

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO. 4 OF 1998

BETWEEN:

CLEMENT NOEL

Appellant

and

EVELYN NOEL

Respondent

Before:

|                                   |                         |
|-----------------------------------|-------------------------|
| The Hon. Mr. C.M. Dennis Byron    | Chief Justice [Ag.]     |
| The Hon. Mr. Albert Redhead       | Justice of Appeal       |
| The Hon. Mr. Albert N. J. Matthew | Justice of Appeal [Ag.] |

Appearances:

Mr. L. Osbourne for the Appellant  
Miss J. Kentish for the Respondent

-----  
1998: November 12 and 23.  
-----

JUDGMENT

MATTHEW J.A. [Ag.]

The appellant and respondent are husband and wife who have been estranged. They live apart by virtue of a separation order. There is one child of the family, a little girl called Nevelyn who was born on August 24, 1990. According to the respondent Nevelyn is a normal child with the exception of her feet. She has blunts disease which is an affliction of the bone and which entails surgery to correct her feet. She has undergone medical treatment from 1994 and is still undergoing medical scrutiny. She has been undergoing this medical care in Puerto Rico. She had surgery on January 16, 1998 and the cost of the surgery was **U.S\$8,000.00**. The

medical treatment over the years has been quite expensive. I should state here that the appellant has contributed in the past together with the friends, family and well wishers of the respondent.

On April 4, 1995 the learned District Magistrate Cumberbatch made an order that the appellant pay to the respondent the sum of \$100.00 a week for the maintenance of Nevelyn. On July 16, 1997 the respondent applied to vary the amount so as to increase it pursuant to section 135 of the Magistrate's Code of Procedure. The provision is as follows:-

"Where an Order has been made by a Magistrate under this Part, the person in whose favour or against whom the Order has been made may apply to the court which made the Order for variation of the original Order and such application for variation of the Order shall be made and heard in the same manner as the original application for such an Order with such variations as may be necessary".

After hearing evidence from the Parties the learned Magistrate Frederick Bruce-Lyle decided as follows:-

**"THE APPELLANT IS ADJUDGED** to pay half of all medical bills pertaining to the child named in the suit, and half of all subsequent bills pertaining to the said child as they occur. Bills are to be submitted to the court by the plaintiff/applicant as they come in hand. These will include all doctor's fees, hotel bills and transportation costs. In this regard the application for variation of maintenance order of 4/4/95 succeeds. The court will not order a further increase in the weekly sums paid by the defendant/respondent ordered on 4/4/95".

The above decision was given on April 16, 1998 and eight days later the appellant filed his notice of appeal and giving as his reasons the following:-

- [1] The Magistrate exceeded his jurisdiction;
- [2] The decision was unreasonable and cannot be supported by the evidence;
- [3] The Magistrate's decision was contrary to the Magistrate's Code of Procedure.

Before this Court learned Counsel for the appellant summarised his grounds of appeal by submitting that the learned Magistrate had no authority to make a lump sum order and that his authority was restricted to making weekly sums. Counsel made reference to section 121[6] of Chapter 255 of the Laws of Antigua and Barbuda and to Act No. 3 of 1993 which amended the Magistrate's Code of Procedure.

Learned Counsel for the Respondent reiterated that the application for variation was being made under section 135 of Chapter 255 and submitted rather forcefully that medical expenses were incidental to maintenance and the issue is whether the learned Magistrate had power to make a lump sum award.

The record does not indicate under what section of the Code Magistrate Cumberbatch acted to make the order of \$100.00 a week. If section 135 is being invoked it becomes necessary to be aware of the section since the application for variation of the original order is to be made and heard in the same manner as the original application with such variations as may be necessary.

Since we are here dealing with husband and wife the appropriate section would appear to be section 121 of Chapter 255 which is referred to as section 119 in Act No. 3 of 1993. The particular provision relating to children of the marriage would be paragraph [d] of subsection [4] which as amended would read:-

"[d] that the defendant shall pay to the applicant, or to an officer of the Court or to a third person on behalf of the applicant a weekly sum not exceeding thirty dollars for the maintenance of each of the children of the marriage. The Magistrate may, having regard to the means of both the defendant and the applicant and all other circumstances, order the defendant to pay a weekly sum of more than thirty dollars if he considers such increase just and reasonable".

There was argument before us that section 126 permitted the Magistrate to make a lump sum award for expenses incidental to the birth of the child but section 126 of Chapter 255 as amended by Act No. 3 of

1993 and which is referred to as section 124 is not applicable. It is the follow up to the preceding section which authorises a man alleged to be the father to be summoned before the Magistrate upon the application of a single woman. An examination of the sections will clarify the position and I set them out below:-

**“Father to be summoned on application of mother of child.**

125. Any single woman who may be with child, or who may be delivered of a child, may either before the birth or at any time within twelve months from the birth of such child, or any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance or otherwise assisted to provide for its support, or at any time within the twelve months next after the return to Antigua and Barbuda of the man alleged to be the father of such child, upon proof that he ceased to reside in Antigua and Barbuda within twelve months next after the birth of such child, make application to a Magistrate for a summons to be served on the man alleged by her to be the father of the child; and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child, and such Magistrate shall upon such application being made issue his summons to the person alleged to be the father of such child to appear before a Magistrate and to show cause why he should not be compelled to maintain such child”.

Section 126 of Chapter 255 was renumbered 124 and was repealed and replaced by Act No. 3 of 1993. The new provision is as follows:-

**“Order on father for maintenance education etc. of child**

[1] On the appearance of the person so summoned or on proof that the summons was duly served, the Magistrate shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the Magistrate, he may-

[a] adjudge the man to be the father of such child; and

[b] make an order on him for the payment to the mother of the child or to any person having custody of the child:-

[i] a sum of money weekly not exceeding thirty dollars for the maintenance and education of the child; but he may, having regard to the means of both father and mother and all the circumstances, order a sum of money more than thirty dollars if he considers such increase just and reasonable.

[ii] a further sum of money for the expenses incidental to the birth of such child and of the funeral expenses of the child, provided it has died before the making of the order, and

[iii] such costs as may have been incurred in the obtaining of such order.

[2] Where an Order is made under subsection [1] in respect of the matters therein mentioned, the Magistrate by whom any such order for payment was made or any other Magistrate sitting in his stead may, on application by either the father or the mother of such child and having regard to the means of both father and mother and all other circumstances, order the father to pay a weekly sum of more than thirty dollars, if he considers such increase just and reasonable."

It appears that section 121[6] of Chapter 255 provides another authority for variation of an order such as was made by the learned Magistrate on April 4, 1995. Indeed it goes further than variation and can even discharge the order. The provision is as follows:-

"[6] A Magistrate, acting within the district in which any order under this section has been made, may on the application of the wife or husband, and upon cause being shown upon fresh evidence to the satisfaction of the Magistrate, at any time, alter, vary, or discharge any such order and may upon such application from time

to time increase or diminish the amount of weekly payment ordered to be made:

Provided that the amount payable by any such order shall not be increased beyond the limits set forth in subsection [4]".

I am not able to discern any areas of conflict between this subsection and section 135. However, the provisions of the subsection apply specifically to orders made under section 121 as amended whereas section 135 pertains to orders made under Part V of the Code which comprises sections 121 to 135. I am of the view that the particular provision in the subsection should apply over the more general one in section 135 in the circumstances of this case.

In his reasons for decision the learned Magistrate had regard to all the circumstances and facts outlined in the evidence pertaining to the case and he had regard to section 135 of the Magistrate's Code of Procedure. He no doubt felt that the appellant should make a further contribution owing to the heavy medical expenses that were being incurred on behalf of the child but he decided that he would not order a further increase in the weekly sum which had been ordered on April 4, 1995.

His authority for so doing has been questioned. It is trite law that the Magistrate's Court is a creature of statute and must find its authority within the parameters of its Code. I am of the view that on the facts of this case the learned Magistrate is not empowered to make a lump sum order.

It is also untenable that the Court should make interlocutory orders in respect of the future medical expenses of the child and especially to do so in the absence of suitable machinery in place for the purpose.

Section 124 of the Magistrate's Code of Procedure authorises the Magistrate to make interim orders where on the hearing of any application for a maintenance order the application is adjourned for any period exceeding fourteen days, but the underlying implication in the section is that the Court is required to make final orders.

This matter is being referred to the learned Magistrate, Mr. Frederick Bruce-Lyle, to be dealt with in accordance with the provisions of the Magistrate's Code of Procedure as amended.

Before I end this judgment I should observe that the Parties had been seeking an out of Court settlement even up to the morning of the hearing before the learned Magistrate. It may be that the order he made could form a suitable basis for such an out of Court settlement which the Parties may yet pursue and this in the final analysis could be in the best interests of the infant.

There shall be no order as to costs.

I Concur

**A.N.J. MATTHEW**  
Justice of Appeal [Ag.]

I Concur

**C.M.D BYRON**  
Chief Justice [Ag.]

I Concur

**A.J. REDHEAD**  
Justice of Appeal