Casebase Number: G0050

Title of Payment: Guardians Payment (Contributory)

Northside Community Law and Mediation Centre
Northside Civic Centre
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Coolock
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Date of Final Decision: 17/12/2013

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Keywords: Definition of orphan - grandchildren - guardian - full time care – abandoned - overpayment

Organisation who assisted claimant: Northside Community Law and Mediation Centre (NCL&MC)

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Case Summary

This case concerns the Appellant's entitlement to Guardian's Payment (Contributory), formerly Orphan's (Contributory) Allowance, in respect of her two grand children, for the period 5th of January, 2011 to 7th of March, 2013.

The Appellant had been in receipt of Guardian's Payment (Contributory), hereafter GPC, since 13th September 2002. Following a review, a letter was issued by a Deciding Officer [DO] on 25th of February, 2013 advising the Appellant of the factors which indicated that she was not eligible for the payment of the GPC between January 2011 – March 2013, and that she had incurred an overpayment. The Appellant was afforded the opportunity to bring any relevant matters to the notice of the DO before a final decision was issued. The Appellant duly submitted evidence at this time in support of her claim.

The Appellant's claim was suspended on 1st of March 2013 for the reason that the children's mother was "resident at same address and has not abandoned and failed to provide for her children". However, on review of the evidence submitted by the Appellant, a decision was made on 21st of May 2013 to reinstate the claim with effect from 8th March 2013. This decision was made on the basis that this was the date when the children's mother allegedly ceased residing at the Appellant's address.

The DO affirmed the position that for the period 5th January 2011 to 7th March 2013 the Appellant was not eligible for the GPC for the reason that "it could not be considered that the [children's mother] had abandoned her [children]."

On the 3rd July 2013, the DO confirming her findings with regard to the period January 2011 – March 2013 made a revised decision as follows:

According to the records of the Department, the children's mother stayed with them two or three nights a week and had regular contact with the children during the period 5 January 2-11 to 7 March 2013, therefore, the children's mother could not have been considered to have abandoned and failed to provide for them.

The decision was retrospective in effect; that is, the DO found that that Appellant was not eligible for GPC for the period 5th January 2011 to 7th March 2013. As a consequence, the Appellant was assessed with a liability for an overpayment of GPC amounting to €32,522.

On the same date, an officer, authorised by the Department of Social Protection [the Department] to recover debts owed to the Department, issued a letter seeking the recovery of the overpayment.

On behalf of the Appellant, NCL&MC submitted notice of appeal to the Social Welfare Appeals Office on the 20th of August 2013.

On 17Th December 2013, the Appeals Officer allowed the appeal. The Appeals Officer found that "the children were orphans for the purposes of social welfare legislation in the period 7/1/11 to 7/3/13."

Key Arguments

- The Department submitted that the children were not orphans for the purposes of the Social Welfare legislation because the Appellant had stated in a social welfare form that the children's mother stayed with them 2-3 nights a week.
- The DSP submitted that the children's mother had regular contact with her children during the period from 5th January 2011 to 7th March 2013
- Appellant submitted that her grandchildren satisfied the definition of orphan under the Social Welfare legislation because the children's mother, her daughter, neither resided with her and the children, nor provided financial help for the children during the period from 5th January 2011 to 7th March 2013.
- Appellant submitted that she was a guardian for the purposes of the Social Welfare legislation because she at all times provided full time care for her grand children during the period from 5th January 2011 to 7th March 2013.
- Appellant submitted that the children's mother did in fact abandon the children and failed to provide for them, as her daughter's circumstances prevented her from caring for her children.

Key Conclusions

- Appeals Officer concluded that the children were orphans for the purposes of the social welfare legislation in the period in question
- Appeals Officer determined that the Appellant's role in providing full time care for the children remained the same during the period in question

Summary of Benefit(s) Received

Guardian's Payment (Contributory), hereafter GPC, is an insurance-based payment, payable to a guardian in respect of an orphan or orphans. A guardian is the person in whose care the orphan normally resides. There is no requirement that the guardian be legally appointed. For a person to be in receipt of GPC, the parent or step-parent of the orphan must have paid PRSI for at least 26 weeks.

In order that the child be regarded as an orphan for the purpose of the scheme, their circumstances must be consistent with the statutory definition of "orphan" as set out in the s. 2 of the Social Welfare Consolidation Act [as amended] 2005, which provides.

> *"orphan" means a qualified child—*
>
> > *(a) both of whose parents are dead, or*
> > *(b) one of whose parents is dead or unknown or has abandoned and failed to provide for the child, as the case may be, and whose other parent—*
> > > *(i) is unknown, or*
> > > *(ii) has abandoned and failed to provide for the child,*
>
> *where that child is not residing with a parent, adoptive parent or step-parent*;

The rules regarding entitlement to GPC are contained in Part 2, Chapter 19 of the Social Welfare Consolidation Act, 2005.

Background

The Appellant had been receiving GPC since 13th September 2002 on the basis that her grandchildren were orphans as defined in the legislation and that she provided full time care for the children. On 2nd of October 2012, the Department initiated a review of her entitlement to GPC. She was asked to complete and return a questionnaire that, amongst other questions, asked, "Is there any contact between the child and their parent(s)?" The Appellant responded - "Yes", and stated "when suits mother." In a further questionnaire dated 2nd of November 2012, the Appellant was asked whether there are any overnight visits by the children's mother. Appellant responded by stating - "mother stays 2-3 nights a week".

Following this review, a letter was issued by a Deciding Officer [DO] on 25th of February, 2013 advising the Appellant of the factors which indicated that she was not eligible for the payment of the GPC between January 2011 – March 2013, and that she had incurred an overpayment. The Appellant was afforded the opportunity to bring any relevant matters to

the notice of the DO before a final decision was issued. The Appellant duly submitted evidence at this time in support of her claim.

In addition to the information provided by the Appellant, a further factor that contributed to the DO's decision was the fact that the children's mother provided the Appellant's address as her place of residence for the purpose of claiming her social welfare payment. Consequently, the Department considered the children's mother to be resident with her children in the Appellant's address.

The Appellant submitted evidence showing that her daughter was housed in a homeless shelter, that her daughter had been committed to a detention centre for substance abuse during the periods in question, and that her daughter had been dealing on an on-going basis with the consequences of addiction. The Appellant's daughter also wrote a letter to the Department confirming her residence in a homeless shelter and her problems with addiction. The daughter confirmed that these factors prevented her from caring for her children.

On reviewing the evidence, the DO, in a decision dated the 21st of May 2013, reinstated the Appellant's GPC payment from 8th March 2013; but decided, in respect of the period from 5th January 2011 to 7th March 2013, that the Appellant consented to the children's daughter using her address for Social Welfare purposes, and that she was residing there for 2-3 nights per week. Therefore, the DO concluded that "it could not be considered that the [children's mother] had abandoned her [children] during the above period." The DO further stated that the "arrears from 8th March 2013 - 30th May 2013 will be held by this Department with a view that the funds can be paid off against your overpayment once it is calculated."

On the 3rd July 2013, the DO affirmed her findings with regard to the period January 2011 – March 2013] and made a revised decision as follows:

> *According to the records of the Department, the children's mother stayed with them two or three nights a week and had regular contact with the children during the period 5 January 2-11 to 7 March 2013, therefore, the children's mother could not have been considered to have abandoned and failed to provide for them.*

The decision was retrospective in effect; that is, the DO found that that Appellant was not eligible for GPC for the period 5th January 2011 to 7th March 2013. As a consequence the Appellant was assessed with a liability for an overpayment of GPC amounting to €32,522.

On the same date, an officer, authorised by the Department of Social Protection [the Department] to recover debts owed to the Department, issued a letter seeking the recovery of the overpayment. The amount to be recovered was €30,590 [the total overpayment was reduced by the arrears due in respect of the GPC consequent on the reinstatement].

On behalf of the Appellant, NCL&MC appealed the decision on 20th August 2013. NCL&MC asserted that the Appellant's grandchildren met the statutory definition of being Orphans for the purpose of the GPC. NCL&MC submitted that the Appellant's daughter did not reside with the Appellant during the period in question, nor did she provide for her children. NCL&MC asserted that the Appellant's relationship with her daughter had not changed in any material respect to warrant the disallowance of the claim. NCL&MC sought an oral hearing in order that the Appellant have the opportunity to submit evidence with regard to the living arrangements and care being provided to her grand children.

The Appeals Officer allowed the appeal by way of summary decision on 17th December 2013.

Date Appeal Taken: 20th August 2013

Date Appeal Heard: Summary decision [no oral hearing]

Decision of the Appeals Officer: 17th December 2013 [Appeal Allowed]

Appeals Officer's Reasoning and Conclusions:
The Appeal's Officer in making his determination acknowledged the particular factors that the Department relied on when disallowing the claim; namely, the Appellant's written response to the Department stating that her daughter had contact whenever "it suited her" and stayed 2-3 nights a week. The Appeals Officer also noted the fact that the Mother provided the Appellant's address as her place of residence for the purpose of making a social welfare claim.

In order to attribute proper significance to these factors, the Appeals Officer paid particular attention to the circumstances of the Mother; that is, her history of drug abuse, periods of imprisonment and homelessness and "her generally chaotic lifestyle". The Appeals Officer reasoned that in view of these circumstances it had not been established that the Mother had resumed her parenting role; that her abandonment of her children had ended.

The Appeals Officer accepted that there had been no material change in the care being provided by the Appellant to her grandchildren and commented:

> *It appears to me that [the Mother's] involvement with her children may have been, at best, casual and unpredictable and, as can be seen, did not lead to reformation of the family unit with her resuming her role as their mother. Throughout the period it would appear that the appellant's role vis a vis the children remained as it always had been. In the circumstances, I am satisfied that the children continued to be orphans during the period under appeal.*

Observations
This case principally concerns the circumstances under which a child may be regarded as "abandoned".

In circumstances where a parent or parents are alive, s. 2 of the Social Welfare Consolidation Act 2005 [as amended] refers - *has abandoned and failed to provide for the child*. This definition is plain and not qualified further. In order to meet this definition, arguably a Guardian must demonstrate that the parent/child relationship does not exist in any meaningful sense, and that the parental role can be shown as being performed entirely by another person. Furthermore, it must be shown that the parent has failed to provide for the child.

It follows that the Department's doubt with regard to the Appellant's claim was reasonable. That is, had the Mother been living at the Appellant's address 2 – 3 nights a week and had regular contact with her children in any meaningful sense these factors would not be consistent with a claim that she had abandoned her children. The fact that she used the Appellant's address to make a social welfare claim provided the Department with further reason to conclude that a parent/child relationship had resumed.

When the circumstances were examined further, and crucially evidence with regard to the Mother's circumstances provided, it became clear that there had been, in the words of the Appeals Officer "no reformation of the family unit". Put plainly, any contact the Mother had with her children was so tenuous that it could not be regarded constituting a change in the relationship; that is, the children remained abandoned by their Mother with their grand mother acting in loco parentis.

The nature of what must be proven is by definition a negative. In order to be regarded as guardian in circumstances where a parent is living, a claimant in the Appellant's circumstances is required to effectively speak against their child in order to affect the rights of the grandchildren. It seems that consideration might be given to providing a less onerous burden of proof on the claimant in these circumstances. In this consideration should be given to providing a qualified definition of "abandoned" by way of regulation.

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