

JGM/JCB

CHILD BENEFIT ACT 1975

CLAIM FOR CHILD BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.F. 4./81

1. My decision is that the increase of child benefit now known as one parent benefit is payable to the claimant from 8 December 1980.

2. The question in issue in this case is the date from which the claimant is to be regarded, in terms of regulation 2(2)(b) of the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976 [S.I. 1976 No 1267] as amended, as not residing with her spouse. Under that regulation it is a condition of title to the increase that the claimant should either have no spouse or not be residing with her spouse. A decree nisi of divorce in respect of her marriage was pronounced on 4 December 1980, but she says that her husband was still holding up the decree absolute in the following March. It is clear, of course, that once the decree was made absolute the claimant would, unless she remarried, satisfy the condition in regulation 2(2)(b) inasmuch as she would have no spouse, but prior to that date she can satisfy the condition only if she can show that she was not residing with her husband, a question which cannot be determined without reference to regulation 11 of the Child Benefit (General) Regulations 1976 [S.I. 1976 No 965], paragraph (1) of which provides as follows:-

"Where a person is married, he and his spouse shall be treated for the purposes of the [Child Benefit Act 1975] as residing together during any period of absence the one from the other falling before the date in that period of absence on which -

- (a) they are separated under an order of a court of competent jurisdiction or deed of separation; or
- (b) they have been absent the one from the other for at least 91 consecutive days,

and, for any part of that period of absence from one another from the date on which they are separated as specified in sub-paragraph (a) or have already been absent from one another as specified in sub-paragraph (b), the spouses shall be treated for the purposes of the Act as not residing together where such absence is likely to be permanent but as residing together where such absence is not likely to be permanent."

3. The claimant and her husband were living under the same roof at the time of the decree nisi, but from the date of that decree (but not, as I understand from the evidence, from any earlier date) they were so living in separate households. The husband moved away on 9 January 1981. The local insurance officer in his submission to the local tribunal expressed the view that the first week at the beginning of which the claimant would not be regarded as residing with her husband, was the week beginning 9 March 1981 the Monday following the expiration of 91 days from the date of the decree nisi (4 December 1980). But he refused to award benefit on the **claim from the earlier date. It is** not in this case disputed that the absence from one another of the claimant and her husband has at all times been likely to be permanent, but it was the view of the insurance officer that the condition in sub-paragraph (a) of regulation 11(1) of being separated under a deed of separation or an order of a court was not at that time satisfied and that condition (b) was not satisfied until the expiry of the 91 days after the absence had commenced. The local tribunal allowed an appeal against this decision on the ground that the decree nisi of divorce was an order of a court of competent jurisdiction under which the claimant and her husband were separated. The insurance officer with the leave of the chairman of the local tribunal appeals to the Commissioner.

4. I consider that the local tribunal were right. Regulation 11 makes reference to two concepts bearing on the question whether a husband and wife are to be treated as residing together or not, viz the concept of "absence the one from the other" and that of being "separated", the latter concept being expressly restricted in the context of the regulation to that of being separated by order of the court or deed of separation. I am not sure whether (apart from the express restriction) there is any difference between the two concepts. In matrimonial law it has been held that the concept of spouses living "apart" imports something more than mere physical separation, viz that one party to the marriage at least has ceased to recognise the marriage as subsisting (see Santos v Santos [1972] F 247). Further spouses may be regarded as living apart notwithstanding that they are living under the same roof if they are not living as one household, a point on which there has been some judicial controversy which ought now I think to be regarded as resolved in favour of the view that I have expressed (see Naylor v Naylor [1962] P 253 and Santos v Santos supra). It follows in my judgment that the lesser conditions of "absence" and "separation" can exist when the parties are under one roof but not living as one household. For this reason I consider that the insurance officer's suggestion that the claimant ceased to be regarded as residing with her husband under sub-paragraph (b) from 9 March 1981 (the Monday following the expiration of 91 days from the date the claimant and her husband ceased to live in one household) was correct.

5. But the increase will be payable from an earlier date under subparagraph (a) if the spouses are separated "under an order of a court of competent jurisdiction or deed of separation". Similar words to these are to be found in section 42(1)(a) of the Income and Corporation Taxes Act 1970, but, probably because there is no 91-day waiting period in cases of permanent separation, otherwise than under a court order or separation deed it has not it seems been necessary to have the words interpreted by the Courts.

6. It is a feature of matrimonial separations that they are normally brought about by act of the parties, and that the effect of separation agreements and court orders is rather to give some formal recognition to what has already in fact taken place than to bring about separation. For instance an agreement to separate in the future is void as contrary to the policy of the law (see Fender v Mildmay [1938] AC 1 at page 44). Parties to a marriage that has already broken down have for many years now been permitted to agree upon the terms of separation and such an agreement was at the time that decrees of restitution of conjugal rights could be obtained an answer to a petition for such a decree (see Fender v Mildmay supra at page 43). Parties to such an agreement, were in terms of regulation 11(1)(a), separated under it even though the separation was not brought about by the agreement, which to be effective under the regulation must be given the formality of being incorporated in a deed.

7. The same holds for orders of the court. A decree of judicial separation is unquestionably an order of a court "under" which in terms of regulation 11(1)(a) the parties would be treated as separated though in normal cases the separation would precede the decree and not be brought about by it. The same would apply to an order of a magistrates court under the ~~now~~ repealed section 2(1)(a) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 to the effect that one spouse is no longer required to cohabit with the other (which is stated by the section itself to have effect in all respects as a decree of judicial separation). In my judgment the same applies to a decree nisi of divorce which was described by Lord Atkin in Fender v Mildmay supra at page 21 (see also pages 16-17) as having for practical purposes the effect of a separation order. I express no opinion of the effect of an order under the Domestic Proceedings and Magistrates' Courts Act 1978 which replaces the 1960 Act above referred to. I hold accordingly that parties to a marriage who are separated and whose separation has been recognised by the courts to the extent that a valid decree nisi of divorce has been pronounced, a decree which gives formal recognition of the fact that the great majority of the conjugal obligations of the parties are at an end, are in terms of regulation 11(1)(a) separated "under" an order of a court of competent jurisdiction. The insurance officer's appeal is dismissed.

(Signed) J G Monroe
Commissioner

Date: 28 September 1981

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Region: Child Benefit Centre, Washington