

SOCIAL SECURITY ACTS 1975 TO 1990



CLAIM FOR WIDOWED MOTHER'S ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside. In exercise of my jurisdiction I hold that the claimant is entitled to an increase of widowed mother's allowance for Le'ann from and including 15 August 1989 because the provisions of section 25 of the Social Security Act 1975 are satisfied.

2. This is a claimant's appeal against the decision of the Bury St. Edmunds Social Security Appeal Tribunal given on 15 January 1990 which confirmed a decision of the adjudication officer that the claimant was not entitled to an increase of widow's mother's allowance for her child.

3. Section 25 of the Social Security Act 1975 provides for widowed mother's allowance. In order to appreciate the point of the case it is necessary to read the statutory provisions which, insofar as relevant, I set out below:

"25.-(1) A woman who has been widowed shall be entitled to a widowed mother's allowance [at the rate specified in section 13 of the Pensions Act], if her late husband satisfied the contribution conditions for a widowed mother's allowance specified in Schedule 3, Part I, paragraph 5, and either -

- (a) the woman is entitled to child benefit in respect of a child falling within subsection (2) below; or
- (b) the woman is pregnant by her late husband or
- (c) ...

(2) A child falls within this subsection if one of the conditions specified in section 43(1) of this Act (conditions of payment of increase for child dependants) is for the time being satisfied with respect to the child and the child is either -

- (a) a son or daughter of the woman and her late husband; or
- (b) a child in respect of whom her late husband was immediately before his death entitled to child benefit; or
- (c) if the woman and her late husband were residing together immediately before his death, a child in respect of whom she was then entitled to child benefit."

4. The claimant's husband died on 23 March 1989. On 29 March she completed a claim form for widow's benefit at the local office of the Department of Social Security. She claimed benefit for herself and one child, Toby, and stated that she was pregnant but ticked the box "no" in answer to the question whether the expected child was her husband's. She was paid widowed mother's allowance, made up of widow's pension, additional pension and an increase for the child Toby. This was paid from 28 March 1989. On 15 August 1989 she gave birth to the child of whom she was pregnant at the time of the death of her husband. On 13 September she claimed an increase to her widowed mother's allowance for this child, Le'ann. Her claim was disallowed by the adjudication officer on 19 October 1989 because, in his opinion, Le'ann was not her late husband's child and consequently the conditions of subsection (2) of section 25 were not met.

5. The claimant appealed to the tribunal. In her grounds of appeal she stated that she wished to appeal as at the time of her husband's death he and she were still legally married and still living together in the same household and as man and wife. At the time of the application for the increase she had said as follows:-

"I wish to claim an addition to my benefit for Le'ann as at the time of her conception I was still living with my husband as man and wife."

A statement from the counter clerk at the local office, who had assisted the claimant to complete the form on 29 March 1989, was before the tribunal. The material part of the statement is as follows:-

"[The claimant] completed the question concerning pregnancy stating that she was not expecting her husband's child but was pregnant, but the father of the child was not her husband. She volunteered this information."

The clerk gave evidence to the tribunal and said that at an early stage in the interview the claimant had volunteered the information that, although she was expecting a child, it was not her husband's child. She had not said who the father of the child was. It is to be noted that in her grounds of appeal to the tribunal the claimant had stated that she was not 100% sure

if the child was or was not her husband's.

6. The claimant did not attend before the tribunal and the hearing proceeded in her absence. The members of the tribunal found as fact that the child Le'ann was born on 15 August 1989 and that the appellant's husband had died on 23 March 1989; they further found, on the balance of probabilities, that the husband was not the natural father of Le'ann. The claimant's appeal was dismissed. In the reasons for their decision the members of the tribunal directed themselves that the only basis on which the claimant could be entitled to the allowance was that Le'ann was the child of herself and her husband. They accepted the evidence of the counter clerk that the appellant stated that the child she was expecting was not the child of her husband. The claimant in her observations on the adjudication officer's submission to the Commissioner has sought to explain what happened at the time she completed the form; but, of course, that evidence was not before the tribunal and I do not have regard to it when deciding the issue of whether a mistake of law was made by the tribunal.

7. The adjudication officer now concerned, who opposes the appeal, argues that the burden of proof rested upon the claimant to show that the conditions governing her claim were satisfied. He further submits that the evidence placed before the tribunal was both un-ambiguous and detailed enough to enable the tribunal to make a reasoned and objective decision. He further argues that the claimant's contention that she was not 100% sure that the baby was not her husband's did not provide sufficient reasons for the tribunal to differ from the adjudication officer's decision.

8. There is a presumption of law that a child born in wedlock to a married woman was begotten by her husband. I need only refer to the Banbury Peerage case (1817) 1 Sim & St 153. That presumption may be rebutted by evidence which shows that it is more probable that the child is not the child of the husband. Clearly the adjudication officer's submission to me relating to the burden of proof is wrong. The presumption is of importance in the instant case because it affected the burden of proof. It does not appear to me from a reading of the decision of the tribunal that the members had it in mind; certainly they did not direct themselves either as to the presumption or the burden of proof. While it is true that the adjudicating authorities are not bound by the technical rules of evidence, it seems to me that the presumption of legitimacy is a rule which they should have regard to because a child is not to be lightly bastardized even for the purposes of social security law. I am satisfied that there was an error of law upon which I must set aside the decision.

9. This seems to me a proper case in which to exercise the power conferred upon a Commissioner by section 101(5)(a)(ii) of the Social Security Act 1975. I consider it expedient to make further findings of fact and to give a decision in the light of them. I accept the claimant's evidence that she and the husband at the time of his death, and prior to it, were living together

in the same house and as man and wife. This is prima facie evidence that the child Le'ann was begotten by the claimant's husband. I have to consider whether that has been rebutted by any other evidence. It seems right to me when considering the rebuttle of the presumption to adopt the standard of proof used by the courts by virtue of section 26 of the Family Law Reform Act 1969. I have to consider whether it is more probable than not that the child was not the child of the husband. There is some evidence in support of rebuttal, namely the statement of the counter clerk that the claimant told her that the father of the child was not her husband. I have evidence before me, which the tribunal did not have, from the claimant where she states that at that time she was upset because of the death of her husband 6 days before and that she was in doubt as to the father of the child. It seems to me that that casts considerable doubt on the accuracy of her statement to the clerk. There, also, is evidence before me, as there was before the tribunal, that during the time the husband had access to the wife she also had relations with another man; and she was not 100% sure if the baby was her husband's. There is evidence that the husband had sexual intercourse with the claimant at the time of conception of the child; there is the statement by the wife that they were living together in the same house and as man and wife. It would not be right for me to inquire whether the husband or the other man is more likely to be the father of the child; and certainly I would not embark upon it in the absence of blood tests being supplied by the adjudication officer. I find that Le'ann is the daughter of the claimant and her late husband. It is not in dispute that the husband satisfied the contribution conditions for widowed mother's allowance.

(Signed) J J Skinner
Commissioner

Date: 24 June 1992