

## SOCIAL SECURITY ACTS 1975

## CLAIM FOR SICKNESS BENEFIT

## DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Charles Henry Russell

Local Tribunal: Sheffield

Case No.: 25/2

[ORAL HEARING]

1. This appeal by the claimant succeeds. I am concerned with 2 periods, namely 29 June to 20 September 1975 and 26 February to 1 March 1976. It is not in dispute that the claimant was incapable of work and entitled to sickness benefit for these periods. The question of principle which arises for decision in the appeal is whether he is entitled under section 41(1) of the Social Security Act 1975 to increases in the weekly rate of benefit in respect of 2 grandchildren, Tina and Wayne. For convenience I will refer to them as "the children". A local tribunal held that the claimant is not so entitled. In my judgment he is.

2. I deal with the question as one of principle because the insurance officer awarded an increase of benefit in respect of one of the children for the first of the above periods, although he disallowed it in respect of the other. Exactly the same considerations however apply in relation to both children for that period, and the insurance officer says that he proposes, should I hold that increases are not payable, to review the decision whereby he awarded an increase in respect of one child. It seems to me in these circumstances convenient that I should give a decision in principle, leaving it to the insurance officer to implement it by taking, or refraining from taking, action as may be appropriate.

3. The children are the illegitimate children of the claimant's daughter Mrs G and Mr T. During the above periods they were living with the claimant and his wife. By orders made by a Magistrates' Court under section 4(2) of the Affiliation Proceedings Act 1975 (as amended), Mr T is required to make weekly payments of £2.50 a week for the maintenance and education of each child. These payments are directed to be made to the clerk of the court. Throughout the period with which I am concerned the payments were punctually made to the magistrates' clerk, and in addition Mr T paid 50p a week in discharge of arrears. Copies of the original orders made by the court in 1967 and 1970 were not before me. I had only copies of orders made in February 1972 whereby the amounts payable for each child were increased. According to the insurance officer, and this was not disputed by Mr M Rowland on behalf of the claimant, the original orders provided that Mrs G was the person entitled to the weekly payments. This must have been on the basis that she had custody

of the children (see section 5(1) and (3) of the Affiliation Proceedings Act 1957). Throughout the above periods the claimant's wife regularly collected the above payments from the magistrates' clerk, and I assume in the absence of evidence to the contrary that this was done by unofficial arrangement between Mrs G, the claimant's wife and the clerk. It is I think relevant to add that as the claimant and his wife have de facto custody of their grandchildren, they could have required the orders to be varied so as formally to entitle them to the payments (see section 5(3) of the Act).

4. For the claimant to be entitled to increases in respect of the children he must show (see section 41(1) of the Social Security Act 1975) that they were included in his family. Whether they were so included falls to be determined under the provisions of the Family Allowances Act 1965 (see the meanings attributed to "child" and "child of family" in Schedule 20 to the 1975 Act). I set out in an appendix the relevant provisions of the Family Allowances Act 1965, as amended. Their effect in this case, so far as not in dispute, is as follows:-

(a) The children cannot be included in Mr T's family under section 3(1)(b). They cannot be treated as his issue because they are illegitimate (section 17(5)). And although he was contributing £5.50 a week to the cost of providing for them, he was not maintaining them. For the amount of his weekly contributions was less than those of the grandparents (see paragraph 1(1)(a) of the Schedule).

(b) The children can be included in Mrs G's family under section 3(1)(c) as her issue provided that she was contributing to the cost of providing for each of them at the rate of at least £1.50 a week (see section 3(2)).

(c) The children cannot be included under section 3(1)(a) in the claimant's family as his issue (see section 19(1)).

(d) Subject as below, the children can be included under section 3(1)(a) in the family of the claimant and his wife on the ground that they were maintaining them (paragraphs 1(1)(a) and 1(2) of the Schedule).

(e) If the children can be included in Mrs G's family as her issue, they cannot be treated as included in the claimant's family as children maintained by him (paragraph 2 of the Schedule).

5. It follows that the appeal turns on a narrow point, namely whether Mrs G was contributing to the cost of providing for each of the children at the rate of at least £1.50 a week. If she was, they cannot be included in the claimant's family, in which case he is not entitled to increases of benefit in respect of them.

6. Mr J S Finney on behalf of the insurance officer submitted that in the periods with which I am concerned Mrs G was contributing a total of £5.50 a week to the cost of providing for the children. He said that she was entitled to the weekly payments made by Mr T, and that by passing them on to her mother she was contributing the

amount thereof to the cost of providing for the children.

Mr M Rowland on behalf of the claimant submitted that Mrs G merely acted as a conduit pipe whereby Mr T's weekly payments were transmitted to the persons having de facto custody of the children, namely the claimant and his wife. Accordingly Mrs G was not making payments at her own expense in terms of section 18(2)(b), with the result that the payments could not be treated as contributions by her to the cost of the children's provision.

7. It seems to me that the appeal turns on the construction and effect of section 18. On my understanding of it its effect is as follows:-

Where a person makes something in kind available for a child's provision which does not involve a money payment by him, then if that thing is provided out of property which belongs to him beneficially, the amount of his contribution is to be taken to be an amount equal to the value of the thing provided. An example of a contribution of this kind is where, as in this case, a person lodges a child in a house which he beneficially owns.

Where a person pays money in order to make food, clothing, education etc. available to a child, the effect of section 18 (see subsection 2(b)) is that the amount so paid is treated as a contribution by that person to the extent, but only to the extent, that it is paid at his own expense.

8. In my judgment Mrs G's weekly payments of £5.50 to her parents were not at her own expense. If A pays money to B to be used for a particular purpose, and B uses it for that purpose, it seems to me difficult, on the ordinary meaning of words, to say that B's payment is at his own expense. And it does not seem to me to affect the matter that B. is not accountable either at law or in equity for the payment received from A. The position in this case, as is apparent from the scheme of the Affiliation Proceedings Act 1957 and the terms of the orders, is that Mrs G's payments from Mr T served the purpose of enabling her to discharge her duty to maintain the children. Having parted with custody, she discharged that duty by passing the payments to the persons who had assumed it. She did not, it is true, receive the payments as trustee for the children, nor was she Mr T's agent or contractually bound to him as to their disposal. But the fact remains that she discharged her duty to maintain the children not at her own expense but at Mr T's.

9. There is a further consideration. The claimant and his wife, Mrs G and Mr T were all concerned in providing for the children's maintenance. The claimant and his wife lodged the children in their house and spent money in paying for food, clothing etc. Towards this they received £5.50 a week. Mr Finney accepted that prima facie the children could be included in the claimant's family under section 3(1)(a) on the basis that he and his wife were maintaining them. In the light of paragraph 1(1)(a) and paragraph 2 of the Schedule this means that he accepted that the claimant and his wife were contributing to the cost of providing for the children, and that their contributions were greater than those of any other person. Mr Finney was constrained to agree, that in determining whether the claimant and his wife contributed each week more than the £5.50 which they received, you have to deduct that sum from the money payments made by them. This seems to me plainly right, for otherwise the operation of paragraph 1(1)(a) of the Schedule is

frustrated, and it becomes unworkable. The paragraph contemplates that when there are several contributors to the cost of providing for a child, the aggregate of their contributions is equal to the total cost of provision. Section 18(2)(b) gives effect to this conception by providing that you disregard a contribution made by a person at another's expense.

10. These considerations seem to me to apply to Mr T's payments of £5.50 a week which Mrs G passed on to the claimant and his wife. Mrs G and Mr T cannot both be treated as contributors.

11. In support of his submission that Mrs G should be treated as contributing £5.50 a week Mr Finney referred to two referees' decisions. The referees were responsible before 1959 for adjudicating on questions relating to family allowances. He also referred to decision R(F) 2/62 in which a Commissioner expressed agreement with the referees' decisions. The Commissioner's observations however were obiter and not necessary to his decision.

12. Both referees' decisions support the insurance officer's submission and were based on similar reasoning. I need refer to one only of them (No. 54). A husband and wife entered into a separation deed whereby it was agreed that the wife should have custody and control of the children of the marriage, and that the husband should pay her 10s a week for the benefit of each child. The referee accepted that the wife spent 10s a week on providing for each child, and held that for the purposes of what is now section 18(2)(b) that constituted money paid at her own expense. In reaching this conclusion he professed to be applying judgments of the Court of Appeal in Stevens v Tirard [1940] 1 K.B. 204. Stevens v Tirard raised an issue under the Income Tax Acts. A husband was ordered by the divorce court to make annual payments to his wife for the maintenance and education of the children of the marriage. He subsequently claimed a tax allowance in respect of each child. His claim was disallowed by the taxing authority on the ground that the effect of the order was to give each child a beneficial title to the amount of the annual payments made for his benefit. The court rejected this view. Clauson L.J. at page 213 put it thus: "As a matter of construction of this order it appears to me abundantly clear that the scheme ... is not at all to create an income to which the infant is in any way entitled. The scheme of the order is to increase the income of the mother so as to enable her to discharge the duty of maintenance laid upon her by the Court in view of her having the infant's custody".

13. I accept that the order in the present case has the same effect as the order in Stevens v Tirard. The only distinction of fact is that Mrs G has parted with the custody of her children, with the result that if she failed to transmit Mr T's payments to her parents to be used for the children's maintenance, they or Mr T could apply for the orders to be varied.

14. The only inference which I draw from Stevens v Tirard as regards the present case is that as Mr T's payments are not impressed with a trust for the children in Mrs G's hands, she is

herself paying £5.50 a week to the cost of providing for them. That however is not the question for my decision. I have to decide whether her payments can be treated as contributions made by her for the purposes of the Family Allowances Act, and that depends on whether they were made at her own expense. In my judgment they were not.

15. My decision is that the claimant is entitled to increases in the rate of sickness benefit in respect of his 2 grandchildren Tina and Wayne for the inclusive periods 29 June to 20 September 1975 and 26 February to 1 March 1976.

(Signed) Hilary Magnus  
Commissioner

Date: 11 February 1977

Commissioner's File: C.S. 396/1976  
C.I.O. File: I.O. 1424/S/76  
Regional File: Y & H (Unregistered Papers)