JOYCE TONAWANE -v- KELLY WANEFIOLO

High Court of Solomon Islands
(Muria, J.)
Civil Case No: 247 of 1991
Hearing: 29 November 1991
Judgement: 5 December 1991

M.B. Samuel for the Appellant
Respondent in person

MURIA J: This is an appeal against the decision of the learned Magistrate who refused the application for attachment brought by the Complainant (now Appellant) on 18 July 1991 against the Respondent.

The Appellant obtained an order on 11 May 1989 under Part II of the Affiliation Separation and Maintenance Act, 1971 against the Respondent. That order says that the Respondent is the putative father of the Appellant's child and that he is to pay maintenance for the said child at the rate of $15-00 per month commencing on 30 May 1989. The Respondent made four payments of maintenance in 1989 and then stopped. The Respondent stopped paying because there was some arrangement for them to get married and the Respondent went and stayed with the Appellant in her house. The marriage arrangement fell through and so the marriage did not take place.

Subsequently on 22 February 1991, the Appellant made a birthday party for the child and the Respondent helped with the expenses of the birthday party. He and the Appellant went together to do the shopping for the party. The money for the shopping was provided by the Respondent. He spent about $400.00 towards the birthday party for the child. In addition to the four payments which totalled up to $167.50 and the $400-00 spent on the child's birthday, the Respondent also gave $40.00 to the Appellant for the child.

The total in arrears claimed was about $305.00. However as the learned Magistrate found, the arrears were $222.50 for maintenance and $80.00 for birth expenses, a total of $302.50 in arrears.

Counsel for the appellant argued in the Magistrates Court as well as in this Court that as regard the $40.00 given to the appellant, the court should not regard that as payment for maintenance because it was given directly to the appellant and not paid

through the court as required by the Court order. The learned Magistrate rejected that argument and in my judgement he was right to reject it. The method of payment through the Court is simply a matter for convenience. If money is paid for the maintenance of the child it makes not the slight difference whether it is paid directly to the complainant or through the court. It is still a payment for the maintenance of the child of the Complainant within the provisions of the Act.

The other argument raised by counsel in the Magistrates Court and also in this court is whether the $400.00 spent by the Respondent on the birthday party for the appellant's child is a payment of maintenance for the child within the meaning of the Affiliation Separation and Maintenance Act, 1971. Counsel says that the $400.00 spent by Respondent for the birthday party cannot be properly regarded as 'payment for maintenance.' Counsel argued that the $400.00 was voluntarily given by the respondent for the child's birthday party. In any case the money was for celebration. It paid for goods such as meat, drinks and other things to be used in the birthday celebration. Therefore, Counsel says, it cannot be regarded as payment of money for maintenance.

A somewhat similar point arose in the case ***Willett -v- Wells*** [1985] 1 AII E.R. 585 where the court was considering section 2(1) of the Affiliation Proceedings Act 1957 of UK. Section 2(1)(a) and (b) of the UK Act are similar to Section 3(b) and (c) of our Affiliation Separation and Maintenance Act, 1971. The question for the Court in that case was whether the gift of a jumper and trousers to the mother for the child constituted the payment of money for the maintenance of the child within section 2(1)(b) of the 1957 Act. In that case the mother gave birth to a child on 8 March 1981. The father was the father of the child. During the three years following the birth of the child the father 'paid no maintenance' to the mother for the child. Before the birth of the child, however, the father paid to the mother half the cost of a pram. The only contribution the father made to the mother on behalf of the child during the three years following the birth of the child was a present of a jumper and a pair of trousers. That present was given on the child's first birthday. The magistrates court refused the mother's complaint as it was issued after three years of her child's birth. As the mother must show that the father had within the three years following the birth of the child paid money for its maintenance, the magistrates' court held that the gift of a jumper and a pair of trousers was insufficient to constitute the payments of money for its maintenance pursuant to section 2(1)(b) of the Affiliation Proceedings Act, 1957. On appeal to the Family Division of the High Court, Hollings J, decided that the gift by the father of a jumper and trousers constituted money paid for the child's maintenance within the meaning of section 2(1)(b) of the 1957 Act. I set out hereunder his Lordship's reasoning to appreciate how he came to the conclusion he did. His Lordship said at page 588:

"If, as it appears, the evidence before them was that he had (that is the father had) given a jumper and trousers and there was no evidence whether he had been given those by somebody else or whether he paid for them himself, the proper inference to be drawn was that he had paid for those himself.

So the basis, the finding of fact, on which this question is founded is that the father did, within the three-year period (apparently about the first birthday of this child it seems) made a present of a jumper and trousers. The assumption is inevitable in the absence of other evidence that he paid money for those himself.

The phrase 'paid for its maintenance', that is a complaint may be made if at any time the father has paid money for its maintenance. It is not said that it must be shown that he has 'maintained the child', which may involve consideration of a number of payments over a period of time to see whether those payments did, as a jury point as it were, amount to maintenance. The phrase itself is 'paid money for its maintenance'. This is apt to cover one payment. Does that money have to be handed over in specie, or can it be paid for something which in itself is something which would properly be paid for out of maintenance payments, such as, as here, clothing? The answer is plainly that it can.

In my opinion, if a putative father, or an alleged putative father, expends money on food or clothing or such other items as would normally be paid for out of maintenance payments, then that is the payment of money for the maintenance of that child, and the magistrates ought to have so found."

Hollings J also had the occasion to consider a Canadian case of ***Camrud -v- Hendry*** [1935] 2 W.W.R 665. In that case the father had bought a pair of shoes for the child as a gift but had not paid money directly to the mother. Knowles J held that the gift of a pair of shoes was outside the terms of the Canadian statute which say "if the alleged father paid money for the maintenance of the child after its birth." The Canadian case there was dealing with a similar provision regarding the time within which a claim should be made in an affiliation case. Section 114 of the Child Welfare Act 1930 of Canada says:

"No affiliation proceedings shall be commenced ... after the expiration of twelve months from the date of birth, save that if the alleged father has paid money for the maintenance of the child after its birth..."

After considering the Canadian case Hollings J was not persuaded. He however found the words of Sir Jocelyn Simon P in ***Roberts -v- Roberts*** [1962] 2 ALL E.R. 967 at 969 - 970:

"It is argued for the wife that there was no evidence here that Mr Wright paid money for Sandra's maintenance. It is true that the wife and Sandra were living in his house and it is reasonable to suppose that what they lived on came from Mr Wright; but, it is contended, that was paid by Mr Wright to the wife in her capacity as housekeeper, and it was out of her earnings that the child was maintained. This seems to us to be an unrealistic approach. The wife may originally have been engaged as Mr Wright's housekeeper; but after a short time she became Mr Wright's kept mistress, and it was their common child, not a stranger, for whom food and clothes and shelter were provided.

This was not provided gratuitously like manna; it had to be paid for; and the source of payment, whoever did the actual shopping, was Mr Wright. We consider that where it is proved that an illegitimate child forms part; of the household of its father, there is a prima facie evidence that he has paid money for its maintenance."

Hollings J in ***Willet -v- Wells*** preferred to hold that food and clothing for a child were purchases made from payments for the maintenance of the child and that his Lordship was of the opinion that such gifts could be considered as money payment.

The above mentioned cases, although were concerned with issuing of proceedings after statutory period similar the Section 3(b) and (c) of our Affiliation Separation and Maintenance Act, 1971, are of considerable assistance when considering what constitutes payment of money for the maintenance of the child under our Act of 1971.

In the present case, the learned Magistrate said in his judgement.

"I do not agree with Maelyn in her argument regarding the $40.00(about) and the more than $400.00 spent by the respondent for the birthday celebration of the child. In my opinion whatever means of assistance given by the respondent to the complainant for the child is within the meaning of maintaining the child according to the court order of May 1989. The question of whether any payment or assistance made by the respondent to the child or to the child through the complainant or through the court is not matter. What matters in my view is whether such assistance is for the child."

The starting point must be our own 1971 statute and then to see if the words in the provisions of the statute allow for the strict interpretation as in the Canadian case of ***Camrud -v- Hendry*** or the more broad and liberal approach as in ***Willet -v- Wells.*** This is a process of assessment by conscientiously seeking to discover the meaning of the words used so that the intention of the lawmakers in Parliament is loyally carried out by the courts.

Although, as I have already stated that the authorities mentioned above are on the provisions of their statutes similar to our section 3(b) and (c) of our 1971 Act, it can be seen from our 1971 Act that section 3(c) uses the words "has .... paid money or has otherwise made provision for its maintenance." That already allows the courts to consider other means of maintaining the child and not restricted to just the father actually paying the money for its maintenance. Section 3(c) of our 1971 has gone ahead and removed the difficulty Hollings J was faced with in ***Willet -v- Wells.***

In the present case we are dealing with the order made under section 5(2)(a) of the 1971 Act. Under that provision that court is empowered -

"If it sees fit in all the circumstances of the case .... to make against the putative father an order for the payment by him of such sum of money .....as the court, having regard to his means, considers reasonable, for the maintenance and education of the child."

The empowering words in this provision are couched in a discretionary language such as "if it sees fit in all the circumstances," "such sum of money" and "as the court ... considers reasonable." The usage of those discretionary words in the said provision can only be concluded that the lawmakers in Parliament when making the law intended to give the courts scopes of taking into consideration other matters affecting the case as they see fit before making the necessary orders.

In considering what the words "the payment by him of money ... for the maintenance ... of the child" I would prefer to follow the same line of reasoning as those of Hollings J in ***Willet -v- Wells*** and Sir Jocelyn Simon P in ***Roberts -v- Roberts***. The payment by the father of money for the maintenance of the child can be money handed over in specie but it can also be money expended on food or clothing or such other items as would normally be paid for out of maintenance payments.

Experience has shown that fathers are more apt to make gifts in kind than to pay cash to the mother.

In the present case the Respondent spent about $400.00 for the birthday party. Some of that money went into buying of food for the child's party. Although the shopping list used by the Appellant and the Respondent together when they were doing the shopping for the party was not produced to the Court, it would not be the party, it would not be unreasonable to imagine that not all of the $400.00 went toward buying of good and drinks alone but at least some of the money were spent by both of them for the purchase of other items as gifts for the child. Equally it would not be a far-fetched imagination that even if the Respondent paid the Appellant the money in specie as maintenance payment, the Appellant could still in her discretion use part of that money to celebrate her child's birthday and no doubt could also purchase clothing and other items for the child.

It will be a sad day for a father to learn that when the money he spends toward maintaining his child becomes maintenance payment only when money is handed over to the complainant who then expends it for the child and it does not become maintenance payment when the father spends it for the maintenance of the child.

In my judgement the learned Magistrate was right in accepting that the amount of about $400-00 spent by the Respondent toward the celebration of the child's birthday

was payment by him of money for the maintenance of and assisting the Appellant in maintaining the child.

The other argument raised against the decision of the learned Magistrate was that he was wrong to vary the original order which he could only do upon application by the Appellant. With respect, this argument is without basis. The learned Magistrate having accepted that the $400.00 is part of the Respondent's assistance to the Complainant for the child proceeded to calculate the period it would cover as maintenance. He then ruled that, after offsetting the arrears, the amount of $124.50 remaining should cover the period from July 1991 to February 1992 which still leaves $4.50 to be counted toward March 1992 payment. So for the month of March 1992, the Respondent will have to pay only $11.50. The only error I can see here is a mathematical one. The figure $11.50 should be $10.50. The learned Magistrate then stated that thereafter the original order of $15.00 per month to continue.

For all the reasons set out above, this appeal is dismissed.

(G.J.B MURIA)
JUDGE