

McV

THE HIGH COURT  
(CIRCUIT APPEAL)

IN THE MATTER OF THE ILLEGITIMATE CHILDREN (AFFILIATION ORDERS)  
ACT 1930

BETWEEN:

N McV

.v.

J McG

Judgment of Mr. Justice Barron delivered the 20th day of  
March 1986.

The Applicant seeks an Order pursuant to the provisions of Section 3(1) of the Illegitimate Children (Affiliation Orders) Act, 1930. She seeks both an Order for maintenance on a weekly basis and also for a capital sum to cover expenses incidental to the birth of a child born to her on the 11th July, 1982. It is not disputed that the Respondent is the father of this child.

The Plaintiff has given evidence that it costs her £63 per week to maintain her child. She pays £20 to her mother, £10 for food, £10 for a creche, £10 for baby-sitters and the balance for clothing, medical and other incidental expenses. These figures are in excess of those originally furnished by the Plaintiff's Solicitors to the Defendant's Solicitors. By letter dated the 24th June, 1985 the sum of £55 per week was claimed. A sum of £20 for maintenance was claimed but this was stated to relate to both the Plaintiff and her daughter. I think the amount now claimed is on the high side and I am prepared to hold that a realistic total cost would be the sum of £50 per week. The Plaintiff's claim in relation to expenses incidental to the birth of the child totals the sum of £2,132. Of this sum the sum of £780 is claimed for loss of wages during the period both before and after the birth of the child and there is a claim for a sum of £400 for maternity clothes. The balance relates to

items of expenditure for or on behalf of the child.

The Plaintiff submits that in assessing the amount of maintenance to be paid by the Defendant regard should be had not only to his actual earnings, and also to the assistance which his parents have given and are still in a position to give to him. The Defendant submits that the Court should have regard not only to the Defendant's own financial circumstances, but also to the financial circumstances of the Plaintiff.

The Defendant relies upon the provisions of Section 28 of the Family Law (Maintenance of Spouses and Children) Act, 1976. By that section the following section is included in the 1930 Act. It is so far as is relevant as follows:-

"4A. Where it appears to the Court on application to it by any person, that a parent of a child has failed to provide such maintenance for the child as is proper in the circumstances, the Court may make an order that the parent make to that person periodical payments for the support of the child for such period during the lifetime of that person, of such amount and at such times as the Court may consider proper.

(2) The provisions of the Family Law (Maintenance of Spouses and Children) Act, 1976, relating to maintenance orders shall apply, with any necessary modifications and adaptations, in relation to an order under this section.

(3) The Court shall not make an order in relation to a parent of a child under this section if an affiliation order ... requiring that parent to make payments for the benefit of the child is in force ..."

save in certain circumstances as specified in that subsection.

Counsel for the Defendant accordingly further submits that for the purpose of determining the amount of the weekly payment to be made against his client regard should be had to the provisions of Section 5(4) of the 1976 Act. That subsection is as follows:-

"(4) The Court, in deciding whether to make a maintenance order and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters -

- (a) the income, earning capacity (if any), property and other financial resources of the spouses and of any dependent children of the family, including income or benefits to which either spouse or any such children are entitled by or under statute, and
- (b) the financial and other responsibilities of the spouses towards each other and towards any dependent children of the family and the needs of any such dependent children, including the need for care and attention."

It seems to me that this provision is intended to apply only where an application cannot be made for some reason under the provisions of Section 3. Otherwise, it would seem that the provisions of Section 3 would no longer be required so far as they relate to a claim for maintenance. Undoubtedly Section 4A alters the scheme of the 1930 Act in that clearly a claim can now be brought not only against a putative father but also against the mother in appropriate circumstances. Even though the provision does not apply to the present applicatic

nevertheless it cannot be ignored. The original scheme of the Act of 1930 was largely an extension of poor law legislation with the presumption clearly indicated that the mother would not be in a financial position to maintain her child. So provision was made whereby not only could the local body administering the relief of the poor seek an Order but when an Order was made, even on the application of the mother, payment could be directed to be made to such body: see Sections 2 and 9 of the 1930 Act. This Act did not specify the test to be applied by the Court in determining the amount of maintenance. The preamble to the Act refers to making provision for the imposition on the father of an illegitimate child of the obligation to contribute to the support or otherwise in respect of such child. While there is nothing in Section 3 to prevent the Justice from directing payment of the full cost of maintenance of the child nevertheless, the Order should reflect only a contribution in appropriate circumstances. This view is also upheld from Section 5 of the Act of 1930 which allows a Justice to terminate a weekly payment when he is satisfied that justice requires that such liability should cease. Having regard to these provisions and also to the provisions of Section 4A it seems to me that the appropriate test in any case is what is fair and reasonable as between the parites.

The ability of the Defendant to pay must be the first consideration of the Court. Nevertheless the Court must also have regard to the financial circumstances of the mother. Counsel for the Plaintiff submits that the Court should also have regard to all the resources of the Defendant including the ability of his parents to assist him. This in an argument

based upon the provisions of Section 5(4) of the Act of 1976 which is strictly not applicable. Nevertheless, it seems to me that in proper circumstances this would be a valid submission. But it is equally valid in relation to the financial position of the mother. In my view regard can be had to the attitude of the parents of both parties both before and after the birth of the child and to whether or not assistance has been willingly given. If assistance has been given, then it is in reality part of the financial circumstances of the party in receipt of it. Such assistance may have been given prior to the circumstances of the birth of the child or may have been given by reason of the existence of the birth of the child. If it is deliberately cut off to require a Defendant to pay more or less maintenance, it may be proper for a Court to make a decision on the basis that such assistance is still available. This would not be a direction for assistance to be continued, but a recognition that the party no longer in receipt of such assistance has made a voluntary decision to manage on a smaller income.

In the present case, the Plaintiff has a larger income than the Defendant. However, I am satisfied that in addition to whatever sum she pays for maintenance in respect of her child she also pays £20 a week in respect of her own keep. While the Defendant has no such liability this results in leaving the Plaintiff with a marginally smaller available income than that of the Defendant. Admittedly, the Defendant's parents had been prepared to assist but this assistance did not cease in a deliberate attempt to lessen their son's income. Taking all the circumstances of the parties including the circumstances of their parents with whom both are living, I regard a figure of £30 per week as being a fair sum to

be paid by the Defendant to the Plaintiff as a contribution to the support of their child.

The claim for expenses is for "the expenses, as measured by the Justice, incidental to the birth of such child." Again there is no indication as to how they should be measured. The section does perhaps suggest that it should be all the expenses reasonably incurred. Section 28(2) of the Social Welfare (Consolidation) Act, 1981, re-enacting Section 21(2) of the Social Welfare Act, 1952 provides:

"(2) In deciding whether or not he shall make an order under the Illegitimate Children (Affiliation Orders) Act, 1930, for the payment of the expenses incidental to the birth of a child, the Justice shall not take into consideration the fact that the mother of the child is entitled to maternity allowance."

This suggests that the Court was entitled to take the means of the mother into account in making any such Order. It seems to me that the Justice should measure whatever he considers fair and reasonable. This should depend first upon the amount of the claimed expenditure incidental to the birth of the child and secondly to the respective means of the parties.

In the present case, the Plaintiff's loss of earnings is not an expense nor is it referable to the birth. It is a loss. It is referable only in part to the fact of the birth and in the main to the period of pregnancy. Similarly, the cost of maternity clothing is referable to the period of pregnancy. Having regard to the scheme of the Act expenses incidental to the birth relate to those arising at or about the time of the birth and incurred on behalf of the child. Of the expenses claimed, the sum of £952 comes within this category. Having

regard to the amount of the Plaintiff's loss of earnings and her expenditure on maternity clothing, it is reasonable that the Defendant should pay the entire of this sum to the Plaintiff.

20/3/86

Henry Barnes.