

Casebase Number: G0075

Title of Payment: Guardians Payment (Non-Contributory)



Community Law & Mediation Northside
Northside Civic Centre
Bunratty Road
Coolock
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Date of Final Decision: 21/04/2015

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Organisation who assisted claimant: Community Law & Mediation Northside (CLM)

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Case summary

The case concerns the Appellant's claim for Guardian's Payment (Non-Contributory), formerly Orphan's (Non-Contributory) Allowance, in respect of her grandchild.

According to the Appellant's instructions, she first applied for Guardian's Payment in or around October 2012. In September 2013 she reapplied, and this claim was refused on 8 January 2014. The Appellant applied for the third time in May 2014. This application was rejected on 1st July 2014. The Appellant sought a review of the refusal. The Appellant attended CLM in or around August 2014 and was provided with advice and representation with respect to the review of the Deciding Officer's decision.

On 20 March 2015 the Deciding Officer issued a decision with respect to the review. The Deciding Officer confirmed her earlier decision, asserting that the Appellant was not eligible for a Guardian's Payment as her grandson did not satisfy the definition of an orphan. The Deciding Officer found that the evidence did not demonstrate abandonment of the child by his father as required under the legislation, noting that, while incarceration limited the father's ability to provide day-to-day care for his son it did not constitute abandonment.

On 30 March 2015 CLM on behalf of the Appellant submitted a Notice of Appeal in respect of the Deciding Officer's decision.

On 21 April 2015, the Deciding Officer revised her decision (the Appeal's Office having forwarded the Appellant's grounds of Appeal to the Deciding Officer), and determined that the Appellant was entitled to Guardian's Payment with effect from 19 December 2014 on the basis that the Appellant's son was not residing at the Appellant's address from this date. According to the record, this decision is consistent with a December report by a Social Welfare Inspector (**SWI**); the SWI being satisfied that the Appellant was looking after her grandson and would continue to do so indefinitely.

The Appellant was awarded €2,910 in arrears (from 19 December 2014 until 30 April 2015). The Deciding Officer further advised that an investigation into whether the Appellant was eligible for arrears of the payment from an earlier date would be undertaken, and that the Social Welfare Appeals Office would be notified of this decision in due course.

On 18 August 2015 CLM wrote to the Deciding Officer seeking an update as regards the Appellant's entitlement to payment from an earlier date. On 16 October 2015 the Deciding Officer wrote to the

Appellant confirming her entitlement to payment from September 2014. This decision resulted in a further € 1,972.25 arrears being issued.

As the Appellant was in receipt of the One Parent Family Payment, Guardian's Payment was awarded at half rate. Guardian's payment and the One Parent Family Payment may be paid concurrently.

Key Arguments

- CLM on behalf of the Appellant contended that the Appellant acted *in loco parentis* in respect of her grandchild, and provided full time care and support for him.
- It was argued that the Appellant's son was unable to care for his son due to the fact that he was imprisoned and also due to effects of drug addiction.
- CLM asserted that while the Appellant's son uses his mother's address, he does not reside there, his stays being sporadic and unpredictable.
- The Appellant's son submitted in evidence two statements confirming that practically he was unable to be parent to his son because of his addiction and the associated degree of dysfunction in his life.
- It was confirmed that the Appellant's son provides no physical, emotional or financial support towards the upbringing or care of his son.
- CLM submitted that the facts and circumstances were consistent with a finding that the Appellant's grandchild had been abandoned by his father; that the child's father had failed to provide for his son, and his circumstances prevented him from caring for his child.

Key Conclusions

On 21 April 2015 the Deciding Officer revised her decision in respect of the Appellant and determined that

"You have been awarded a Guardians Payment (Non Contributory)...on the basis that your son...is not currently residing at ...address."

Summary of Benefit(s) Received

Guardian's Payment (Non-Contributory), is a non-contributory payment, payable to a guardian in respect of an orphan. The main rules regarding entitlement to the payment are set out in section 168 of the Social Welfare Consolidation Act, 2005 (as amended).

A guardian is the person in whose care the orphan normally resides. There is no requirement that the guardian be legally appointed. The means test for this payment is based on the orphan's means. Payment is made up to the orphan's 18th birthday, or 22nd birthday if they are in full-time education. To qualify for Guardian's Payment (Non-Contributory) a person must be 'habitually resident' in the state.

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 s. 2 of the Social Welfare Consolidation Act 2005 (as amended), 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 stepparent;

Background

The Appellant is the sole carer of her grandson. She is a court appointed guardian of her grandson and has joint custody of the child with his father, the Appellant's son. The mother of the child died soon after the child was born, and the child has been cared for by the Appellant since that time. The child's father has a drug addiction and had been imprisoned on a number of occasions. He was released from prison in September 2014 on probation, but in or around 13 October 2014 was remanded in custody. The Appellant's son when not incarcerated used the Appellant's address but he stayed there sporadically, his movements unpredictable.

On 30 October 2014, CLM on behalf of the Appellant submitted a letter stating that the Appellant is entitled to Guardian's Payment since her first application in or around October 2012 as she provides full time care for her grandson, and further asserting that the child has been abandoned by his father. On 9 December 2014 the Appellant's son provided a statement in which he claimed that he was not able to look after his son as he is a recovering drug addict and is in jail.

On 5 January 2015 CLM submitted updates in relation to the incarceration of the child's father, confirming that he had been in prison since 20 December 2014. CLM argued that as the Appellant's son was not in a position to care for his child, the Appellant was entitled to Guardian's Payment and was so entitled since the date she first applied. It had been submitted that the Appellant provides full time care for her grandson and is acting *in loco parentis*. The Appellant's parental role includes responsibility for her grandson's medical, financial and all day to day care needs and any decisions in respect of that care. It was further submitted that the father of the child provides no physical, emotional or financial support towards the upbringing or care of his son.

The Deciding Officer wrote to the Appellant on 23 January 2015 requesting that she provide documentation from the prison authorities confirming the following:

- The date that the Appellant's son was released from Prison in the summer of 2014;
- All dates relating to his committal and release from prison in 2014;
- The date corresponding to his current committal;
- Information with respect to his length of sentence, and due date of release.

This information was provided to the Department of Social Protection, and on 20 March 2015 the Deciding Officer disallowed the Appellant's claim for the Guardian's Payment (Non Contributory) on

the basis that the Appellant's grandchild did not satisfy the definition of orphan as outlined in s2(1) of the Social Consolidation Act 2005. The Deciding Officer's decision refers:

While it is accepted that the appellant's son's current incarceration limits his day-to-day ability to provide care for his son, parental abandonment, on his part, has not been evidenced in this case.

On 30 March 2015 CLM submitted Notice of Appeal on behalf of the Appellant, disputing the decision of the Deciding Officer for the reasons outlined above. At the time of submitting Notice of Appeal, the Appellant's son had been released from prison. The Appellant's son provided a further statement with respect to his practical inability to care for his son due to the challenges of trying to recover from his addiction. This was submitted in evidence with the client's Notice of Appeal.

On 21 April 2015 the Deciding Officer revised her decision, and determined that Guardian's Payment (Non-Contributory) should be awarded to the Appellant.

Decision of the Appeal's Officer : 21/04/2015 Decision by way of Revision by a Deciding Officer

Deciding Officer's Reasoning and Conclusions:

The Deciding Officer awarded the payment with effect from 19 December 2014 *"on the basis that your son...is not currently residing at the above address."*

According to the record, this decision is consistent with a December report by a SWI; the SWI being satisfied that the Appellant was looking after her grandson and would continue to do so indefinitely.

The Appellant was awarded €2,910 in arrears (from 19 December 2014 until 30 April 2015). The Deciding Officer further advised that an investigation into whether the Appellant was eligible for arrears of the payment from the date of the claim would be undertaken, and that the Social Welfare Appeals Office would be notified of this decision in due course.

On 18 August 2015 CLM wrote to the Deciding Officer seeking an update as regards the Appellant's entitlement to payment from an earlier date. On 16 October 2015 the Deciding Officer wrote to the Appellant confirming her entitlement to payment from September 2014. According to the record, based on a SWI Report documenting an inspection and interview with the Appellant on September 17th, 2015, the Decision Officer accepted that the Appellant's son *"abandoned and failed to provide for his son"*, the Appellant's grandson, from 26 September, 2014. According to the record, this date corresponds with the date that the Appellant's son ceased claiming for his son as a child dependant on his Social Welfare payment. This decision resulted in a further €1,972.25 arrears being issued.

As the Appellant was in receipt of the One Parent Family Payment, Guardian's Payment was awarded at half rate. Guardian's payment and the One Parent Family Payment may be paid concurrently.

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.

Initially, the DSP considered there to be insufficient evidence of abandonment. The father of the child used the Appellant’s address, and stayed in the Appellant’s house on occasions when not staying with friends. The incarceration of the Appellant’s son could not in itself qualify as abandonment by the father. Furthermore, the fact that on his release from prison he relied on the Appellant’s address indicated that the parent/child relationship had resumed.

When the circumstances were examined further, and crucially evidence with regard to the father’s circumstances provided, it became evident, in the words of the Deciding Officer that the father had ‘*abandoned and failed to provide for his son.*’ Rare contacts that the father made with his son could not be regarded as constituting a bond of a parent/child relationship. Accordingly, in every practical sense the child was abandoned by his father, with his grandmother acting *in loco parentis*.

The nature of what must be proven is by definition a negative. In order to be regarded as a 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 discharge the onus of proof given the construction of the definition of abandonment.

For further information:

<http://www.welfare.ie/en/Pages/Guardians-Payment-Contributory-and-Guardians-Payment-No.aspx>

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/death_related_benefits/guardians_payments.html

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