JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 34/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	ANNA DYKE	APPELLANT
AND	HENRY FORDE	RESPONDENT

Gordon Steer for the appellant

Dr. R. B. Manderson-Jones for the respondent

December 18, 1990

CAREY, J.A.:

I will ask Morgan, J.A. to deliver the first judgment.

MORGAN, J.A.:

This is an appeal against an order under section 2 of the Affiliation Act made in the Family Court, Kingston, on the 15th May, 1990. A previous order was made on the 21st October, 1985, for the payment by the respondent to the appellant of $450 per month for the maintenance of a child, then one year old, until the child attains the age of eighteen years and to pay educational, medical, dental and optical expenses reasonably incurred. This child is now six years old and will in another ten to eleven weeks be seven years old. A variation of the sum to $1,800 per month was sought

and the Judge of the Family Court, having heard the evidence, made an order for $750 per month for the maintenance of the child.

Mr. Steer for the appellant has submitted that the figure of $1,800, which was proposed, was not challenged. He argued that the father gave no evidence neither did he suggest an alternative figure; that the Judge of the Family Court made no findings of fact and that the means of the father not having been contested and the expenses not having been challenged the amount sought ought not to have been reduced.

Dr. Manderson-Jones has submitted that the Judge of the Family Court has a discretion to reduce any order sought and rested his submission on section 7 of the Maintenance Act and section 5(2) of the Affiliation Act. Section 7 of the Maintenance Act reads:

> "..... the Resident Magistrate shall proceed to enquire into the means of the party or parties complained against, and if satisfied that he or they or any of them are of ability to maintain or contribute to the maintenance of the party complaining, or on whose behalf complaint is made as aforesaid, the Resident Magistrate shall proceed to make an order (to be called an order of maintenance) against such party or parties, ordering him or them to pay."

He submitted that, although the ability to pay is relevant, it is not the sole consideration to be taken into account by the Magistrate and that there is no rule of law that provides that a father, who has the ability to pay for the maintenance of this child, should be bound to pay the entire amount of maintenance.

It is clear that what this section speaks of is, that the person who is complained against - who in this instance

is the father - if that person has the ability to maintain or if he does not have the ability to maintain, but he has the ability to contribute, then, depending on the facts as found by the Judge, the order can be made accordingly either to maintain or to contribute. The fact that a mother earns a substantial income is irrelevant in interpreting this section. In this case, it is not contended that the father does not have the ability to pay, in fact it is admitted that he has the ability to pay and it is my view that the order should be made as requested. Accordingly, I would allow the appeal and substitute the amount of $1,800 per month for maintenance of the child.

CAREY, J.A.

I entirely agree and desire to add a few observations of my own merely because we are differing from the learned Judge of the Family Court.

The first comment I think I should make is that, in her reasons for judgment, the learned trial judge substituted her knowledge of life in this country for evidence adduced before her. At page 2 of her reasons she made this statement where she was considering various items put forward by the mother as being necessary for the child -

> ".....Certainly he cannot require a pair of shoes or an outfit every month. Judicial notice being taken of the cost of Children's wear, it is my view that the sum of Fifty Dollars ($50.00) per month is adequate."

That approach, in my view, is wholly wrong. A judge cannot take judicial notice of matters of that sort. A judge must have, adduced before him, evidence on which he can act. It is pertinent to observe in this case, that only the mother gave evidence before her and doubtless there was cross-examination and suggestions made but never accepted. The learned judge is obliged to accept that evidence or of course, to reject it and is not entitled to substitute her knowledge for evidence.

The second observation, I think it is essential to make, is that in the course of his address to the judge, Dr. Manderson-Jones suggested that this seems to have been accepted by her, that the father should only be called upon to pay half the expenses for the child, meaning thereby, that the mother should contribute the other half. We think that the learned trial judge in acceding to that view of the law, in my view, fell into error. The language of Section 7 of the Maintenance Act is pari materia with Section 5(2) of the Affiliation Act. Morgan, J has already rehearsed those sections and it is wholly unnecessary once again

to reiterate them. It is enough to say this, that what the judge is called upon to do by those provisions is to enquire into the means and insofar as this case is concerned, of the father. And if the court is satisfied that the father has the ability to pay then of course, it must make an order accordingly. It was, as I understand Dr. Manderson-Jones' argument inequitable to expect, that at this period towards the end of the twentieth century, that a father, although he was able to support his child entirely, should be called upon to do so where perhaps the mother was in receipt of an income greater than his. Speaking for myself, I see nothing inequitable about it. Under the Maintenance Act certainly, it is made the primary responsibility of a father to maintain his child.

So far as contributions go, that only becomes relevant where he is not able to maintain the living child with regard to his means. The most liberal interpretation of Section 7 The Maintenance Act or 5(2) The Affiliation Act cannot lead to the view, in my judgment, that a mother is required to pay half of expenses in circumstances where the father's means are such as allow him to contribute entirely to the support of his offspring. And it is well that fathers should appreciate that it is their primary responsibility to maintain, insofar as finance is concerned, their children. It cannot be forgotten that in this country the mother contributes her presence, care, love and attention and from a nearer distance than the father. With all respect to the pertinacity of Dr. Manderson-Jones, I do not think that his argument has any support either in law or indeed in commonsense. For these reasons therefore, I concur in the view that this appeal must succeed.

GORDON, J.A.(AG.)

I concur in the judgments given by my learned brother and sister. The scheme of the Maintenance and the Affiliation Acts require that a father must maintain his child. Provision is therein made for the judge to determine the amount that is paid according to the means of the father and where the father cannot maintain but can contribute to the maintenance of the child, the law provides for that. There is no doubt that the father in this case can maintain the child. He must maintain that child.

CAREY, J.A.

In the result the appeal is allowed, the order of the court below is set aside and the sum of $10.00 is substituted. The costs of appeal are fixed $500.