

8 Nfld. & P.E.I.R. 194

E. v. H.

Newfoundland Supreme Court, Appeal Division

Noel, J.

Judgment: March 21, 1975

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Earle v. Hillier

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Counsel: **David Day**, for the appellant.

Raymond J. Halley, for the respondent.

Noel, J.:

1 This is an appeal from an affiliation order made 6 December 1974 pursuant to *The Children of Unmarried Parents Act*, 1972, adjudging the respondent to be the father of a child born to the appellant and ordering him to pay \$648.00 in respect of his liability under section 21(1)(a)(b)(e) and \$1200.00 pursuant to section 21 (1)(c)(4).

2 The respondent filed a notice of appeal on 6 March 1975, from the order adjudging him to be the father of the child, upon the grounds that the evidence of the appellant was not corroborated as required by section 22(1) and that there was not sufficient evidence.

3 A party who is aggrieved in respect of an affiliation order may appeal from the decision granting or refusing the order to this Court consisting of one or more judges without a jury. (section 32). The proceedings on appeal are, unless stated to be otherwise by the act, governed by the same rules as apply to appeals from summary convictions or orders made by a stipendiary magistrate. (section 35). A party desiring to appeal must give notice within 14 days of the granting or refusing of the order. (The summary *Jurisdiction Act*, R.S.N. 1970, Ch. 364, section 101.)

4 Counsel for the appellant objected to the hearing of the cross-appeal because notice had not been given within 14 days. The cross-appeal will be dismissed.

5 At the hearing, the adjudication of the appellant's objection was reserved and the cross-appeal was heard. It had no merit and would have been dismissed for that reason if not for the reason stated.

6 The appellant's ground of appeal was that the sum of \$1,200.00 was not an adequate contribution for the maintenance and education of the child and that the order should have included an order for periodic payments until the child reached the age of 17 years as required by section 21(1)(c) instead of for a specified sum of \$1200.00 pursuant to section 21(4).

7 Counsel for the appellant urged that an order for a specified sum under Section 21(4) should be made only when there was good reason for not ordering periodic payments, until the child attained 17 years, pursuant to section 21(1)(c). That submission, with respect, was not based upon a correct interpretation of the act which, by section 21, obliges a magistrate, upon determining paternity, to make an order requiring the father to pay to the director on behalf of the mother, or on behalf of the child, or on behalf of both, as the case may be, the sums to be determined pursuant to section 21(1)(a)(b)(c)(d) and (e).

8 In determining the periodic payment to be made by the father under section 21(1)(c), in respect of the maintenance and education of the child, the magistrate is instructed by section 21(2) to take into consideration the ability of each of the father and the mother to provide for the maintenance and education of the child and the means of the father to provide for the proper subsistence of his wife and legitimate children, if any, and for the education of his legitimate children, if any. In the event that the mother has married, the magistrate may in a proper case, exercise a judicial discretion and cancel an affiliation order pursuant to section 28. In the present case, the appellant married 4 May 1974 and the magistrate should consider the effect of her marriage on her ability to provide for the child.

9 The magistrate, having made the affiliation order referred to in section 21(1) may, in the exercise of a judicial discretion, commute the liability imposed upon the father by the affiliation order pursuant to section 21(1)(c) by making or ordering that liability for the periodic payments shall be satisfied upon payment of a specified sum, not less than \$1,200.00, to be paid by instalments in the manner prescribed by section 21(4). The father is not obliged to pay pursuant to an order made under section 21(4) but, if he does, his liability under the affiliation order relating to section 21(1)(c) is extinguished, if he does not, his liability under the affiliation order in respect of the said periodic payments continues.

10 The uncertainties of life lead to the conclusion that the father of an illegitimate child should be encouraged to make early provision for the maintenance and education of the child, surely, it is in the best interest of the child that this should be done and, to that end, the specified sum referred to in section 21(4) may, in appropriate instances, be fixed considerably less than the sum of the periodic payments fixed pursuant to section 21(1)(c). It is common knowledge that even with the best of intentions, which are sometimes lacking, it is often difficult for a man to continue periodic payments after he has married and taken on the responsibility of a family of his own.

11 The cross-appeal is dismissed and the appeal is allowed with costs and it is ordered that the case be remitted to the magistrate for a determination of the periodic payments to be made by the respondent pursuant to section 21(1)(c) and, if it is considered appropriate, for the determination of the specified sum which the respondent may pay in commutation of the said periodic

payments pursuant to section 21(4) and that the affiliation order be amended by the magistrate accordingly.

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