

Casebase Number: G0087

Title of Payment: Guardians Payment (Contributory)



Community Law and Mediation Northside
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Date of Final Decision: 3 February 2017

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Organisation who represented the Claimant: Community Law and Mediation Limerick

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Case Summary:

This case relates to the appeal of a decision, dated 21/09/2016, to refuse the Appellant Guardian's Payment (Contributory) in order to care for her grandson ("the Child").

The Appellant applied for Guardian's Payment (Contributory) in respect of her grandson on 15 August 2016. By letter, dated 21st September 2016, the Appellant was notified that her claim was refused for the reason that the facts with respect to her grandson's contact with his father, and the support provided by the Child's father, were not consistent with the statutory definition of an "orphan" for the purpose of receiving the Guardian's Payment (Contributory).

When submitting her application for the Guardian's Payment, the Appellant completed a questionnaire in which she stated that her son, the father, provided support through the provision of uniform, books and clothing. The Appellant further stated that the father had overnight access to his son at the weekends. In view of this information, the Deciding Officer found the Child could not be regarded as an orphan within the meaning of the relevant statutory provision.

The circumstances that led to the Appellant's application for the Guardian's Payment commenced following the death of the Child's mother in May 2016. It was agreed by the relevant parties that the child would live with his paternal grandmother. The Child's parents were not married, and the father had not been appointed the Child's legal guardian.

The Child's Father presented as having ongoing mental health difficulties, and was in receipt of a disability payment. He did not receive a "qualified child" increase on his payment, as his son (the Appellant's grandson) was not normally residing with him. The Appellant had been in receipt of Child Benefit payable in respect of her grandson, since August 2016.

The Appellant sought the assistance of Community Law and Mediation Limerick. In October 2016, the Appellant appealed the Deciding Officer's (DO) decision. In submitting grounds of appeal, it was asserted that the Child's father had "abandoned and failed to provide" for his son, in light of the criteria set out in the Department of Social Protection Guidelines. It was further submitted that due to the failure of the Child's father to provide financially for his son's support, and the fact that he had "failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child," meant the definition of "orphan" was satisfied.

It was asserted that the facts in the case with respect to the role of the Child's father demonstrated that threshold of "abandoned and failed to provide for the child" had been met. Therefore, the Child should be regarded as satisfying the statutory definition of "orphan" for awarding the Guardian's Payment.

Key Conclusions:

Appeal Allowed:

"The Appellant has taken over rights and duties of a parent in respect of the upbringing of the child. The appellant has the right to make all major decisions affecting the child's upbringing, including choice of school, medical treatment, religious matters, health requirements and decisions about leaving the country. She is responsible for the welfare of the child which includes the moral, intellectual and physical wellbeing of the child. The child's surviving parent is not fulfilling any such role. The Appeal is allowed."

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 (the 2005 Act), 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;

For the purposes of this payment, Section 133 of the 2005 Act defines a "guardian" as the person in whose care an orphan normally resides.

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

When determining whether a child has been abandoned, the Department of Social Protection Guidelines have set down the following criteria to be considered by the Deciding Officer in making their decision:

- Likely duration of the existing circumstances
- Level of contact between the parent and the child
- Level of parent's involvement in the welfare of the child
- Willingness of the parent to have the child live with them
- Evidence of conflict between the parent and the child
- Parent's view of their relationship with the child

It is further stated in the Guidelines, that the list as referred is not exhaustive, and due to the complex and sensitive circumstances often involved in such cases the Deciding Officer may request and consider such other evidence as they see fit before arriving at a decision. A parent is considered to have failed to provide for their child where they do not provide financial support for or towards the care of the child. Abandonment and failure to provide includes the failure of a parent's duty to provide for the emotional and physical necessities of life required by an orphan.

Key Arguments:

In view of the statutory criteria for award of the payment, as the father was alive, the question before the Appeals Officer for determination was the extent to which the father in this case could be found to have "abandoned" his child.

- In making the decision to refuse the application, the DO relied on evidence submitted by the Appellant in the form of a questionnaire. In completing this questionnaire, the Appellant advised that the Child's father provided support in the form of uniforms, books, clothes and footwear. The Appellant had further advised that the Child's father "takes him weekends". In considering these facts, and the relevant statutory provisions, the DO rejected the Appellant's claim.
- By way of written submission, and in oral arguments on the Appellant's behalf, CLM Limerick considered the facts in the context of the Department of Social Protection's guidelines regarding the question of "abandonment". The following points were made:
 - (i) Regarding the likely duration of the existing circumstances, it was submitted that there was no evidence to suggest that the Child's father would in the future assume responsibility for the care of his child.
 - (ii) On the matter of the level of contact between the parent and child, it was submitted that while the Child had weekly contact with his father, this contact was subject to change and cancellation. It was further submitted that contact did not necessarily diminish the fact of abandonment, and that weekly contact was not a substitute for the day-to-day care and responsibility of a child.
 - (iii) With respect to the involvement of the father in the Child's welfare, it was submitted that he had no involvement in the day-to-day welfare of his child,

as the Child's needs and decisions with respect to his care were provided for by the Appellant- including education, health and day-to-day care.

(iv) With respect to the father's willingness to have his child live with him; CLM Limerick referred to the father's statement in which he referred: *"I feel it is in my son's best interest to be cared for by my mother, his grandmother. He would have more stability in his life."*

- CLM Limerick submitted that the Appellant's son did not have legal guardianship rights in relation to the Child. At the time of his mother's death, the child had no legal guardian, and while it was open to his father to apply to the courts, he did not do so. The Appellant had however made an application for legal guardianship, and this was granted in December 2016, making her the sole legal guardian to the Child.
- CLM Limerick asserted that according to the Department of Social Welfare Guidelines 'a parent is considered to have failed to provide for their child where they do not provide financial support for or towards the care of the child.' It was submitted on behalf of the Appellant that her son did not provide financial support for the child, as the occasional provision of support in the form of contributions to clothes, books and footwear did not constitute on-going support.
- With respect to the legal definition of abandonment, CLM Limerick sought to rely on a decision by an Appeals Officer in a previous case, reported in the Social Welfare Appeals Office Annual report 2015 at page 53 – 55 (ref 2015/04). That case concerned the withdrawal of an existing payment following a review. The Appeals Officer allowed the appeal. The decision as reported refers:

While there is no legal definition of 'abandonment' or 'failure to provide', the Appeals Officer noted dictionary definitions of abandonas being 'to leave completely and finally; to forsake utterly; to give up control of' or 'a subjective emotional state in which people feel undesired, left behind, insecure or discarded'. Legally, in the Supreme Court, McGuinness J. has held that failure of duty towards a child does not necessarily or invariably amount to abandonment, but that the requirement of abandonment is not to be considered in isolation, separate from the failure of duty. It is 'such a failure' of duty that may amount to abandonment [2002] IESC 75. In re Justice, Levin J. wrote 'A parent abandons a child if the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child'. Tusla, the Child and Family Agency, states on its website that: 'Child abandonment occurs when a child's parent or guardian wilfully withholds emotional, physical, and financial support, with no regard for the child's safety and welfare. This may include physical abandonment, such as leaving a child somewhere with no intent to return for him, or it may include failure to provide physical supervision, emotional support, and other necessities of life for a child living in the home'. The Appeals Officer considered that abandonment and failure to provide must be held to be more than merely financial, as in this case, with the provision of maintenance via the courts; it includes the failure of a parent's duty

to provide for the emotional and physical necessities of life which the appellant had evidenced in her oral testimony regarding both parents.

Appeal ALLOWED 3 February 2017

Appeal Officers Reasoning and Conclusions:

The Appeals Officer's reasoning was as follows:

" At oral hearing the appellant's solicitor successfully argued that the child's father has made no real financial support available for him and has been unable to provide the child with appropriate care and attention. In examining this question, the Supreme Court has held that failure of duty towards a child does not necessarily or invariably amount to abandonment but that the requirement of abandonment is not to be considered in isolation, separate from the failure of duty. It is such failure of duty that may amount to abandonment." Reference was made to the Supreme Court Judgment of McGuinness J [2002] IESC 75 by way of footnote.

The Appeals Officer continued:

" As the child's legal guardian, the Appellant has taken over the rights and duties of a parent in respect of the upbringing of the child. The appellant has the right to make all major decisions affecting the child's upbringing, including choice of school, medical treatment, religious matters, health requirements and decisions about leaving the country. She is responsible for the welfare of the child which includes the moral, intellectual and physical wellbeing of the child. The child's surviving parent is not fulfilling any such role.

The Appeal is allowed."

Observations:

The decision of the Appeals Officer is noteworthy in terms of the range of factors that were considered in order to assess whether the definition of abandonment and failure to provide was met. That reference was made to a Supreme Court judgment in the Appeals Officer's decision, provides some clarity in respect of the question of "abandonment", which is not defined in the 2005 Act.

It was noted that while the failure of a parent to provide a child with 'appropriate care and attention' is not in and of itself proof of abandonment, nor is it the case that demonstrating a lack of support is a requirement to establish that abandonment exists. It is the totality of the evidence that must be weighed in order that consideration of one factor in isolation does not distort the making of a reasoned finding in a particular case.

This case also highlights the limited information relied on by the Deciding Officer for the purpose of making a determination. A questionnaire has by definition limitations in terms of the amount of

information that can be elicited in order to determine context, and appropriately weigh all the relevant factors for the purpose of making a finding. It may have assisted a more informed decision making process had the matter been referred to a Social Welfare Inspector in order that the Appellant and the father of the Child be interviewed.

For further information:

For information on the Department of Social Protection's Guidelines for Guardian's Payment (Contributory) please see:

<https://www.welfare.ie/en/Pages/Guardians-Payment-Contributory.aspx#note1>

Social Welfare Appeals Office Annual Report 2015:

<http://www.socialwelfareappeals.ie/uploads/annrep15.pdf>

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