

CG 3/1981

MJG/BOS

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR GUARDIANS ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.G. 2/81

1. My decision is as follows:

- (i) The decisions of the insurance officer awarding guardian's allowance to the claimant in respect of her granddaughter Paula for the inclusive period from 4 July 1978 to 10 March 1980 were properly reviewed because they were given in ignorance of a material fact, namely that a person (J.F.) other than P.G. the husband of Paula's mother was alleged to be Paula's father: Social Security Act 1975 section 104(1)(a);
- (ii) However, the said decisions of the insurance officer, though properly reviewed, should not have been revised because
 - (a) I find as a fact that P.G., the husband of Paula's mother, was Paula's father and J.F. was not her father;
 - (b) Paula's mother died on 21 January 1978 and her former husband P.G. was divorced from the mother before the mother's death and
 - (c) Paula was not in the custody of or being maintained by her father P.G. and there was no order of a court granting custody of Paula to the father or imposing any liability on him for Paula's maintenance.

Consequently guardian's allowance is payable to the claimant in respect of Paula from and including 4 July 1978 and for so long as conditions for receipt by the claimant of the allowance are satisfied: Social Security Act 1975 section 38(2) as modified by the Social Security (Guardian's Allowances) Regulations 1975, S.I. 1975 No 515, regulation 4(1).

Decision C.G. 2/81

2. On 30 January 1979 the claimant claimed guardian's allowance for her 2 female grandchildren whom I will refer to by their Christian names Paula and Joanne, stating that both children had been living with the claimant since 1 June 1978. I do not know why guardian's allowance was originally awarded only from 4 July 1978 and not 1 June 1978 but no doubt the local insurance officer can look into that, if necessary. Only the claim for the child Paula is before me on this appeal. On the form of claim (form BG1) the claimant stated that Paula's father was P.G., who had been married to the child's mother, the date of the marriage being 17 November 1966 but the parents being divorced. Subsequently information was received from the Court that the date of the decree absolute of divorce was 19 November 1974. The claimant also stated that the child's mother (the daughter of the claimant) had died on 21 January 1978.

3. On 27 November 1979 a document came to light, which stated about Paula. "Father [J.F.] - common-law husband of [the child's mother]". That was of course in contradiction of what had been stated by the claimant on the claim form, the claimant having stated that the child's father was P.G. the lawful husband of the child's mother.

4. As a result of this new information coming to the notice of the Department, an inspector of the Department spoke to the claimant on the telephone and his memorandum (dated 5 February 1980) of that telephone conversation states, "I discussed the question of Paula's paternity with her and she confirmed that her father was J.F. Her late daughter, Paula's mother, was living with J.F. for 9 years. I pointed out that the child's birth certificate showed P.G. as being the father. She confirmed that this was the case but said that the reason for this was convenience and also to save Paula from any embarrassment in later life". The claimant apparently added that she did not have any written documents proving the fact of J.F.'s paternity (and I should add that no such written document has been produced) but suggested that J.F. himself would probably confirm the fact of paternity and the claimant gave his address to the inspector.

5. The Department's inspector also spoke to the probation officer in the area, under whose supervision both grandchildren had been placed by an order of the court of 25 January 1979. The probation officer asserted that J.F. was the father of Paula and was regarded by Paula as being her father. A copy of the order of court of 25 January 1979 is among the appeal papers but, although it deals with such matters as custody and access to the child Paula by both P.G. and J.F., it does not deal with the question of paternity (as to other court proceedings concerning Paula, see paragraphs 19 to 24 below).

6. On 22 February 1980, J.F. signed the following statement, in the presence of a Departmental supervisor,

"I wish to state that Paula who was born on 3 September 1970 is my child and that I am her father. At the time of her conception and birth I was living with [the child's mother]... and we were treated as common-law husband/wife. I was living with [the child's mother] up until her death on 21 January 1978 after which Paula was looked after by her grandmother."

7. As a result of this information, which undoubtedly constituted a material fact of which the insurance officer was ignorant (see Social Security Act 1975, section 104(1)(a) giving him a consequent right to review his decisions), the insurance officer reviewed the decisions by which guardian's allowance in respect of Paula had been paid to the claimant for the inclusive period from 4 July 1978 to 10 March 1980. However, he did not require repayment of that sum from the claimant stating that he was satisfied that the claimant had used due care and diligence to avoid the overpayment etc (see Social Security Act 1975 section 119(2)). The whole of the insurance officer's review decision was the subject of an appeal by the claimant to the local tribunal.

8. The hearing before the local tribunal was twice adjourned. On the second occasion, when an adjournment was asked for by the claimant's representative, the reasons given for the adjournment were in order to enable that representative to obtain 2 further pieces of evidence which the representative stated she had, namely a letter from P.G. giving the claimant permission to take Paula out of the country and a letter from a social worker who was present at a conversation about February 1980 between the claimant and P.G., when the latter was seeking custody of Paula and Joanne, both of whom he alleged were his children.

9. In the event neither of those pieces of evidence was brought to the local tribunal but, at its hearing on 4 September 1980, P.G. himself (the erstwhile lawful husband of the child's deceased mother) gave evidence as follows:

"I married [the child's mother] in 1967. The marriage broke up in 1969. We had a brief reconciliation at the end of 1969, beginning of 1970. Paula was the child of this reconciliation. We parted February or March 1970, [J.F.] went to live with [the child's mother] later in 1970. Paula Helen born 3.9.70."

10. The insurance officer then pointed out that J.F. had stated that he had lived with the child's mother for 9 years and that he was the father of the child and that 9 years back from 1978 would cover the period of the child's birth and before. In answer to that, P.G. stated:

"I was definitely living with [the child's mother] during the period December 1969 to January 1970. J.F. did not come on the scene till later. He is my half brother."

Decision C.G. 2/81

11. The local tribunal nevertheless dismissed the claimant's appeal finding as a fact "that the father of Paula was J.F. The tribunal accepts the signed and witnessed statement by J.F. to this effect". In making that finding the local tribunal must have been purporting to apply regulation 3(1)(b) of the Guardian's Allowances regulations. Regulation 3 provides as follows:

"Illegitimate Children

3(1) Where a child ... is illegitimate and:

- (a) a person has been found by a court of competent jurisdiction to be the father of the child, or
- (b) there is no such finding but in the opinion of the determining authority the paternity of the child has been admitted or established,

section 38(2) of the Act shall be modified so as to have effect as if the mother and father of the child were the child's parents within the meaning of that sub-section."

12. The result of the tribunal's determination was that, J.F. being regarded as the father of Paula and being of course alive, there would be no question of payment of guardian's allowance to the claimant, since that allowance normally depends (under section 38(2) of the Social Security Act 1975) on both parents of the child being dead.

13. The claimant appealed to the Commissioner on the ground that the local tribunal had reached the wrong conclusion as to the paternity of Paula, alleging that there was no basis for preferring the written statement of J.F. to the detailed verbal testimony of P.G. If in fact P.G. and not J.F. were Paula's father, then guardian's allowance would prima facie be payable to the claimant because of regulation 4(1) of the Guardian's Allowances regulations, which provides,

"Children of Divorced Persons, etc

4(1) Where the marriage of a child's parents was terminated by divorce and where at the death of one of the parents the child was not in the custody of, or being maintained by, the other parent and there was no order of a court granting custody of the child to that other parent or imposing any liability on him for the child's maintenance, then section 38(2) of the Act shall be modified so as to have effect as" /to require only death of one parent as a precondition of payment of the allowance/.

14. The insurance officer now concerned, in paragraph 10 of his submission of 9 January 1981, submits as to regulation 3 of the Guardian's Allowance regulations (cited in paragraph 11 above),

"Regulation 3 of the Guardian's Allowances Regulations is of application in relation to illegitimate children and I submit that regard can be had to this regulation only if it is established that the child Paula, is, in fact, illegitimate. There is a presumption in English law that a child born to a woman during the subsistence of her marriage is legitimate and this presumption may only be rebutted by evidence which shows on balance of probability that the child is illegitimate."

15. I accept that submission as being a correct statement of the law. Before, to refer to regulation 3(1), the determining authority (e.g. the Commissioner) can have as his opinion that the paternity of a child has been "admitted or established" the pre-condition for the operation of regulation 3 must exist, namely that the child is illegitimate. However, where a child is born during the subsistence of a marriage there is a well established common-law presumption that the child is legitimate. The presumption continues to exist even where husband and wife are living apart by agreement. Undoubtedly, therefore, the presumption of Paula's legitimacy, i.e. that P.G. was her father, arises in this case, even if I did not accept P.G.'s evidence before the local tribunal that he was living with the mother at the probable date of Paula's conception.

16. The next question is whether the presumption of Paula's legitimacy is rebutted by the evidence in this case. Section 26 of the Family Law Reform Act 1969 provides as follows:

"26. - Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption."

17. Section 26 alters the previous rule that, in order to rebut the presumption of legitimacy of a child born during the subsistence of a marriage, it was necessary to prove beyond reasonable doubt that the child was in fact not legitimate. Now all that is required to rebut the presumption is that there shall be evidence "which shows that it is more probable than not that that person is illegitimate" (s. 26). The 1969 Act does not define what it means by "any civil proceedings" but I hold that claims for benefit and adjudication thereon by the statutory authorities under the Social Security legislation undoubtedly constitute "civil proceedings". I therefore apply section 26 of the 1969 Act to this case.

18. In my judgment the question is nicely balanced but, approaching the matter (as I must) by first applying the presumption of legitimacy, I come to the conclusion that the sum total of all the evidence before me (which I have set out in detail above) is not such as to show that

Decision C.G. 2/81

it is "more probable than not" that Paula is illegitimate. That finding of fact by me does not mean that I necessarily prefer the evidence of one witness to another but simply hold that the presumption of legitimacy has not been rebutted. It also means that my finding is in no sense a finding by me that paternity of Paula "has been admitted or established" within the meaning of regulation 3(1)(b) of the Guardian's Allowances Regulations (cited in paragraph 11 above) since the reasoning by which I have decided I should allow the appeal in this case necessarily involves a situation where regulation 3 does not apply. That is because it cannot be postulated at the outset that Paula is illegitimate. On the contrary she is the child of what was then a subsisting marriage and is therefore presumed to be legitimate. In my view regulation 3 of the Guardian's Allowances Regulations cannot operate at all unless it is clear that a child is illegitimate. That will not be the position, save in the most exceptional circumstances, where the child is a child of a marriage subsisting at the date of the child's birth.

19. As I have found that the effect of the unrebutted presumption of legitimacy is that P.G. is the father of Paula, regulation 4(1) of the Guardian's Allowances Regulations (cited in paragraph 13 above) applies. The marriage of Paula's parents was terminated by divorce and, at the death of her mother, Paula was not in the custody of or being maintained by P.G. nor was there any order of the court granting custody of Paula to P.G. or imposing any liability on him for the child's maintenance. The result is that section 38(2) of the 1975 Act is modified by regulation 4(1) so as to give the claimant entitlement to guardian's allowance (so long as the detailed requirements of regulation 4(1) continue to be fulfilled) because Paula's mother is dead and no account is to be taken of the father P.G.

20. I had already arrived at the conclusions set out in paragraphs 1 to 19 before, at a late stage, the claimant's representative submitted further evidence concerning High Court proceedings in 1974/75 in connection with the dissolution of the marriage between Paula's mother and P.G. I have considered that further evidence and the submissions on it of the claimant's representative and of the insurance officer now concerned. However, for the reasons set out below (paragraphs 21 to 24) I conclude that this further evidence is not in any sense conclusive of the question of Paula's paternity. Consequently, I continue to base my decision on the operation of the presumption of legitimacy, though the further evidence does, as is seen below, reinforce the conclusions I had already reached.

21. The further evidence consists, first, of an Order, dated 26 November 1974, by the District Registrars of the High Court, made in the divorce proceedings between Paula's mother and P.G., J.F. being a party cited. The Order is for an issue to be tried by the Judge as to whether Paula "is a child of the family", the parties being stated to have agreed a serologist's report (i.e. by a medically qualified blood-tester and analyst) of 9 March 1973. (I return to that report in paragraph 23 below). The hearing was

before the Judge on 25 February 1975 and the document recording his judgment states,

"The Judge declared by consent that the Court was satisfied that the only children who are or may be children of the family to whom section 41 of the Matrimonial Causes Act 1973 applies are the following:

Joanne Marie and Paula ..."

22. That declaration does not, however, necessarily constitute a finding that P.G. was Paula's father because section 52(1) of the Matrimonial Causes Act 1973 provides,

"52 (1) - In this Act ...

'child', in relation to one or both of the parties to a marriage, includes an illegitimate child of that party or, as the case may be, of both parties;

'child of the family', in relation to the parties to a marriage means -

- (a) a child of both those parties; and
- (b) any other child, not being a child who has been boarded out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family;"

The Judge's declaration for the purposes of section 41 of the Matrimonial Causes Act 1973 (financial arrangements for the children of the family of divorced parents) is therefore consistent with the hypothesis that Paula's father could have been J.F. so that she was illegitimate but that she had been treated by Paula's mother and P.G. as a "child of their family" (s. 52(1)(b)).

23. Moreover, the serologist's report of 9 March 1973 (a copy of which is before me) does not in any sense constitute a specific assertion that P.G. is the father of Paula. It merely states that from the results of the blood tests (taken only from Paula, her mother, and P.G., but not from J.F.), "P.G. is not excluded from possible paternity of Paula", giving as reasons for that conclusion, "Child has no unexpected blood group factor". The form of report then requires the serologist to give his "Comments on value, if any, of tests in determining whether any person tested is the father of the person whose paternity is in dispute". In this case, the serologist answers that question, "No statistical evidence in favour of paternity". In no circumstances, therefore, can the serologist's report be said to determine the issue of Paula's paternity as between P.G. and J.F. It merely indicates that the evidence of the blood tests does not rule out the possibility that P.G. is her father.

Decision C.G. 2/81

24. I cannot, therefore, accept the further submission of the insurance officer now concerned (paragraph 2) that "a court of competent jurisdiction has accepted that [P.G.] is the father of Paula" Nor can I accept the further submission of the claimant's representative that the High Court had made a finding on 25 February 1975 that P.G. was Paula's father. The claimant's representative also submits that regulation 3(1)(a) of the Guardian's Allowance Regulations (cited in paragraph 11 above) now applies i.e. that "a person has been found by a court of competent jurisdiction to be the father of the child". I cannot accept that submission either, because there has, in my view, been no such finding (see above) and, in any event, regulation 3 only comes into play, as it states, "Where a child is illegitimate". For the reasons set out in paragraphs 14 and 15 above, I hold that therefore regulation 3 can have no application in this case.

25. Although, therefore, I cannot regard the Judge's declaration of 25 February 1975 as in any way being conclusive of the issue of Paula's paternity, I nevertheless allow the claimant's appeal for the reasons set out in paragraphs 1 to 19 above, i.e. by the application of the common-law presumption of legitimacy.

(Signed) M J Goodman
Commissioner

Date: 15 July 1981

Commissioner's File: C.G. 3/1981
C I O File: I.O. 7096/G/80
Region: Child Benefit Centre