The Court of Appeal for Bermuda

CIVIL APPEAL No 8 of 2016

Between:

SHARELL EYVETTE PHILLIPS

Appellant

-v-

PATRICIA ROSE ANN HILL

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Ms. Arisha Flood, AAF & Associates, for the Appellant
Mr. Richard Horseman, Wakefield Quin Limited, for the Respondent

Date of Hearing: **17 March 2017**

Date of Decision: **17 March 2017**

Date of Reasons: **17 April 2017**

REASONS FOR JUDGMENT

Bell, JA

Introduction

1. This case concerns a straightforward issue of a determination of paternity, with the motivation of the parties arising from the prospect of sharing in the proceeds of the estate of one Earl Robinson Darrell ("the Deceased"), who had died on 11 February 2013. The Respondent to the appeal ("Ms Hill)" had herself previously taken proceedings to establish that she was the lawful daughter of the Deceased,

and consequently entitled to share in his estate. The Appellant ("Ms Phillips"), had then taken proceedings under the provisions of the Children Act 1998 ("the Act"), with a view to establishing that the Deceased was her father, and that she too was entitled to share in the Deceased's estate.

2. Ms Hill similarly took these proceedings under the provisions of the Act, but during the course of the proceedings before the Chief Justice, following assistance from counsel, it became clear that the court had no jurisdiction to grant the declaratory relief sought by Ms Hill under the provisions of the Act, and the Chief Justice so found. At an earlier stage Mr Horseman, counsel for Ms Hill, had recognised the difficulties of proceedings under the Act, and had chosen instead to rely upon the inherent jurisdiction of the court in relation to its probate jurisdiction. The Chief Justice in his judgment of 19 February 2016 noted that it was not seriously disputed that the court possessed inherent jurisdiction to make a declaration of parentage for inheritance purposes, and having reviewed the relevant statutory provisions expressed himself satisfied that the court must have the jurisdiction to determine whether or not any person is qualified as beneficially interested in an estate by virtue of falling into the categories of relationship, including child, set out in rule 20 of the Non-Contentious Probate Rules 1974.

The Evidence

3. From that point forward, it was a relatively straightforward matter for the Chief Justice to consider the evidence and rule upon it. In relation to the standard of proof, the Chief Justice found that very clear evidence must be required to support a declaration of paternity in the inheritance context, even though proof on a balance of probabilities might be said to be all that was strictly required. In this regard, the Chief Justice relied upon the case of *Stanley v Phillips* [2011] ECSC JO 113-1, a case from the High Court of Anguilla.

4. Ms Hill relied upon DNA evidence produced by the same local and overseas laboratories upon whose test results the declaration in favour of Ms Phillips had

been based. The Chief Justice found that attempts by Ms Phillips' counsel to discredit Ms Hill's test results had "an unrealistic air about them", noting that the motivation for her challenge seemed clear.

5. Quinton Butterfield of Central Diagnostics, the Bermuda agency which had obtained DNA swab samples and sent them to the laboratory in the United States, gave evidence for Ms Hill. The Chief Justice described Mr Butterfield as an impressive witness, and said that he had no hesitation in accepting the accuracy of the DNA evidence, which had concluded that Ms Hill was almost certainly the daughter of the Deceased. Even ignoring Ms Hill's own evidence, the Chief Justice's view was that this evidence was clearly sufficient to support the applicant's prayer for a declaration of paternity to a high standard of civil proof.

6. There was however one aspect of the evidence which called for comment from the Chief Justice, and this was that no positive case of unreliability had been put to Mr Butterfield in respect of Ms Hill's test results. However, when subsequently cross-examining the niece of the Deceased ("the Niece"), Ms Flood for Ms Phillips had put to the Niece that the results in relation to her had initially indicated that she was a daughter of the Deceased, rather than a niece. It was said in response that there had originally been a mistake but that such had been corrected. Yet in her closing submissions before the Chief Justice, Ms Flood had sought to rely on this mistake to discredit Ms Hill's test results. Predictably, Mr Horseman for Ms Hill suggested that counsel had deliberately avoided affording Mr Butterfield an opportunity to explain the discrepancy.

7. In the event, the Chief Justice ruled that Ms Hill was entitled to a declaration that she was the child of the Deceased, under the inherent jurisdiction of the court.

The Grounds of Appeal

8. These are written in narrative form, but I will endeavour to distil, in summary form, the nature of the complaints. However, I should first comment that there

has been an increasing tendency to draft grounds of appeal without reference to the provisions of the rules. Rule 2(4) of the Rules for the Court of Appeal for Bermuda provides that "The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively". That rule was not complied with in this case.

9. Nevertheless, it is possible to set out the gravamen of the appellant's complaints. First, it was said that the Chief Justice had erred in law in not ordering a series of new paternity tests from a different local and overseas laboratory. Reliance was placed on the evidence of the Niece, and the point was made that no concrete details had been given as to how the mistake had been allegedly corrected. It is a statement of the obvious that the best chance of determining how the mistake in the case of the Niece had been made, and how it had been corrected, would have been to ask Mr Butterfield those questions. That was not done. Secondly, it was said that the Chief Justice was wrong to consider Mr Butterfield to be an impressive witness in view of the evidence of the Niece, and it was said that the Chief Justice did not consider the inconsistences of the Niece's evidence when compared to that of Mr Butterfield. The answer to that question may be thought to be that Mr Butterfield did not address the issue for the very good reason that he had not been asked about it. It could hardly be maintained that the quality of his testimony had been impugned by an issue which had never been put to him. The third ground of appeal concerned the laboratory results relating to the earlier DNA testing of Ms Phillips. The ground went into considerable detail of the complaints which had been made by various family members regarding this testing. The Chief Justice made reference to that. It is hard to see how one set of test results could be conclusive in relation to the accuracy of a completely different set of results, but that is what was relied upon.

10. There was then a complaint in regard to the fact that in looking at the provisions of the Act, the Chief Justice had not looked at the provisions of an amendment act passed in 2002. That was the Children Amendment Act of 2002, which was

relied upon by Ms Flood for its stated purpose. But the expressed purpose was extremely broad, and the ground did not rely upon the terms of any particular section of the amendment act, and did not address the question of jurisdiction on which the Chief Justice had ruled in the negative.

11. Finally, complaint was made that the Chief Justice had erred in law in paragraph 4 of his judgment, in relation to section 18F of the Act, which it is said is the section designed to address the "mischief" that occurred in this case. In fact, it was the examination of this section, and particularly subsection 2 thereof, that led the Chief Justice to examine the jurisdictional aspect of matters with the care that he did.

The Conduct of the Appeal

12. Ms Flood began her presentation of the appeal by making an application for leave to adjourn the proceedings. The grounds in support of that application suggested that problems existed with Ms Phillips' Legal Aid certificate, but it emerged that the real purpose behind the application to adjourn was to seek to adduce further expert evidence in relation to the DNA test results, which it was claimed had not been independent.

13. The conditions upon which fresh evidence may be admitted on the hearing of an appeal are well known, and are set out in the case of *Ladd v Marshall* [1954] 1 WLR 1489. Those conditions are, first, that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible, though it need not be incontrovertible. In this case, the nature of the evidence sought to be adduced had not even been identified, and in any event the application failed to satisfy the first condition, since the evidence was clearly of a kind which could have been obtained for use

at the trial. We had no hesitation in rejecting the application, and the conduct of the appeal continued.

The Act

14. Ms Flood began her argument by maintaining that the Chief Justice had jurisdiction on the basis of the Act. That position appeared to be in conflict with the submissions that Ms Flood had made before the Chief Justice, as evidenced in his judgment, to the effect that an application under the Act could not be made under section 18F(1), unless both the persons whose relationship is sought to be established are living. That not being the case, it seems obvious that the Act had no application, yet before us Ms Flood sought to maintain that the Chief Justice had had jurisdiction on the basis of the Act. She accepted that she had not made it clear before the Chief Justice that she was challenging his finding that the court had inherent jurisdiction to reach a conclusion in the matter. When the first sentence of paragraph10 of the Chief Justice's judgment was put to Ms Flood, namely that … " It was not or not seriously disputed that the court possessed the inherent jurisdiction, if the Children Act 1998 did not apply at all, to make a declaration of parentage for inheritance purposes", Ms Flood accepted the position. She sought to maintain that her submissions in relation to the effect of the Act had been misrepresented, but the reality was that the Act did not apply, and in those circumstances if the court did not proceed upon the basis of its inherent jurisdiction, Ms Flood's client would have been without remedy in any event.

15. Ms Flood then moved to the provisons relating to presumption of paternity set out in section 18I of the Act, none of which provisions appeared to have been satisfied, something which Ms Flood was bound to and eventually did accept. However, she maintained that evidence of biological paternity was not sufficient, and there needed to be evidence of a relationship between parent and child for paternity to be established. It was not immediately apparent where there was legal support for such a contention.

16. Seeking support for this proposition, Ms Flood turned to the provision of section 3 of the Wills Act 1988, but was bound to accept, as she ultimately did, that none of the three requirements of that section had been established. In response to questioning from the Court, Ms Flood did then accept that there was no basis for requiring the establishment of evidence of a relationship as had been submitted. Eventually, Ms Flood accepted, as she was bound to, that the Chief Justice had been entitled to find that the DNA evidence before him was conclusive, and that paternity had been established, as sought.

Conclusion

17. It followed, there being no other grounds on which it could be maintained that the Chief Justice's judgment was subject to challenge, that the appeal was doomed to fail. Accordingly, the Court did not call upon Mr Horseman for the Respondent, and dismissed the appeal with reasons to follow.

Costs

18. I would expect costs to follow the event, and would so order in the absence of an application to be made on the Appellant's behalf within 21 days.

Signed

Bell, JA

Signed

Baker, P

Signed

Clarke, JA