

SOCIAL SECURITY ACTS 1975 TO 1977

CLAIM FOR GUARDIAN'S ALLOWANCE

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

File in Commission  
Division  
number

CW 3/78

[HEARING]

1. My decision is that guardian's allowance is payable to the claimant from and including 25 January 1977. The payments and deductions already made are required to be taken into account.
2. The claimant gave birth to a boy on 8 August 1965, who was named M. She was then a single person aged 15 years and on 9 February 1967 her parents jointly adopted M (a certified copy of the relevant entry in the records of The General Register Office is included in the papers). The claimant's mother died on 28 December 1975 and her father died on 21 January 1977. On his death, the claimant took M to live with her. There is no dispute that he has lived with her and has been maintained by her ever since. By this time the claimant had married and there are 2 children of the marriage, who are now aged 6 years and 4 years. Thus, as from 21 January 1977 the household has consisted of the claimant, her husband and 3 children. On 6 March 1977 she claimed guardian's allowance in respect of M. However, the insurance officer decided that the allowance was not payable to her "because the claimant is the child's parent". The claimant's husband then appealed on her behalf to the local tribunal. She did not attend and was not represented at the hearing which took place on 12 December 1977. The decision of the tribunal was "The appeal is allowed". The insurance officer then appealed to the Commissioner. The appeal was dealt with by me on 19 April 1978. Mrs. M. Morgan, a member of the solicitor's office of the Department of Health and Social Security, appeared for the insurance officer, and the claimant, who attended, was represented by Mrs. P.M. Jenkins.
3. In her further observations to the Commissioner dated 16 March 1978, the claimant stated "I was not notified of the Local Tribunal hearing on 12/12/77, so neither I nor any representative of mine could be present". It would appear that for some unknown reason the appropriate notification sent to the claimant in relation to the hearing before the local tribunal was not received by her. The local tribunal were unaware that this was so and proceeded in good faith to deal with the appeal. I am satisfied that, in the circumstances, it is within my discretion to either remit the case to be dealt with afresh by a differently constituted local tribunal or to proceed to deal with the issues which arise forthwith. Mrs. Jenkins and Mrs. Morgan invited me to follow the latter course. I have come to the conclusion that in all the circumstances it is appropriate that I should follow this course.

4. There was no dispute that the following statutory provisions and regulations are of relevance: Section 38 of the Social Security Act 1975, regulation 2 of the Social Security (Guardian's Allowances) Regulations 1975 [S.I. 1975 No. 515]; section 8 of the Children Act 1975 together with paragraphs 3 and 4 of Schedule 1 to the Act (see also section 13(1) of the Adoption Act 1958). During the course of the submissions made to me, particular reference was made by both Mrs. Morgan and Mrs. Jenkins to the provisions which I have set out in the appendix to my decision.

5. Section 38(6) of the Social Security Act 1975 provides that "No person shall be entitled to a guardian's allowance in respect of a child of which he or she is the parent". Mrs. Morgan's contention was that the claimant is the parent of M and, accordingly, is not entitled to a guardian's allowance. She submitted that, as the natural parent of M, the claimant continued to be the parent of M for the purposes of section 38(6) despite his adoption, and that the only way she could cease to be so regarded was by a specific provision to the effect that a person in her position was not to be so regarded. There was no such provision in the Social Security Act 1975 or any other Act or relevant regulation. She accepted that the effect of the adoption was to deprive the claimant of all parental rights and duties as far as M was concerned and to vest them in the adopters. Nevertheless, she remained the parent of M for the purposes of section 38(6). When invited to indicate as to what was the position of the adopters in this respect during their lifetime, she initially contended that as from the date of the adoption the adopters also became the parents of M for the purposes of section 38(6). However, she subsequently maintained that this was not so and argued that the reference to parents in section 38(6) referred solely to natural parents. She submitted that while the statutory provisions and regulations relating to adoption conferred a particular status upon the child concerned, they did not have the effect of altering the position of the natural parent of the child. She remained the parent, albeit a parent with none of the rights and duties of a parent. She maintained that, by reason of the regulation made by virtue of the powers conferred by section 38(4), namely regulation 2 of the Social Security (Guardian's Allowances) Regulations 1975, the reference to "parents" in section 38(2)(a) was a reference, as far as the present case was concerned, to the adopters of M and not to the claimant. She contended that this was so solely by reason of the regulation modifying subsection (2), that the power to make regulations in this context related solely to subsections 2 and 3 and that the position, as far as the provision of section 38(6) was concerned, remained unaltered. Reference was made to Decision R(G)12/55, which was a decision of a tribunal of Commissioners, and Mrs. Morgan directed my attention, in particular, to the contents of paragraphs 13 and 16.

6. Brett L J once spoke of "the shifting meaning of the word "Parent"" (see *Ralph v Carrick* 48 L J Ch 809). Thus, for example, for the purposes of a particular statute, it has been provided that "Parent" includes "any person at law liable to maintain such child or entitled to his custody", and in another, that it includes "father and mother, and grandfather and grandmother, and stepfather and stepmother". I note that for the purposes of the Children Act 1948 (see section 59) and the Social Work (Scotland) Act 1968 (see section 94) "parent" "in relation to a child adopted in pursuance of any enactment, means

the person or persons by whom he was adopted, to the exclusion of his natural parents;". I also note that it is provided in section 17 of the Children Act 1958 that "In this Part of this Act the following expressions have the meanings hereby respectively assigned to them, that is to say, - ..... "parent", in relation to a child adopted in pursuance of any enactment (including any enactment of the Parliament of Northern Ireland), means the person or one of the persons by whom he was adopted;".

7. Mrs. Jenkins handed in a written submission. She also urged me not to lose sight of the fact that section 38 is concerned with the circumstances in which guardian's allowance is payable in respect of a child. She contended that in this context the status of the child concerned was of relevance and maintained that, for the purposes of the section including subsection 6, reference to "parent" was a reference to the person in whom the rights and duties of a parent were vested in respect of that child. She submitted that, by reason of the Children Act 1975, M was no longer in law the child of the claimant and that, therefore, the claimant was no longer in law the parent of M. She maintained that in the absence of a definition of "parent" in the Social Security Act 1975, the meaning to be attached to the word had to be determined by reference to the context in which it was used. The context was such, she contended, as to exclude his natural parent despite the fact that the Act did not include a specific reference to "the exclusion of his natural parents".

8. I much appreciate the assistance I received from Mrs. Morgan and Mrs. Jenkins in relation to a question which I consider is not free from difficulties. Having taken into account the background, together with the relevant statutory provisions, I have come to the conclusion that the claimant should not be regarded as the parent of M for the purposes of section 38(6) of the Social Security Act 1975. I found the arguments advanced by Mrs. Jenkins to be more persuasive than those of Mrs. Morgan and, in general, I accept the submissions made by the former. They appear to me to be supported by the relevant statutory provisions. I refer, in particular, to sections 8(1) and 8(3)(a)(i) of the Children Act 1975, together with paragraphs 3(1)(a), 3(2) and 3(5) of Schedule 1 to the Act. Paragraph 3(5) provides, in effect, that what is laid down in paragraph 3 "applies for the construction of enactments or instruments passed or made before the adoption or later, and so applies subject to any contrary indication". The proviso to paragraph 4 is also of relevance. I am unable to accept the argument that, although M ceased to be the child of the claimant for all legal purposes, the claimant remained the parent of M for the purposes of determining entitlement to guardian's allowance. I appreciate that it is difficult, if not impossible, to reconcile the conclusion to which I have come with that arrived at in Decision R(G)12/55. This is why I only arrived at my conclusion with very considerable diffidence. There is no dispute, and I am satisfied, that in view of the conclusion to which I have come, my decision should be that set out in paragraph 1.

9. The appeal of the insurance officer is disallowed.

Commissioner's File: C.W.G.3/78  
C.I.O. File: I.O.7002/G/78  
Regional File: Wales: Unregistered  
Papers

(Signed) E. Roderic Bowen  
Commissioner  
Date: 2 May 1978

APPENDIX

Social Security Act 1975

"38.- (1) Subject to the provisions of this Act (and in particular to those of section 43 imposing limitations on payment of benefit in respect of children), a person shall be entitled to a guardian's allowance at the weekly rate specified in relation thereto in Schedule 4, Part III, paragraph 4, in respect of a child where he is entitled to child benefit in respect of that child and the circumstances are any of those specified in subsection (2) below.

(2) The circumstances referred to in subsection (1) are -

(a) that both of the child's parents are dead;

(3) .....

(4) Regulations -

(a) may modify subsection (2) or (3) above in relation to cases in which a child has been adopted or is illegitimate, or the marriage of a child's parents has been terminated by divorce;"

The Social Security (Guardian's Allowances) Regulations 1975 [SI 1975 No.515]

"2. Where a child has been adopted in pursuance of an Order made in the United Kingdom, the Channel Islands or the Isle of Man or by an overseas adoption within the meaning of section 4 of the Adoption Act 1968(a), section 38(2) of the Act (circumstances in which guardian's allowance may be payable) shall be modified so as to have effect:

(a) in the case of a child adopted by two spouses jointly, as if the references to a child's parents were references to those spouses;"

Children Act 1975

"8.- (1) An adoption order is an order vesting the parental rights and duties relating to a child in the adopters, made on their application by an authorised court.

(2) .....

(3) The making of the order operates to extinguish -

(a) any parental right or duty relating to the child which -

(i) is vested in a person (not being one of the adopters) who was the parent or guardian of the child immediately before the making of the order;"

SCHEDULE 1

"ADOPTION ORDERS

Status conferred by adoption

3.-(1) An adopted child shall be treated in law -

- (a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized);
- (b) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

(2) An adopted child shall be treated in law as if he were not the child of any person other than the adopters or adopter.

(3) It is hereby declared that this paragraph prevents an adopted child from being illegitimate.

(4) This paragraph has effect -

- (a) in the case of an adoption before 1st January 1976, from that date, and
- (b) in the case of any other adoption, from the date of the adoption.

(5) Subject to the provisions of this Part, this paragraph applies for the construction of enactments or instruments passed or made before the adoption or later, and so applies subject to any contrary indication.

(6) Subject to the provisions of this Part, this paragraph has effect as respects things done, or events occurring, after the adoption, or after 31st December 1975, whichever is the later.

Vocabulary

4. A relationship existing by virtue of paragraph 3 may be referred to as an adoptive relationship, and -

- (a) a male adopter may be referred to as the adoptive father;
- (b) a female adopter may be referred to as the adoptive mother;
- (c) any other relative of any degree under an adoptive relationship may be referred to as an adoptive relative of that degree,

but this paragraph does not prevent the term "parent", or any other term not qualified by the word "adoptive", being treated as including an adoptive relative".