

NATIONAL INSURANCE ACTS 1965 TO 1974

CLAIM FOR GUARDIAN'S ALLOWANCE

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Decision C.G. 1/75

[ORAL HEARING]

1. My decision is that the claimant is not entitled to guardian's allowance.
2. On 7th October 1973 the claimant claimed guardian's allowance in respect of a boy, Billy, who was born on 11th January 1966. The claimant and her husband, Mr. L., took Billy into their home on 8th November 1972 and have since cared for him as if he were their own child. He is a son of Mr. L.'s late sister, Mrs. S., who unhappily died on 3rd November 1972.
3. The local tribunal have rejected the claimant's claim and the claimant has therefore appealed to the Commissioner. I have heard her appeal at an oral hearing at which both she and Mr. L. attended and gave evidence, and she was represented by Mr. K. Johnson, an officer of her association.
4. The claimant and Mr. L. live in Essex but Mr. L. came from Aberdeen where one or more of his brothers and a sister still live. When the events material to this case began, the claimant and Mr. L. had been out of touch with Mrs. S. for some years. They had never met Mr. S., who was her second husband, but knew that he was a trawler-man by occupation.
5. In October 1972 the claimant and her husband unexpectedly received from Mrs. S. a letter dated the 19th of that month, of which the original was handed to me by Mr. Johnson at the hearing. Mrs. S. wrote the letter from a hospital in Bradford but headed it with her home address, also in Bradford, and after giving some news of herself asked the claimant and Mr. L. to write to her at her home address. The letter contains a reference to her husband in a sentence which reads: "If they get my legs healed before Xmas Denny is going to let me up to Aberdeen for a week or two". The next news that either the claimant or Mr. L. had of Mrs. S. came from one of Mr. L.'s brothers who lives in Aberdeen. He telephoned Mr. L. at his place of work to tell him that Mrs. S. had died.
6. By arrangement with his brother, Mr. L. travelled up to Leeds on 7th November 1972, where he met the brother and other relatives from Aberdeen. The claimant did not go with him. On the next day Mr. L.

Decision C.G. 1/75

and his relatives attended the funeral service, as also did Mr. S. whom Mr. L. then met for the first time. After the service the mourners accompanied Mr. S. back to his home at the address given by Mrs. S. in her letter of the 19th October 1972. There are seven children of the marriage of Mr and Mrs. S., of whom the youngest was then only six months old, and the members of Mr. L.'s family discussed what should be done to take care of them. Each married couple offered to take one or two of the children, Mr. L. offering to take Billy. He told me at the hearing that Mr. S. seemed please to accept his offer, and shortly afterwards Mr. L. left taking Billy with him. He had to catch a train to London, and was therefore the first to leave.

7. What happened at that meeting after Mr. L. left is related in a letter dated 29th July 1974 written from Aberdeen by Mr. L.'s sister. She has described in that letter how Mr. S. had a change of heart and refused to part with any of the children, even the baby. Accordingly, all the children other than Billy were left with him.

8. In the same letter Mr. L.'s sister has given such later information concerning Mr. S. as she has. She tried to keep in touch with him, but after a time he stopped writing to her. Then he turned up in Aberdeen "with no money and nowhere to stay and still holding on to the children". Subsequently, Mr. L.'s sister (who has not given dates for the events which she has described) again lost touch with Mr. S. and his children, but shortly before she wrote her letter had received a visit from the children and had learned from them that they were in a Home in Dumbartonshire.

9. The claimant and Mr. L. have only heard once from Mr. S. since they took Billy into their home. This was in January 1973, when Mr. S. sent to Billy a birthday card and a £1 note. They have since made some enquiries concerning his whereabouts which it is not necessary for me to describe. They have not, however, asked the Department of Health and Social Security to forward a letter to him; this the Department would do if possible, although they will not reveal the address of the person with whom it is intended to communicate. Nor have they got in touch with the National Union of Seamen or made enquiries in Hull which Mr. S. told Mr. L. was the port from which he usually worked. Moreover, so far as I know, no enquiry has been made of the Home where Mr. S.'s children are.

10. The law which I have to apply is contained in section 29(1) and (5) of the National Insurance Act 1965 ("the Act") and regulations made under section 29(2) of the Act. So far as material section 29(1) and (5) provide as follows:-

"(1) Subject to the provisions of this Act ... a person shall be entitled to a guardian's allowance ... in respect of any child who is for the time being a child of his family if -

(a) the parents of the child are dead; and

(b) one at least of the parents was an insured person."

"(5) In the case of a child who is a child of the family of a man and his wife, the wife only shall be entitled to a guardian's allowance ..."

11. There is no controversy on two points. First, Billy has at all material times been, and continues to be, a child of the family of Mr. L. and the claimant within the meaning of the quoted provisions. Secondly, when last encountered Mr. S. was, and if still living still is, an insured person: see section 1(1)(b) of the Act.

12. It is also clear that when the claimant and Mr. L. took Billy into their home Mr. S. was alive, and there is no evidence that he has since died. Consequently, it cannot be affirmed of Billy that he is a child whose parents are dead. All that can be affirmed with certainty is that he is a child one of whose parents is dead.

13. It follows that the condition for entitlement to guardian's allowance contained in section 29(1)(a) of the Act is not satisfied, and if no other statutory provision is available the claimant's claim must fail. However, that condition is modified by regulation 5(1) of the National Insurance (Guardian's Allowances) Regulations 1973 [S.I. 1973 No 1078], which are the relevant regulations made under section 29(2) of the Act. Regulation 5(1) provides as follows:-

"Subject as aforesaid, where one of the child's parents is dead and the person claiming the guardian's allowance shows that he was at the date of the death unaware of, and has failed after all reasonable efforts to discover, the whereabouts of the other parent, there shall be substituted for the said condition that the parents of the child are dead the condition that one of the parents is dead."

14. The claimant seeks to take advantage of that regulation. As I understand the argument advanced on her behalf, it is contended that the claimant has never known the whereabouts of Mr. S. It is said that her husband, Mr. L., ascertained the whereabouts of Mr. S. when he met him at Bradford on the day of the funeral, but Mr. L.'s knowledge is not her knowledge. It is further contended that the claimant has made all reasonable efforts to ascertain the whereabouts of Mr. S.

15. The local tribunal accepted the first part of that argument, but not the second. Their findings read as follows:-

"The knowledge of the claimant's husband gained when he attended the funeral is not the knowledge of the claimant. The claimant did not know the whereabouts of the father. Unfortunately there is no evidence that the claimant has made all reasonable efforts to discover the whereabouts of the other parent."

The local tribunal therefore dismissed the claimant's appeal to them. However, they added in the grounds of their decision: "No doubt if the claimant makes efforts to discover the whereabouts of Mr. [S.] she could again apply for the allowance". While I agree with the local tribunal that the claimant has not made all reasonable efforts to discover the whereabouts of Mr. S., I disagree with their last comment. My reasons are stated below.

16. With respect to those concerned, I do not consider that the approach to the case involved in the argument advanced on the claimant's behalf, and also in the local tribunal's findings, is correct. Whether or not the knowledge of Mr. L. can be imputed to the claimant is irrelevant. When Mr. L. returned home with Billy on the 8th November 1972 he told the claimant of his experiences in Bradford,

Decision C.G. 1/75

including his encounter with Mr. S., and, whatever may have been the claimant's previous state of knowledge, she then became aware of the whereabouts of Mr. S. by means of information supplied to her from a reliable source. She learned that Mr. S. was alive, resided in a certain house in Bradford and was actually there on that date. When the regulation refers to a person being "unaware" of the whereabouts of another person it does not mean or imply that to be aware of such whereabouts the former must have the evidence of his own eyes, or must receive a communication direct from the other person. In my judgment, he can be "aware" of the whereabouts of the other person from reliable information supplied by a third person.

17. In the reported Tribunal Decision R(G) 10/52, the expression "at the death" was construed to refer to "the moment of dying". The Tribunal were not then considering the precursor of regulation 5(1), but it may well be that a similarly strict interpretation has to be given to the phrase "at the date of the death" where it occurs in that regulation. I do not have to decide this question, and I mention it only because, in view of such interpretation and the evidence presented to the local tribunal, it was open to that tribunal to hold that, within the meaning of regulation 5(1), at the date of the death of Mrs. S. the claimant was unaware of the whereabouts of Mr. S. The argument that the claimant was so unaware has been weakened by Mrs. S.'s letter dated 19th October 1972 (see paragraph 5 above) which was not in evidence before the local tribunal. If I may say so, I think it creditable on the part of the claimant and of Mr. Johnson that the letter was disclosed at the hearing of this appeal. However, again I do not need to decide the question, and shall assume in the claimant's favour that at the date of the death of Mrs. S. the claimant was unaware of the whereabouts of Mr. S.

18. On the other hand, in my view it is clear that the claimant became aware of the whereabouts of Mr. S., if not previously aware of them, a few days after the date of the death of Mrs. S.; that is to say on 8th November 1972. In my judgment, once that happened regulation 5(1) could no longer assist her because, in the terms of the regulation, she had not failed to discover the whereabouts of Mr. S. The regulation is not designed to operate in relation to the subsequent disappearance of a second parent missing at the death of the first parent, once his whereabouts have been discovered. In my view, the claimant cannot now succeed in a claim to guardian's allowance in respect of Billy without proving the death of Mr. S. or, if and when the time comes, relying on the legal presumption of death after a person has not been heard of for 7 years.

19. Some explanation of the law is owed to the claimant and Mr. L. who have behaved so generously to Billy. In my view, the first principle is that the guardian's allowance is intended to benefit somebody who takes into his family an orphan, that is to say a child both of whose parents are dead: see the Tribunal Decision R(G) 10/52, paragraph 8. This principle is modified by the relevant regulations in relation to adopted children, illegitimate children and the children of dissolved marriages; and regulation 5(1) also modifies it so as to give assistance to a claimant in a case where one parent is known to be dead but it is not known whether the other is alive or dead. The purpose of this regulation is to avoid the difficulty confronting a claimant in that situation of producing evidence to prove the death of the second parent. He is allowed to substantiate his claim

Decision C.G. 1/75

without positive proof of such death: see the reported Tribunal Decision R(G) 11/52, paragraphs 8 and 9, and the reported Commissioner's Decision R(G) 3/68, paragraph 14. The reason for this privilege disappears, however, once it is established that the second parent is alive. In that case, it becomes known that the child in the case is not an orphan; and accordingly guardian's allowance is not payable in respect of him. If it is to be payable, then the death of the second parent must be proved in the ordinary way, just as the death of the first parent had to be proved. This is the position which has been reached in the present case.

20. My conclusion is, therefore, the same as that of the local tribunal although based on different reasons. Accordingly, I must dismiss this appeal, and give the decision set out in paragraph 1.

(Signed) R. S. Lazarus
Commissioner

Date: 4th March 1975

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