Court in respect of applications for paternity declarations. It was common ground that it has been the established practice of the Family Court (possibly pre-dating the Learned Magistrate's comparatively recent appointment) to entertain such applications in the face of the statutory provisions which made it unarguably clear that this Court alone was empowered to adjudicate such applications.

5. This gave rise to a need to not simply articulate the comparatively straightforward reasons for allowing the appeal. In addition, this Court was clearly required to give some considered guidance as to how it would deal with similar appeals in respect of past or pending paternity applications before the Family Court; and, if it all possible, obviate or substantially reduce the need for any appeals at all.

The statutory framework

6. The first statutory provision in the suite of provisions in Part IIA of the Children Act 1998 (as amended in 2002) under the sub-heading "ESTABLISHMENT OF PARENTAGE" is section 18E which provides as follows:

> "***Declaration of parentage***
> *18E (1) Any person having an interest may apply to the Supreme Court (in this Part referred to as the "court") for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.*
>
> *(2) Where the court finds that a presumption of paternity exists under section 18I, the court shall make a declaratory order confirming that the paternity is recognized in law unless it is established, on the balance of probabilities, that the presumed father is not the father of the child.*
>
> *(3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.*

(4) Subject to section 18G, an order made under this section shall be recognized and have effect for all purposes." [emphasis added]

7. Section 18E(1) speaks for itself in conferring jurisdiction on the Supreme Court to entertain applications for what might somewhat colloquially be described as a "paternity declaration". It also explicitly defines the term "*court*" as meaning "*Supreme Court*" for the purposes of "*this Part*". The Part of the Act these sections fall within is Part IIA ("STATUS OF CHILDREN") Section 18J provides, in material part, as follows:

> "***Blood tests***
> *18J (1) Upon the application of a party in a civil proceeding in which the court is called upon to determine the parentage of a child, the court may give the party leave to obtain blood tests of such persons as are named in the order granting leave and to submit the results in evidence.*
>
> *(2) Leave under subsection (1) may be given subject to such terms and conditions as the court thinks proper.*
>
> *(3) Where leave is given under subsection (1) and a person named therein refuses to submit to the blood test, the court may draw such inferences as it thinks appropriate.*
>
> *(4) Notwithstanding subsection (3), the court may compel a person to submit to a blood test where the court considers it necessary to do so to protect health of a child.*
>
> *(5) Where a person named in an order granting leave under subsection (1) is not capable of consenting to having a blood test taken, the consent shall be deemed to be sufficient —*
>
> *(a) where the person is a minor of the age of sixteen years or more, if the minor consents;*
>
> *(b) where the person is a minor under the age of sixteen years, if the person having the charge of the minor consents; and*
>
> *(c) where the person is without capacity for any reason other than minority, if the person having his charge consents and a legally qualified medical practitioner certifies that the giving of a blood sample would not be prejudicial to his proper care and treatment....*" [emphasis added]

8. Section 18J (4) unambiguously provides that "*the court may* [only] *compel a person to submit to a blood test where the court considers it necessary to do so to protect health of a child*." The Court may otherwise grant leave for the taking of blood tests (section 18J (1)) and where a person refuses to submit "*the court may draw such inferences as it thinks appropriate*" (section 18J (3)).

The impugned Order

9. The Respondent initially applied by Summons dated November 16, 2010 for "*a maintenance and access order*" in respect of C. At an initial hearing on January 27, 2011, the Family Court heard argument on its jurisdiction to make orders under section 18 of the Act, with Ms Pearman appearing for the Appellant and the Respondent in person. Counsel for the Appellant (correctly) submitted that the Court had no jurisdiction to compel the taking of blood tests; it could only grant leave for the taking of such tests. The Family Court adjourned the matter until May 10, 2011.

10. On May 10, 2011, Mr Worrell appeared for the Respondent and (correctly) expressly submitted that the Family Court had no jurisdiction to make any order under section 18 which applied to the Supreme Court. He sought mediation with a view to achieving agreement on the taking of blood tests. Ms Pearman (correctly) reiterated the point that there was no power to compel the taking of blood tests. The Family Court implicitly determined that it possessed jurisdiction by granting the Respondent (the applicant below) leave to obtain blood tests. Somewhat surprisingly, the Respondent was granted relief he submitted the Family Court had no jurisdiction to grant.

11. On June 29, 2011, the Respondent reported that the Appellants had refused to submit to blood tests. Mr Worrell agreed with Ms Pearman's previous submissions to the effect that section 18J did not empower the Family Court to compel her clients to submit to blood tests. Accordingly, he (correctly) invited the Family Court to proceed to grant a declaration of paternity and to draw inferences from the Appellants' refusal to submit to the tests.

12. The Family Court on August 26, 2011 ordered the Appellants to submit to blood tests. The Court's Judgment did not expressly refer to the statutory basis for making such an order in circumstances where both counsel had submitted that no jurisdiction existed. However, it is clear that the Court was quite properly preoccupied with the best interests of C. The Judgment cited the *dictum* of Ward LJ in *Re H (Paternity: Blood)* [1996] 2 FLR 65 describing the earlier judicial observation that "*there must be few cases where the interests of children of children can be shown to be best served by the suppression of the truth*" as "*unassailable wisdom*". Accordingly, the Learned Magistrate concluded as follows:

> "*These observations in our opinion seem completely applicable to the facts of this case. Therefore, this pane3l is satisfied that DNA testing would be in the Child's best interests and balanced against the interests of the mother and her husband, ought to take place.*"

13. There is no reason to doubt the soundness in general terms of the Family Court's assessment of where the best interests of C lie. But that assessment did not form the basis of the present appeal; and that issue is not presently before this Court.

Findings: did the Family Court have jurisdiction to make the August 26, 2011 Order and/or any other order under Part IIA of the Children Act?

14. It was ultimately clear that the Family Court lacked the jurisdiction to make the August 26, 2011 Order, which purported to compel the Appellants to submit to blood tests for the purposes of determining C's paternity. This is because:

    (a) (most broadly), Part IIA of the Children Act confers exclusive jurisdiction upon this Court to determine applications for parentage declarations under section 18E of the Act; and

    (b) (more narrowly), section 18J of the Act did not empower the Family Court to compel the Appellants to submit to blood tests for the purposes of determining C's parentage in the circumstances of the present case.

15. The jurisdiction of the Family Court, a creature of statute with no inherent jurisdiction, must be found in statutory form. The Children Act does not confer an unfettered discretion on the Family Court to make whatever order it deems fit in the best interests of the relevant child. The Family Court gave no reasons for rejecting the submissions of counsel that it lacked the statutory jurisdiction to make the impugned Order.

16. In *Re M (a Minor, W-v-M)* [2009] Bda LR 22[2] where this Court considered another jurisdictional question relating to the Children Act, I made the following legal finding with respect to the scheme of the Act:

> "*5. The normal rule is that the "jurisdiction conferred upon the court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates' Act 1948…known as the Family Court": section 13 Children Act 1998. As the Respondent's counsel pointed out, where the draftsman intends a provision to apply to the Supreme Court, the reference is explicit (e.g. applications for a declaration of parentage, section 18E).*"

17. *Re H (Paternity: Blood)* [1996] 2 FLR 65, an English case decided in a statutory context which apparently <u>does</u> empower the ordering of blood tests is of no assistance in elucidating the jurisdiction conferred by Part IIA of Bermuda's Children Act 1998.

[2] *W-v-M* [2009] SC (Bda) 18 Civ (17 March, 2009).

18. For these reasons the August 26, 2011 Order of the Family Court was set aside and the parties were encouraged to:

    (a) seek a consensual resolution of the entire matter; and/or

    (b) agree expedited directions for a hearing of any Originating Summons that the Respondent might issue seeking relief under Part IIA of the Act.

Conclusion: status of past parentage orders or pending parentage applications before the Family Court

19. It is possible that the Family Court has in the past purportedly made orders under Part IIA of the Children Act. It is difficult to see why such orders ought not to be regarded as valid, irrespective of what the technical legal position may be. It would almost invariably be inconsistent with the best interests of the children concerned (not to mention wasteful of costs) for any such orders to be revisited on their merits by this Court based on wholly technical considerations. For good order, this Court would likely deal administratively with any consensual request to substitute an Order of this Court for an Order previously made by the Family Court.

20. As far as applications pending before the Family Court are concerned, if any, the Family Court would no doubt decline to entertain such applications any further. But where the issue of parentage has arisen out of a matter properly before the Family Court such as an application for access or custody (as occurred in the present case), the Family Court can properly seek to encourage the parties through mediation or otherwise to resolve any parentage disputes so as to avoid the need for a formal application to be made to this Court.

Dated this 9th day of November, 2012 _____

IAN RC KAWALEY CJ