Casebase Number: G0156

Thematic Note of SWAO Case Studies: Guardian's Payment

Community Law and Mediation

Northside Civic Centre

Bunratty Road

Coolock Dublin 17

Period of Analysis: 2009-2023

Theme: Guardian's Payment

Period of Analysis: 2009-2023

Keywords: Guardian's Payment; Guardian; Orphan; Abandonment; Financial Support; Contributory; Non-Contributory; Department Guidelines.

Casebase No. Case G0156

Summary of the relevant law:

The law on Guardian's Payment is provided for in both the Social Welfare (Consolidation) Act, 2005 and in the Department of Social Protection's Operational Guidelines on Guardian's Payment.

An applicant will be eligible for Guardian's Payment if an orphan resides with them and they are responsible for the orphan's care. The payment given must be used for the benefit of the orphan.

Section 2 of the Social Welfare (Consolidation) Act 2005 defines an "orphan" as:

> *"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."*

A "qualified child" is regarded as a child up to the age of 18, or, if they are in full-time education, up to the end of the academic year in which the qualified child reaches the age of 22. Therefore, to be considered an orphan under Irish law, a child must be under 18 or under 22 years of age in full-time education, with neither parent capable of providing for them.

There are two types of Guardian's Payment which can be claimed:

1. **Contributory**: an orphan will be entitled to claim this type of Guardian Payment (paid at a standard rate of €227 per week) if their parent(s) or step-parent(s) had previously worked and made PRSI payments for 26 weeks, or
2. **Non-Contributory**: if an orphan is not entitled to claim the Contributory payment, they will be eligible for the Non-Contributory payment, which is based on means test and at a maximum of €227 per week.

Deciding Officers, appointed by the Minister for Social Protection, take certain considerations into account when determining a claim for Guardian Payment. Certain case studies have noted that these factors include (but are not limited to) the following:

- Likely duration of the existing circumstances;
- Level of parent's contact and involvement with the child; and
- Evidence of conflict between the parent and child.

Additionally, the Department Guidelines outline a range of circumstances which might affect continuing entitlement to Guardian Payment, which guardians should keep the Department of Social Welfare informed of, such as the following:

- An orphan no longer residing with the guardian;
- An orphan reaching the age threshold;
- Imprisonment or detention of the guardian or orphan;
- An orphan or guardian becoming entitled to a different social welfare payment which cannot be claimed alongside Guardian Payment (i.e. foster care allowance);
- An orphan becoming a foster child or becoming adopted; and
- The parent providing financial support towards the child or residing at the same address as the child.

Key grounds of appeal by appellants:

The case studies of the SWAO Annual Reports from 2009-2023 have been reviewed. The majority of appeals are grounded on eligibility issue. There are also a number of cases resting on issues related to payment (i.e. concurrent payment, back payment and overpayment):

1. **Failure to Establishment Abandonment:**

- 15 appeals were brought from 2009-2023 against the decision to disallow Guardian Payments on the basis that the applicants failed to establish that the child had been abandoned by their parent(s) and therefore could not be considered an orphan under Section 2 of the Social Welfare (Consolidation) Act and eligible for the Guardian Payment.
- For example, in **Case 2015/04**, the appellant (the child's grandmother) appealed against the decision that the child had not been abandoned on the basis that, although the child lived with their grandmother, the child's father had regular contact with them and was providing weekly payments of €140 in line with a Court Order.
- Additionally, in **Case 2016/06**, the appellant (the child's grandmother) appealed against the decision to deny payment on the basis that the care arrangement was the result of a private mutual arrangement between the children's mother and the appellant and that the children were in regular contact with their mother, meaning abandonment had not been proven.

2. **Concurrent Payment**

- In **Case 2015.05**, an appeal was brought against the decision to refuse the appellant's claim for half-rate Carer's Allowance on the basis that the appellant was already receiving Guardian's Payment and Widow's Pension. The appeal was granted on the basis that the Guardian's Payment is technically paid to the child, not to the Guardian and therefore should not preclude the Guardian from receiving other social welfare payments.
- This case is of considerable importance as the decision was reached on review by the Chief Appeals Officer under Section 318 of the 2005 Act.

3. **Back Payment**

- In **Case 2017/08**, an appeal was brought against a decision to deny back pay to a guardian for a certain period during which they did not apply for the Guardian Payment. The appellant successfully argued that this was because they had not been informed about Guardian Payment when they had enquired with the Department for information regarding their entitlements.

4. **Overpayment**

- In Case **2023/4.2.2**, an appeal was brought against a decision that the appellant guardian had been overpaid, on the basis that the child's father had begun residing with the child and appellant which amounted to a change in circumstances affecting the Guardian Payment.

Observations on appeal outcomes:

1. **The Importance of Operational Guidelines:**

- The appeal outcomes have illustrated that Appeal Officers often rely on the criteria and guidance laid down in the Operational Guidelines when assessing a given case (i.e. in **Case 2017/08** and **Case 2018/318/70**).
- However, it has been noted that the Operational Guidelines should be regarded as mere guidelines and should not be viewed as prescribing a certain method of assessment to an Appeal Officer when reviewing a case. In **Case 2020/318/70**, in considering whether abandonment had occurred, the Appeal Officer noted that the Operational Guidelines, although helping in providing points of reference for a decision maker, do not create an obligation on decision makers to consider all of the points in the Guidelines in their decision making, nor should the list of considerations in the Guidelines be considered exhaustive.
- Therefore, although the Guidelines remain a useful starting point for Deciding Officers and a helpful tool for Appeal Officers in assessing a decision, they are not prescriptive.

2. **Definition of Abandonment:**

- A number of cases have indicated that Appeal Officers, in granting Guardian's Payment, are moving away from a restrictive definition of "abandonment" and are embracing a wider meaning of what may constitute a child being abandoned by a parent.
- In **Case 2015/04**, the Appeals Officer, in granting the Guardian's Payment, noted that there is no legal definition of "abandonment" and looked to other definitions for clarity, including that provided by Tusla on its website.
- In **Case 2016/06**, in reversing the decision to deny payment, the Appeals Officer considered that abandonment may occur even where a child lives with a parent, but the parent has failed to provide for their financial, emotional or physical security. It was also noted that abandonment is not restricted to a failure to provide financially for a child but also includes failure to provide for a child's emotional and physical necessities of life.
- Additionally, in **Case 2018/318/70**, the Appeals Officer considered that, in the absence of a legal definition of abandonment, the decision must be based on the individual circumstances of the case.

Relevant Case Studies of the SWAO Annual Reports 2009 – 2023

A.	**2009**	
	N/A	
B.	**2010**	
1.	2010/07 Guardian's Payment	Question at issue: whether the appellants granddaughter may be deemed to satisfy the definition of orphan as prescribed by the social welfare legislation
2.	2010/08 Guardian's Payment	Question at issue: whether the appellant was entitled to payment as the child's guardian in view of the fact that her parents were providing support
C.	**2011**	
	N/A	
D.	**2012**	
1.	2012/10 Guardian's Payment	Question at issue: Whether the child may be defined as an orphan
2.	2012/11 Guardian's (Contributory) Payment	Question at issue: Abandonment

E.	**2013**	
	N/A	
F.	**2014**	
	N/A	
G.	**2015**	
1.	2015/04 Guardian's Payment (Contributory)	Question at issue: Abandonment
2.	2015/05 Guardian's Payment, Widow's Pension & Carer's Allowance	Question at issue: Concurrent Payment
H.	**2016**	
1.	2016/06 Guardian's Payment (Contributory)	Question at issue: Eligibility
2.	2016/07 Guardian's Payment (Contributory)	Question at issue: Eligibility
I.	**2017**	
1.	2017/07 Guardian's Payment (Contributory)	Question at issue: Eligibility
2.	2017/08 Guardian's Payment (Contributory)	Question at issue: whether the Eligibility criteria was met at an earlier date
J.	**2018**	
1.	2018/318/70 Guardian's Payment (Contributory)	Question at issue: Whether the eligibility criteria had been met
K.	**2019**	
	N/A	
L.	**2020**	
1.	2020/318/70 Guardian's Payment (Non-Contributory)	Question at issue: whether the eligibility criteria had been met
M.	**2021**	
1.	2021/65 Guardian's Payment (Non-Contributory)	Question at issue: Eligibility
	2021/66 Guardian's Payment (Contributory)	Question at issue: Eligibility
N.	**2022**	
1.	2022/58 Guardian's Payment (Contributory)	Question at issue: Eligibility
2.	2022/59 Guardian's Payment (Non-Contributory)	Question at issue: Eligibility
O.	**2023**	
1.	2023/4.2.2 Guardian's Payment (Contributory)	Question at Issue: Entitlement and whether an overpayment should be assessed
2.	2023/4.2.15 Guardian's Payment (Non-Contributory)	Question at issue: Whether the child in respect of which the application was made met the definition of orphan to be considered a 'qualified child', as set out in the legislation.

2010/07 Guardian's Payment – oral hearing

Question at issue: whether the appellant's granddaughter may be deemed to satisfy the definition of orphan as prescribed in social welfare legislation.

Background: The appellant applied for Guardian's Payment in respect of the provision of full-time care and attention for her granddaughter C whose parents had both been given custodial sentences. C's mother M (the appellant's daughter) and her father had been committed to prison in 2009 and were due for release at the end of 2010. M was caring for C prior to her incarceration, and had been in receipt of a One Parent Family Payment. The appellant had fulltime responsibility for C, who is brought to visit her mother on a weekly basis. Arrangements have been made to allow her to speak with her for six minutes daily by telephone. She is brought to visit her father on a monthly basis and also speaks with him by telephone for six minutes once a week.

Report of hearing: Having confirmed the decision under appeal and advised as to the purpose of the hearing, the Appeals Officer invited the appellant to outline the circumstances of the case. The appellant stated that she had responsibility for all day to day care, both financial and emotional, for her granddaughter C. She reported that while she had full-time employment, she had fallen into debt due to the additional expense involved, and that she owed significant sums of money to her mother and to the Credit Union. She took issue with the Department's interpretation and stated that, due to the cost and non-availability of help, C's visits to her mother now average approximately one per month.

Consideration of the Appeals Officer: In examining this case, the Appeals Officer noted the conclusions of the Deciding Officer and the appellant's contentions, both written and oral. He found the Department's interpretation of the relevant legislation to be quite narrow. In his view, the consequence of C's parents' actions was that they had abandoned their child as, through their criminal behaviour, they were no longer able to provide any financial support. In addition, he considered that the six minute telephone calls and monthly visits could not be said to constitute any significant emotional support and could only be described as marginal at best. He was satisfied that all financial support and all daily emotional support fell to be provided by the appellant. In addition, he noted that because she wished to continue working full-time, the appellant had the significant extra financial burden of paying for full-time childcare. He concluded that the lack of financial support and the very marginal level of emotional support provided by C's parents amounted to abandonment and a failure to provide.

Outcome: Appeal allowed.

2010/08 Guardian's Payment – summary decision

Question at issue: Whether the appellant was entitled to payment as the child's guardian in view of the fact that her parents were providing support.

Background: The mother of two children (J and E) left the family home, leaving E in the care of J. E was a minor. J applied for Guardian's Payment but her claim was disallowed as the Deciding Officer held that her mother was providing support by remitting Child Benefit payable in respect of E, that she visited periodically and that E was at liberty to reside with her. Further, the Deciding Officer referred to phone calls from E's estranged father (who had left the family home some ten years earlier) and occasional shopping visits, and held that the condition as to abandonment had not been met. On

advice from the Department of Social Protection, J applied for and was granted direct payment of Child Benefit in respect of E. Further, J applied for and was granted One Parent Family Payment with E as a qualified child.

Consideration of the Appeals Officer: His reading of the evidence in this case led the Appeals Officer to conclude that both of E's parents were effectively out of the picture and that little or no emotional support was being provided, with only occasional phone contact. He noted that financial support appeared to have been limited to the transfer of Child Benefit and a small discretionary stipend. He observed that there was nothing in the arrangement that he would regard as providing familial guardianship and that E had, in effect, been abandoned. He noted also that the Social Welfare Inspector, who investigated the case, had reported that she was satisfied that J was the sole guardian for E and that she met the conditions for receipt of Guardian's Payment. Furthermore, J's case had been supported by the Health Service Executive (HSE). The Appeals Officer regarded as important the evidence indicating that the District Court had directed, in September 2009, that all relevant allowances be paid to J who had day-today control of E. The Appeals Officer concluded that J met and exceeded all that could reasonably be asked of any person as guardian and, importantly, that she could not but be considered to meet all the legal requirements of the Guardian's Payment scheme and her appeal succeeded.

Outcome: Appeal allowed.

2012/10 Guardian's Payment

Decision under appeal: claim rejected – reason(s) stated:- In order to qualify for Guardian's Payment (Contributory), a child must meet the legislative definition of an orphan as contained in Section 2 (1) of the Social Welfare (Consolidation) Act, 2005 [outlined]. Having carefully considered all of the available evidence in this case, I am satisfied that the current arrangement for [M] is as a result of a private, mutual agreement between her mother and yourself. Her mother provides maintenance towards her upkeep from her Child Benefit. As such, [M] cannot be considered to be an orphan in accordance with the provisions governing the scheme. Therefore, Guardian's Payment is not payable.

Issue: Whether the Deciding Officer was correct to so decide.

Background: The appellant's daughter had ongoing health problems and the appellant was looking after her granddaughter on a daily basis. The child's father is deceased.

At oral hearing: The Social Welfare Inspector attended at the request of the Appeals Officer. The appellant advised as follows:

- Child Benefit continued to be paid to the child's mother.
- She (the appellant) had not applied formally for custody of her granddaughter.
- The child stays full-time with the appellant but her mother visits her and the appellant brings her to visit her mother.
- The child's mother had been admitted to hospital for further investigation of her condition (the first occasion on which she had been hospitalised).
- The child's mother was working on a Community Employment scheme for twenty hours (5 days per week).
- The child's mother can perform most activities of daily living but gets tried very easily. She drives and is still independently mobile with a stick but had been falling a lot of late.
- The child's mother remains the first contact name for school; should the need arise she would ring the appellant to go to the school.

- The appellant feeds and clothes her granddaughter. While the child's mother offers her money, the appellant does not always accept it.

Comment/Conclusion: The question at issue was whether the child [M] may be defined as an orphan for purposes of Guardian's Payment. The Appeals Officer noted that the Social Welfare (Consolidation) Act, 2005, Section 2(1) defines an orphan as follows.

> "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 Appeals Officer noted that the child's father was deceased, and that her mother's medical condition placed certain restrictions upon her as regards providing care. He noted also that the 28 child lived full-time with her grandparents but was visited by and visited her mother frequently. He took note of the fact that the child's mother offered money for her upkeep although the appellant frequently refused to accept. In addition, he noted that the child's mother retained legal custody and was paid Child Benefit as well as an increase for a qualified child on her Survivor's Pension. Taking all of the available evidence into consideration, the Appeals Officer was not satisfied that that the care arrangements for the child, whereby she lived with her grandmother, established that her mother had abandoned and failed to provide for her. Accordingly, he did not consider that the child could be regarded as an orphan for purposes of the governing legislation.

Decision of the Appeals Officer: The appeal is disallowed. I decide that [M] is not an orphan for the purposes of social welfare legislation.

Note on the reason(s) for decision: Taking all of the available evidence into consideration, including that adduced at the oral hearing, I am not satisfied that that the care arrangements for [M], whereby she lives with her grandmother, establish that her mother has abandoned and failed to provide for her, as required by social welfare legislation. Consequently, the appellant is not entitled to receive Guardian's Payment for her. Regrettably, her appeal does not succeed.

2012/11 Guardian's (Contributory) Payment

Decision under appeal: claim rejected – reason(s) stated:- In order to qualify for Guardian's Payment (Contributory), a child must meet the legislative definition of an orphan as contained in Section 2 (1) of the Social Welfare (Consolidation) Act, 2005 [outlined]. Having carefully considered all of the available evidence in this case, I am satisfied that the care arrangement for [N] from end September 2010 to January 2011 was as a result of a private, mutual agreement between his mother and yourself. His mother is now resident with him at your address. As such, [N] cannot be considered to be an orphan in accordance with the provisions governing the scheme. Therefore, Guardian's Payment is not payable.

Background: The appellant claimed Guardian's Payment (Contributory) in 2010 in respect of her grandson [N]: his father was serving a prison sentence and his mother had left Ireland and gone abroad. She returned after some months and the appellant's claim was refused as outlined above.

At oral hearing: The appellant was represented by a solicitor from the Northside Community Law Centre. The Social Welfare Inspector and the Deciding Officer attended at the request of the Appeals Officer. The Inspector reported that she had met the appellant at the house where she was living with her husband, her daughter and [N]. She confirmed that she had been satisfied that the appellant was looking after [N] for the duration of his mother's absence from the State.

The appellant's solicitor pointed out that this issue had been ruled on after the return of the appellant's daughter and she suggested that, as a consequence, the view had been taken that the absence was only of a temporary nature. She argued that had the claim been processed at the date of the application, a different decision might have been made. She referred to the Inspector's report and the fact that she had taken the view that the appellant was entitled to the payment for the duration of her daughter's absence from the State, and had further suggested that the appellant contact the Guardian's Payment area of the Department to enquire if the payment could be reinstated for the period during which her daughter had attended rehabilitation. She contended that no evidence had been produced to indicate an arrangement between the appellant and her daughter regarding the care of [N], as had been suggested by the decision to refuse her claim. On behalf of the appellant, she denied that any such arrangement existed and she submitted that the decision was incorrect on that basis.

The appellant advised that her daughter was a drug addict, and said that she was a heavy user and would disappear for a couple of days at a time; on those occasions, she would look after [N]. In relation to the period at issue, she said that her daughter went missing and she had just assumed it was another of those short duration disappearances. However, after a period of a week or so, she became very concerned. She said that she had also become aware that her daughter was involved in a new relationship. After about eight days, her daughter phoned her and advised that she was in another country. The appellant said that she was not terribly coherent at the time. She went on to say that she had assumed at that point that her daughter would come home soon. Her concern for her daughter's safety grew and she made contact with the Gardaí and with the relevant Irish embassy. Ultimately, she obtained a phone number for her daughter's boyfriend and was able to contact her. She said that her daughter told her that she was planning to stay where she was and appeared not to have an interest in her son's welfare. After some months, she purchased a ticket for her to come home. She reported that her daughter went into a rehabilitation centre on her return and that she continued to look after [N]. She said that she had not sought payment in respect of that period, that she simply wanted to be paid for the period that her daughter was abroad having effectively abandoned her son.

The appellant said that she had been afraid to seek legal custody because of her age, and a concern that she and her husband would not be allowed to keep [N]. She confirmed that she was in receipt of Child Benefit and that her husband was in receipt of a child dependant increase on his pension. In conclusion, she said that her daughter was clean from drug use for a number of months and things were looking positive for her.

Comment/Conclusion: The Appeals Officer was satisfied that the documentary evidence affirmed the case outlined by the appellant. He noted that the decision to refuse the claim related to a point in time after the date of application and with the benefit of hindsight in terms of the return to Ireland of the appellant's daughter. He noted also that the Deciding Officer's reference to an agreement entered into between the appellant and her daughter had been made without evidence of such an agreement and, as such, was merely conjecture. He examined the question as to whether, at the time of her application, the appellant believed that her daughter had abandoned [N]. Based on the transient nature of her daughter's behaviour owing to her drug use, and the appellant's account of the circumstances of her departure and absence in the period at issue, he considered that it was

reasonable for her to have made that assumption. He noted that this had, in effect, been recognised by the Department in paying Child Benefit to her and in approving a child dependant increase on her husband's pension.

The Appeals Officer noted that the governing legislation refers to abandonment as one of the criteria for determining whether a child may be regarded as an orphan for purposes of Guardian's Payment. He examined a legal definition which states that: abandonment refers to a parent's choice to wilfully withhold physical, emotional and financial support from a minor child. In other words, abandonment is when a non-custodial parent fails to fulfil his or her parental responsibilities and chooses not to have contact with his or her child. He considered that this was precisely what had occurred in this case, and that had the Department conducted its investigation prior to the return of the appellant's daughter a different outcome would have prevailed, having regard to the evidence available.

The Appeals Officer noted that there is nothing in social welfare legislation to indicate a time frame upon which to rely in relation to any specific case of abandonment of a minor, or in terms of the time that must pass before such abandonment may be deemed to have occurred. In contrast, he noted that this issue is addressed elsewhere in legislation in relation to adoption. In the circumstances, and for purposes of his decision, he chose dates based on evidence which confirmed that the appellant and her spouse were put in the position of having to care for [N] initially until the date immediately preceding the return of the appellant's daughter.

Decision of the Appeals Officer: The appeal is allowed.

Note on reason(s) for decision: Having considered all of the evidence in this case, including that adduced at the oral hearing, I decide that the appellant is entitled to receive Guardian's Contributory Payment in respect of her grandson [N] for the period from [date specified] 2010 to [date specified] 2011.

2015/04 Guardian's Payment (Contributory)

Oral hearing

Question at issue: Whether the children may be regarded as orphan

Background: The appellant had been caring for her two grandchildren since 2000. Her daughter, the children's mother, had a serious drug addiction and their father did not support them. She applied for a Foster Care Allowance but was held to be ineligible as she was related to the children and they were not, nor had they been, in the care of the HSE. She made a claim for Guardian's Payment in 2002 and this was backdated for two years. However, following a review in 2014, it was held that the qualifying conditions of abandonment and failure to provide no longer applied. The Deciding Officer relied on the report of a Social Welfare Inspector, which indicated that the children's father had regular contact with them and was providing weekly payments of €140 in line with a Court Order granted in 2007. The appellant denied this version of events and made an appeal against the decision.

Oral Hearing: The appellant was accompanied by a local public representative, and the Deciding Officer attended at the request of the Appeals Officer. At the Appeals Officer's invitation, the Deciding Officer outlined the background to the case and the reasons for her decision, including reference to interviews conducted by the Social Welfare Inspector where the children's father advised that he was paying maintenance of €140 per week, on foot of a Court Order sought by the appellant.

For her part, the appellant stated that she had to break down the door of her daughter's flat in 2000 so that she could take the children, who were in a state of neglect. She said that she had encountered

hardship in raising them, as she had received no support from the HSE. She expressed concern that a Foster Care Allowance was not payable as it is set at a higher rate and would have been accompanied by a formal care plan. She stated that no one had ever contacted her to know if she was doing an adequate job in raising the children. She said that, in addition, because she was in receipt of Guardian's Payment, rather than a Foster Care Allowance, she was not entitled to get any grants for extending her family home to accommodate two young children and so had no option but to get another mortgage, which had placed her under additional financial pressure.

The appellant advised that the two children have lived with her since they were babies and that her daughter had not recovered from her addiction despite numerous attempts. In relation to their father, she stated that he never had any hand in bringing up the children. He had contributed towards their crèche fees but, when he stopped paying, she was advised to take legal action and she obtained a Maintenance Order for €140 per week. She stated that when they were younger, he took them occasionally to the cinema or for an overnight stay but had not done this for a number of years. She stated that she had proposed that he seek full custody of the children but that he had continuously refused to take any responsibility for them. She advised that he discontinued paying maintenance when he lost his job in 2015 and is currently making no contribution. She said that he had never partaken in their health or education choices or disciplinary issues, nor asked to be consulted in any way, that he had no responsibility for school matters and was not listed anywhere as their next-of-kin. Whilst he became their joint guardian in 2007, he has never exercised guardianship nor availed of the custody agreement made at the time.

Conclusion: The Appeals Officer made reference to the provisions of Section 2 (1) of the Social Welfare (Consolidation) Act, 2005 which defines an 'orphan' as 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.

While there is no legal definition of 'abandonment' or 'failure to provide', the Appeals Officer noted dictionary definitions of abandon as 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.

She noted that the Department had accepted initially that the children had been abandoned and as such met the legislative conditions which define an orphan for purposes of the Guardian's Payment scheme. In addition, it had been accepted that there were family arrangements in place at the time and that the appellant was the main carer and provider for the children. She noted that this arrangement had continued, with the only change being in 2007 when the appellant sought formally to obtain maintenance for the children. She concluded that the evidence available served to establish that there had been no fundamental change in circumstances which would warrant withdrawal of the payment and accordingly that the appeal should succeed.

Outcome: Appeal allowed.

2015/05 Guardian's Payment, Widow's Pension & Carer's Allowance

Summary decision and Section 318 review

Question at issue: Concurrent payment

Background: The appellant, who was in receipt of a Guardian's Payment and Widow's Pension (Non-Contributory), made a claim for half-rate Carer's Allowance. This was refused on grounds that she was already in receipt of two payments. It was held that the legislative provisions which refer to overlapping payments applied. As a full-rate Carer's Allowance is payable with Guardian's Payment, but only half-rate may be paid with Widow's Pension, an assessment was made as to the highest combination of the payments at issue. On that basis, the Guardian's Payment continued in payment and full-rate Carer's Allowance was awarded. The appellant made an appeal, submitting that the Guardian's Payment should not be subject to the overlapping payment provisions as it was paid in respect of her niece.

Consideration: The Appeals Officer referred to Section 247(5A) of the Social Welfare (Consolidation) Act, 2005 which provides that Carer's Allowance is not payable where a person is in receipt of more than one other social welfare payment. He noted that the appellant was already in receipt of two payments when she applied for Carer's Allowance and, on that basis, he concluded that the appeal could not succeed.

Request for review: The appellant sought a review by the Appeals Officer of his decision and, ultimately, requested a review by the Chief Appeals Officer under Section 318 of the Social Welfare (Consolidation) Act, 2005

Review by the Chief Appeals Officer: The Chief Appeals Officer undertook a review, indicating that her role was a revising one under the terms of the legislation, rather than another avenue of appeal.

Grounds for Review: Solicitors acting for the appellant submitted that there were errors in fact and law in interpreting the legislation governing concurrent payment. They referred also to Section 133 (3) of the Social Welfare Act, 2005 which provides that a Guardian's Payment be paid to a person other than the guardian in whose care the orphan normally lives or, subject to any conditions that may be prescribed, directly to an orphan who is at least 18 years of age and is not normally living with a guardian. They indicated that this provision was not brought to the appellant's attention and advised that her niece had recently attained 18 years.

In connection with the review, and while not specifically requested, the Chief Appeals Officer examined the application of the provisions relating to multiple payments set out in the Social Welfare Consolidation Act, 2005 and the accompanying Regulations. She noted that Section 247(5A) of the Act provides that –

"A payment under section 186A shall not be payable where a person is in receipt of more than one payment by virtue of regulations made under subsection (4)",

while Section 247(1) provides that –

"Where, but for this subsection, more than one of the following would be payable to or in respect of a person in respect of the same period, only one shall be paid—

(a) any benefit specified in section 39(1) other than death benefit by way of a grant in respect of funeral expenses, bereavement grant or widowed or surviving civil partner grant, or

(b) any assistance specified in section 139(1) other than a payment under section 186A, domiciliary care allowance, supplementary welfare allowance or widowed or surviving civil partner grant".

She noted that the general rule created by this provision is that only one payment can be paid, irrespective of whether a claimant can establish a qualifying entitlement under two or more schemes. In addition to certain exceptions set out in the Act, Section 247(4) confers power on the Minister to make Regulations in the following terms:

"Notwithstanding subsections (1) and (2), the Minister may make regulations enabling more than one of the payments specified in those subsections to be paid to or in respect of a person in respect of the same period".

She noted that Regulations had been made pursuant to that provision, as outlined in the Social Welfare (Consolidated) Claims, Payments and Control Regulations, 2007 (S.I. No. 142 of 2007), where Chapter 5 of Part 7 contains provisions in relation to 'overlapping benefits' and Article 222 specifically provides for 'Payment of guardian's payment with other social welfare payments'.

The Chief Appeals Officer noted that pursuant to this Article, where Guardian's Payment and a number of specified payments set out in Article 222(3) are payable 'to or in respect of' a person 'in respect of the same period', both such payments may be paid 'to or in respect of that person in respect of that period'. She considered that this was noteworthy in relation to the provisions of Section 247(3) of the 2005 Act which states that for the purpose of this section:

"….any payment specified in subsection (1) (a) or (b) payable in respect of a person shall be regarded as such specified payment payable to that person".

Accordingly, Guardian's Payment, being a payment in respect of an orphan, is not regarded as a payment to the guardian but as a payment to the orphan. Thus, a guardian can receive a Guardian's Payment and a payment in their own right, such as a Widows Pension, without offending Section 247.

In the circumstances, the Chief Appeals Officer concluded that Section 247 (5A) did not preclude the appellant from receiving half-rate Carer's Allowance and Widow's Pension (Non-Contributory) by virtue of having been in receipt of Guardian's Payment, this latter payment being a payment to the orphan. Accordingly, she asked the Department to review the appellant's entitlement and to make the necessary adjustment to her payments for the period in question. In addition, she noted that it was open to the appellant to apply to the Department for a decision as to whether the Guardian's Payment might be paid to some other person or directly to her niece. Accordingly, she revised the decision of the Appeals Officer under Section 318 of the Social Welfare Consolidation Act, 2005 and allowed the appeal.

Outcome: Appeal allowed.

2016/06 Guardian's Payment (Contributory)

Oral hearing

Question at issue: Whether the eligibility criteria are met

Background: The appellant's daughter was living with her when her daughter's children were born and they remained living with her for some years. Their father's identity was not known. When the children were still very young, their mother became involved in another relationship and moved out of the family home. Problems emerged, including issues in relation to addiction, and the appellant took the children back to live with her. She was granted guardianship in 2009. The appellant was in receipt of State Pension and child dependent increases were paid in respect of the children. She was also in receipt of Child Benefit. She made a claim for Guardian's Payment in 2015 and the case was referred to a Social Welfare Inspector for investigation. He interviewed the appellant and the children's mother. Subsequently, the Deciding Officer wrote to the appellant requesting independent written confirmation as to why her daughter was not in a position to care for the children. Ultimately, the claim was refused on grounds that the children were held not to be 'orphans', according to the definition outlined in Section 2(1) of the Social Welfare Consolidation Act 2005.

In outlining reasons for the decision, the Deciding Officer stated that she was satisfied that the care arrangement for the children was the result of a private, mutual agreement between their mother and the appellant and that the children were in regular contact with their mother. In her appeal against that decision, the appellant submitted that her grandchildren had been abandoned by their mother and that they should be considered orphans, and she requested an oral hearing

Oral hearing: The appellant was accompanied by a family member, and an advocate. The Social Welfare Inspector who had investigated the case attended and, at the request of the Appeals Officer, outlined details of his investigation into the case. He referred to an interview with the children's mother and reported her account of having lived with the appellant until she was re-housed by the local authority, and then finding herself unable to cope with the responsibility of looking after the children. She said it had been agreed that it would be best if they stayed with their grandmother. She had also advised that there was insufficient space to accommodate them

The Appeals Officer reviewed the Deciding Officer's request for an independent statement about the care of the children, the nature of the contact between the children and their mother, and details of maintenance paid. The appellant referred to the letter from the school principal which she had submitted in support of her claim and a letter written by the children, indicating that they would not live with their mother. She referred to the involvement of social workers in the case and their approval of the arrangements put in place. She advised that she had requested a letter from social workers but was told that the case had been closed since the children were resident with her and were no longer deemed to be at risk. She stated that the children see their mother as often as they like but do not stay overnight. On the question of maintenance, she stated that the children's mother was in receipt of a social welfare payment and was not in a position to pay maintenance

The family member who had accompanied the appellant submitted that if she had not taken the children in, they would have ended up in care due to their mother's chaotic lifestyle and her addiction. The appellant submitted that her daughter could not cope with the responsibility of caring for her children properly.

On behalf of the appellant, her advocate submitted that the decision appeared to indicate that there was no abandonment on the basis of the contact between the mother and children, whereas abandonment did not necessarily mean that a parent had no contact at all with the child. He went on to suggest that some interpretations of abandonment included cases where a child lives with a parent but the parent has failed to provide for their financial, emotional or physical security. He made reference also to a Guardian's Payment case study included in the Social Welfare Appeals Office, Annual Report 2015 (2015/04), where the Appeals Officer had accepted that abandonment must not be considered in isolation from the failure of duty by a parent as indicated by McGuinness J. in *Northern Area Health Board & ors -v- An Bord Uchtlala & anor* [2002] IESC 75.

Consideration: The Appeals Officer noted that the appellant's evidence had been credible and he accepted that she had taken the children into her care to ensure their wellbeing and protection following their brief move to alternative accommodation with their mother. He noted the involvement of social workers in the case at an early stage and the evidence which indicated that their mother had failed to provide financially for the children. He noted some contradictions in the evidence in relation to the extent of contact between the children and their mother but considered that this should not take away from the evidence, indicating that they had been raised and cared for by their grandmother. He made reference to the letter of support which the school principal had written and to the children's own letter

He examined the assertion that the care arrangement for the children had resulted from a private mutual agreement between their mother and the appellant. He considered, however, that the evidence did not support this view. On the contrary, it indicated that the children's mother had a chaotic lifestyle in which their care was not the priority it should have been and that the appellant had intervened to ensure that they were given a secure home and stable upbringing. He made reference to the Supreme Court judgment cited and, in the absence of a legal definition of 'abandonment', accepted that it constitutes more that the failure to provide financially for the child but includes failure of a parent's duty to provide for the child's emotional and physical necessities of life. He concluded that the evidence had shown that it was the appellant who had been exercising this parental duty, and had established that the children had been abandoned and as such could be deemed to be qualified children for the purposes of Guardian's Payment.

Outcome: Appeal allowed.

2016/07 Guardian's Payment (Contributory)

Oral hearing

Question at issue: Whether the eligibility criteria are met

Background: The appellant's grandchildren came to live with her 2011, having lived with their mother prior to that. In the same year, she was granted joint guardianship. She made a claim for Guardian's Payment which was refused on grounds that the children did not satisfy the definition of 'orphan' as defined in legislation. She made an appeal against that decision, submitting that both of the children's parents were in new relationships and were not in a position to care for them.

Oral hearing: The appellant was accompanied by her local political representative. She outlined the background circumstances, saying that the children had been born when their parents were very young. The relationship had come to an end and the children lived with their mother until 2011, when difficulties emerged

The appellant stated that the children's father had applied to the Court for guardianship in 2011, which was granted to him, and then granted to the appellant also. The appellant reported that the children's mother had been instructed to pay maintenance, by way of a Court Order, but that she had not received any payment from her until 2015. She stated that the children's father was not paying maintenance and that he was not in a position to do so. The appellant confirmed that she was in receipt of Child Benefit and a discretionary payment of €29.80 per child per week under the Supplementary Welfare Allowance scheme. She said that she worked hard to earn extra to provide for the children and sees them as her own. She went on to say that she felt exhausted and was no longer able to work the same number of hours, and that she needed financial assistance.

On the question as to parental contact, the appellant reported that their mother sees the children for an hour on one day each week, and that she takes them out to eat on occasions or at weekends. She reported that visits are organised with their mother only and do not include her partner. The appellant reported that their father has a good relationship with the children, that there is a good atmosphere when he visits with his other children, and that he buys presents for birthdays and at Christmas. She advised that he takes the children to sports training and stated that he is very much involved in their lives. She confirmed that he had not paid maintenance but advised that he had paid legal costs associated with the guardianship process, as well as dental bills.

On behalf of the appellant, her political representative submitted that the appellant is doing her best to provide for the children and that they are doing well at school. He contended that the governing legislation appears not to cater for the circumstances at issue and requested that the matter be dealt with as a unique case.

Consideration: The Appeals Officer noted that social services had been involved in the case only as part of the guardianship process, following the Court's instruction that the children be afforded counselling. This was provided through the Health Service Executive. She noted that both parents had failed to provide financially for the children, although legal costs in relation to guardianship had been met by their father, as had dental expenses. She observed that parental contact between the children and their parents was still intact, that an access arrangement was in place in respect of their mother, while their father had open access and visited regularly. She noted that the Social Welfare Inspector who had investigated the circumstances of the case reported that the children's father was emotionally and materially involved with them and that he has a keen interest in their development.

The Appeals Officer noted the appellant's role in providing ongoing support for her grandchildren both financially and emotionally, acknowledging that she had played a significant part in their overall development and wellbeing. On the question as to financial provision, she considered that the evidence had established that this had not been fully addressed by all of the parties involved in the case. She noted that the children's parents were very much a part of their lives, that there was evidence of regular contact with both parents and strong evidence that their father participated to a large degree in their lives. She concluded, therefore, that the children could not be held to be 'orphans' within the meaning of the legislation governing Guardian's Payment.

Outcome: Appeal disallowed.

2017/07 Guardian's Payment (Contributory) Oral Hearing

Question at issue: Eligibility

Background: The appellant applied for a Guardian's Payment in respect of her grandson. The application was rejected on the grounds that the child did not satisfy the definition of an orphan under

Section 2(1) of the Social Welfare Consolidation Act 2005: *"orphan" means a qualified child –(a) both of whose parents are dead, or (b) one of the 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.*

The Deciding Officer noted that the child's father maintained contact with his son and stays overnight with him every weekend. The child's father provides school uniforms, books, clothes and footwear for his son. The child's father had stated that he could not care for his son due to his medical problems and that the child's best interests are served by being in the care of the appellant, the child's grandmother.

The child's grandmother appealed the decision not to grant her a Guardian's Payment and made a statutory declaration stating that her grandson had been in her care since the death of his mother in May 2016. She stated that the child had never lived with his father because of his mental health difficulties and that he is not capable of caring for the child. While the child stays with his father over weekends, this arrangement can and often is cancelled at short notice when the father is unable to cope. The appellant asserted that she was acting in loco parentis and her son, the child's father, was not providing for the child.

Oral Hearing: An oral hearing was held and the appellant attended with a solicitor from an independent law centre. It emerged that the appellant had been appointed legal guardian of the child. The appellant stated that even before the death of the child's mother, the child mostly stayed with her. Child Benefit had been granted to the appellant. The solicitor for the appellant argued that the case turned on the definition of abandonment and examined the Department's guidelines on the question. It was unlikely that the child's father would assume care of the child due to his mental health problems. While contact was maintained, the level of contact was not consistent or dependable and was subject to the father's wellbeing at any one time. The solicitor contended that once a week contact is not a substitute for day-to-day care and responsibility. It was argued that the lack of involvement by the father in the child's welfare had to be taken into account. The appellant attended to all of the child's medical, educational and financial needs. The solicitor referred to a previous Appeals Officer's decision, highlighted in the Social Welfare Appeals Office Annual Report 2015 (2015/04 Appendix 1), which also looked at the issue of abandonment and failure of duty. She argued that occasional financial contributions do not constitute financial support. The evidence was that the child's father only provided some contributions towards school uniform, school books and footwear. She also stated that contact and staying overnight once a week was insufficient grounds for rejecting the application.

Consideration: The Appeals Officer accepted that the child's father had made no real financial support available for him and was unable to provide the child with appropriate care and attention. The Appeals Officer noted the Supreme Court ruling [2002] IESC 75 in which that Court 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.' The Appeals Officer took into account the death of the child's mother, the lack of any adequate financial provision by the child's father, the father's mental health problems and the child's ongoing reliance on his grandmother for all his needs as evidenced by her appointment as legal guardian. He concluded that occasional contact and intermittent financial support cannot be taken to counteract what amounts to abandonment and failure to provide. The Appeals Officer held that the appellant had taken over the rights and duties of a parent in respect of the upbringing of the child. The appellant had the right to make all major decisions affecting the child's upbringing. The Appeals Officer found that the appellant was responsible for the overall welfare of the child and the child's surviving parent was not fulfilling any such role.

Outcome: Appeal allowed.

2017/08 Guardian's Payment (Contributory) Summary decision

Question at issue: The eligibility criteria were met at an earlier date

Background: The appellant applied for Guardian's Payment (Contributory) in respect of her sibling who had been living with her for many years. This payment was awarded, and was backdated for 6 months in line with the provisions of the governing legislation. The appellant requested that her claim be backdated for a further period to 2013. The Department refused to backdate the claim to 2013 on the grounds that there was no basis for backdating in excess of the 6 month period. The appellant stated that she did not claim for Guardian's Payment at the prescribed time due to lack of knowledge.

Consideration: The Appeals Officer referred to the Department's "Guidelines on Claims and Late Claims" which provide that: "In the case of Guardian's payment (Contributory) and Guardian's payment (Non-Contributory), a previous claim for the orphan as a qualified child on another social welfare payment may be accepted where the scheme conditions are fully satisfied". The Appeals Officer noted that the appellant brought the above Guidelines to the attention of the Department and that the Department did not respond to this. The Appeals Officer also noted that the Guidelines provide that: *"Where information was supplied on a claim form for a particular scheme that should have alerted the Department to the fact that the person was entitled to another DSP scheme which is refused, the date of the earlier claim may be accepted as the date of claim for the appropriate entitlement".*

The Appeals Officer noted that the appellant was in receipt of a child dependent increase for her sibling on her Jobseeker's Allowance claim since June 2013. He also noted that when the appellant approached the Department for information regarding her entitlements for her sibling, she was only told about the child dependent increase and was never informed about the Guardian's Payment. The Appeals Officer, having considered all the available evidence, and giving particular weighting to the Department's own Guidelines on late claims, concluded that the appellant's claim for Guardian's Payment should be backdated to the date of her Jobseeker's claim in 2013, provided all the other conditions for the scheme have been met.

Outcome: Appeal allowed.

2018/318/70 Guardian's Payment (Contributory)

Question at issue: Whether the eligibility criteria had been met

Grounds for Review: The appellant, the child's grandmother, sought a review of the Appeals Officer's decision on the basis of mixed error of fact and law. In relation to the test of abandonment, the child's grandmother asserted that the test of abandonment under the Act of 2005 cannot be more onerous than under the Adoption Acts. The appellant asserted that the child's parents had given up care and control of him and had allowed the child to be raised by his grandmother and failed in their duties as parents. In summary, it was asserted that the Appeals Officer had erred in law and had applied too stringent a test in respect of "abandonment".

Background: The claim for Guardian's Payment was disallowed by a Deciding Officer as it was considered that the arrangement in respect of the child was as a result of a mutual agreement between the child's grandmother and his mother. The Deciding Officer also outlined that the child's mother had regular contact with him and was also caring and providing for her other children. The Appeals Officer also considered that the child could not be deemed to be an "orphan" within the meaning of the Act

of 2005 and in those circumstances the appeal was disallowed. The Appeals Officer also formed the view that the arrangement whereby the child would stay with his grandmother was a private arrangement between the child's mother and grandmother entered into at the time of the child's birth.

Review: To be a qualified child for the purpose of Guardian's Payment the child must be regarded as an orphan, defined in Section 2 (1) of the Act of 2005 as:

"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;

There is no legal definition of "abandonment" or "failure to provide" for the purposes of the definition of "orphan" as defined in Section 2(1). In those circumstances the decision maker must make a judgment based on the individual circumstances of the case before him/her. For the purposes of this review, I considered the legislative provisions of the Adoption Acts to which I had been referred and to the consideration of the test of abandonment under those Acts by the Supreme Court in *Northern Area Health Board v An Bord Uchtála*. [Supreme Court judgement delivered on 17th December 2002]. I noted that while the payment of Guardian's Payment is governed by the Social Welfare Consolidation Act 2005 the considerations of the Court on the test of "abandonment" were nonetheless helpful.

I also consulted the Department's Guidelines for the purposes of the review and set out the points below which I considered were of relevance in this case.

- *It is not necessary to be a legally appointed guardian in order to qualify for a Guardian's Payment;*
- *A payment may be approved for the person with whom the orphan lives and who has responsibility for the child's care and the payment must benefit the child;*
- *In cases where one or more parents are still living the decision maker must be satisfied that the child has been abandoned and that the parent(s) have failed to provide for him/her;*
- *In cases where the child has one or more parent still living the decision maker examines the circumstances which led to the child being looked after by someone other than their parent, assess the relationship between the child and the parents and arrive at a decision as to whether the child is an "orphan" for the purposes of the payment;*
- *When determining whether a child has been abandoned, the following will be considered:*
  - *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*
  - *Whether the parent has the care of other children*
- *This list is not exhaustive and other evidence may be requested or considered.*

- *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 the orphan.*

The question to be determined in this case was whether the child's mother may be deemed to have abandoned and failed to provide for him. There was no question at issue in relation to the child's father.

From my review, it seemed to me that both the Deciding Officer's and the Appeals Officer's decisions were based on the premise that the care arrangement with the child's grandmother was a private mutual agreement. However, on review of the Appeals Officer's decision, it was not clear to me what weight was afforded to that evidence or to what extent that evidence was persuasive. It was the grandmother's contention that there was no mutual agreement and that certain correspondence on file to this effect was erroneous with regard to this point. The child's grandmother asserted that the agreement with the child's parents was on foot of an Order by a District Court appointing her guardian of the child. This evidence was supported by documentary evidence on file from the Court.

The evidence adduced at the oral hearing recounted the circumstances which occasioned the child coming into the care of his grandmother when he was a very young baby. I was satisfied that there was clear evidence of unwillingness on the part of the child's mother to have him live with her.

The evidence also indicated that the level of contact between the child and his mother was sporadic and appeared to be always at the initiation of the child's grandmother. There was no evidence that the mother was involved in the child's welfare or that she provided any financial support for or towards the care of the child. There was no evidence that the child's mother provided for his emotional and physical needs. The Social Welfare Inspector noted in his report that the child's mother has very little contact with him and expressed the opinion that it would be in the best interest of the child to remain with his grandmother.

While noting that the 'best interests of the child' does not form part of the consideration of 'abandonment', I considered that this comment was supportive of the application for Guardian's Payment.

I considered that the evidence in this case was clear and that notwithstanding the circumstances that gave rise to the child being in the care of his grandmother and the occasional visits and contact with the child's mother and other children, the mother in this case had abandoned and failed to provide for the child within the meaning of the definition of "orphan" as set out in Section 2 (1) of the Social Welfare Consolidation Act, 2005. I considered that the Appeals Officer erred in law in the weight afforded to the circumstances that gave rise to the child being in the care of his grandmother and did not have sufficient regard to the totality of the evidence.

Outcome: Decision revised and appeal allowed.

2020/318/70 Guardian's Payment (Non-Contributory)

Question at issue: Whether the eligibility criteria had been met

Grounds for Review: An advocate acting on behalf of the appellant, the child's grandmother, requested a review of the Appeals Officer's decision on the basis of mixed error in fact and law.

The following is a summarised account of the grounds submitted

- That the Appeals Officer applied the wrong test and relied on a dictionary definition of the word 'abandon' and was not entitled to do so in circumstances where the Supreme Court has scrutinised the word 'abandon' in three named decisions;
- That the Appeals Officer erred by relying on foreign jurisprudence when there is settled Irish Supreme Court authorities on the issue;
- That the Appeals Officer erred by failing to act in accordance with the Department's guidelines when making his decision and it was asserted that he was bound to take these into account;
- That the Appeals Officer erred in law and fettered his discretion in seeking to distinguish the case from a precedent case which the appellant sought to rely on and which is reported in the Social Welfare Appeals Office Annual Report 2015 – Reference 2015/04;
- Under the heading 'duty to give reasons', while not stating on what basis it was considered that the Appeals Officer had erred, requested that the Appeals Officer's decision be set aside on this ground;
- It was asserted that there were important matters of fact, in particular in relation to financial support and parental visits that necessitated resolution at oral hearing

Background: The claim for Guardian's Payment was disallowed by a Deciding Officer on the basis that the care arrangements in place could not be considered to constitute parental abandonment and that the child could not therefore be considered to be orphaned. The care arrangements referenced were fortnightly contact with both parents and financial support from both parents towards the child's care. The Appeals Officer also considered that the child could not be deemed to be an "orphan" within the meaning of the 2005 Act and in those circumstances the appeal was disallowed.

Review: By way of context, the award and payment of a guardian's payment is governed by Social Welfare legislation and in the case of Guardian's Payment (Non-Contributory) the legislation is contained in Chapter 6 of Part 3 of the 2005 Act and certain provisions of the 2007 Regulations.

Section 168 of the 2005 Act contains provisions governing entitlement to Guardian's Payment (Non-Contributory) and provides inter alia that it shall be payable in respect of an orphan.

"Orphan" as defined in Section 2(1) of the 2005 Act 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;

Insofar as it was asserted that the Appeals Officer applied the wrong test in considering if the child was an orphan I outlined that in deciding whether a child can be considered an "orphan" for the purpose of this payment under Social Welfare legislation, the decision maker must, in cases where the child has one or more parent still living, be satisfied that the child has been abandoned and that their parent or parents have "failed to provide" for the child.

I noted that there is no legal definition of "abandonment" or "failure to provide" for the purposes of the definition of "orphan" as defined in Section 2(1) of the 2005 Act and in those circumstances the decision maker must make a judgement based on the individual circumstances of the case before him/her. In the absence of a legal definition and in keeping with general rules on statutory

interpretation I formed the view that it was open to the Appeals Officer to have regard to the ordinary meaning of the word and, if necessary, to consult a dictionary definition of the word.

The Supreme Court decisions I was referred to were concerned with the legal interpretation of "abandonment" in the context of the Adoption Acts. I outlined that the fact that one Act uses the same or similar terminology to another may be helpful but it is not necessarily determinative of the matter in the context of different legislation. The question before the Appeals Officer had to be answered by reference to the terms of the statute governing the payment of the guardian's payment – that being the 2005 Act.

In any event I noted that the Appeals Officer did not rely exclusively on any one source to guide his consideration of the issue of abandonment. I therefore found no reason to revise the Appeals Officer's decision on this ground.

It was asserted that the Appeals Officer erred by his failure to follow the Department's guidelines in this respect. It was submitted that the jurisprudence from the courts establishes that:

(i) where a scheme is established, even if informal; and

(ii) where a public body has promised to follow a certain procedure

the administrative body in question must enforce the procedure or implement its promise, as the case may be.

I considered that the implication of the assertion in this regard is that the guidelines constitute the establishment of a scheme and/or a promise to follow a certain procedure and as such are legally binding.

I understood that the guidelines being referred to are the operational guidelines published by the Department. Having reviewed the guidelines in question it was clear that they aim to provide some guidance or points of reference to decision makers but do not purport to set out in a formulaic way or create any obligation on decision makers to take any or all the points into consideration in their decision making. I noted that there is no legislative requirement on the decision makers to have regard to the guidelines and within the guidelines themselves it is noted that the list of things that can be considered is not exhaustive and other evidence may be requested or considered. Therefore, the guidelines contain an indicative list of things that can be considered.

I formed the view that the guidelines do not establish a scheme in that the payment in question is clearly provided for in legislation and do not constitute a promise by the Department to follow a certain procedure.

Therefore, while it was open to the Appeals Officer to have regard to the guidelines there was no legal obligation on him to do so. In any event from my review of the Appeals Officer's decision I found that the Appeals Officer while not specifically saying which guideline he was taking into account had in fact regard to the spirit of the guidelines. I therefore found no reason to revise the Appeals Officer's decision on this ground

Insofar as it was asserted that the Appeals Officer had fettered his discretion by not following a previous decision, I did not find any reason to revise the Appeals Officer's decision on this ground. I outlined that while the Social Welfare Appeals Office endeavours to be consistent in its decision making and strives to ensure that the same conclusion is reached in cases that are based on the same or similar factual circumstances, all appeals are determined on a case by case basis and on the

particular facts of each appeal. In those circumstances appeal decisions do not themselves create precedents.

I also found no reason to revise the decision based on the assertion that the decision of the Appeals Officer should be set aside for failure to provide reasons. Having regard to the standard to be achieved, as recognised by the Courts, that a party can understand the reasons for the decision and which enables a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed, I was satisfied that there could be no doubt as to why the Appeals Officer disallowed the appeal and that the reasoning process could be clearly understood.

Insofar as it was asserted that the Appeals Officer had erred by not holding an oral hearing I did not find any reason to revise the Appeals Officer's decision on this ground. I was referred to the Supreme Court decision in *Kiely v Minister for Social Welfare.*

While the legislation may not be specific as to when an oral hearing is required it is not entirely silent and Article 13 of the Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998) provides:

Where, in the opinion of the appeals officer, a case is of such a nature that it can properly be determined without a hearing it may be determined on a summary basis.

The position therefore is that there is no absolute right to an oral hearing and an Appeals Officer has discretion as to whether to grant an oral hearing or not. The basic rule is that an appeal can be disposed of on a summary basis unless it cannot be properly determined without an oral hearing.

The Supreme Court in *Kiely v Minister for Social Welfare*, in interpreting these provisions, and which I was referred to, envisages an oral hearing where there are unresolved conflicts of evidence.

The Appeals Officer's consideration of the question before him was based on the documentary evidence submitted by the appellant and there was no other evidence that could be considered to be in conflict with that evidence. In those circumstances I was satisfied that the appeal could have been properly determined without an oral hearing.

Notwithstanding that I found no grounds to revise the decision of the Appeals Officer on the grounds outlined above I reviewed the decision on a more general basis. For this purpose I read the Supreme Court's consideration of the test of "abandonment" to which I was referred and I also consulted the Department's guidelines as a useful guiding framework.

I am setting out below the points from the Department's guidelines I considered of relevance in this case.

- *It is not necessary to be a legally appointed guardian in order to qualify for a guardian's payment;*
- *A payment may be approved for the person with whom the orphan lives and who has responsibility for the child's care and the payment must benefit the child; #*
- *In cases where one or more parents are still living the decision maker must be satisfied that the child has been abandoned and that the parent(s) have failed to provide for him/her;*
- *In cases where the child has one or more parent still living the decision maker examines the circumstances which led to the child being looked after by someone other than their parent, assess the relationship between the child and the parents and arrive at a decision as to whether the child is an "orphan" for the purposes of the payment;*
- *When determining whether a child has been abandoned, the following will be considered:*
    - *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*
- *Whether the parent has the care of other children*

This list is not exhaustive and other evidence may be requested or considered. The Guidelines also outline that 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 the orphan.

The question to be determined in this case was whether the child's parents may be deemed to have abandoned and failed to provide for him.

The evidence on the appellant's file outlined the circumstances that arose which occasioned her grandson coming into her care. It is clear, and not disputed, that the child had lived with the appellant, his grandmother, since his birth. The appellant outlined that the circumstances that led to her grandson being in her care was 'because social workers contacted [the grandparents] on safety grounds'. The child had been residing with his maternal grandparents since his birth based on a recommendation from Tusla and with the agreement of the child's parents. There was no evidence in relation to the likely duration of the existing circumstances but it appeared that they were not temporary.

While the evidence suggested, as outlined by the Appeals Officer, that the child had contact with his parents on a fortnightly basis the evidence also indicated that the level of contact was sporadic, not consistent and arrangements made for visits were frequently cancelled at short notice. In the appeal contentions it was submitted that the level of contact with the child was not dependable due to the parents' well-being. The Appeals Officer noted that both parents contributed €20 per week towards the child's keep.

There was no evidence that the parents were involved in decisions in relation to the welfare of the child and all major decisions in relation to the child's welfare were taken by his grandparents. There was documentary evidence that decisions relating to medical matters would be taken by the child's grandparents when the parents were not available. Apart from visits and financial contributions, there was no evidence that the child's parents provided for his emotional and physical needs. From the evidence presented I formed the view that due to their health difficulties the parents were not able to look after the needs of the child.

The Department's guidelines outline that the following will also be considered:

- *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*
- *Whether the parent has the care of other children*

From my review of the evidence that was before the Appeals Officer there was no specific evidence on file in relation to these issues.

I considered that the evidence in this case supported a conclusion that the parents had abandoned and failed to provide for the child within the meaning of the definition of "orphan" as set out in Section 2 (1) of the 2005 Act. I considered that the Appeals Officer erred in law in the weight afforded to the level of contact with the parents and their financial contribution and did not have sufficient regard to the totality of the evidence including the parents' duty to provide for the emotional and physical necessities of life required by the child.

Outcome: Decision revised

2021/65 Guardian's Payment (Non-Contributory) Eligibility

Summary Decision

Question at Issue: Eligibility- definition of 'orphan'.

Background: The appellant's claim for Guardian's Payment (Non-Contributory) in respect of her two grandchildren was refused by the Department on the grounds that the children were not considered to be orphans within the meaning of the governing legislation**.**

Consideration: In accordance with Section 2(1) of the Act a child is regarded as an orphan if both of the child's parents are dead, or one parent is either dead or unknown or has abandoned and failed to provide for the child, and the other parent is unknown or has abandoned and failed to provide for the child.

The appellant came to live in Ireland and her two grandchildren came to live with her. The appellant stated that the children came into her care so they could receive an education in Ireland as their parents could not afford to educate them in their home country.

The appellant submitted that she received no financial support from the children's parents and she had responsibility for the medical, financial and care needs of the children. She also submitted that there was no income coming into the parents' house and they were unable to provide for the children. It was the appellant's contention that the parents had abandoned the children. In her application form the appellant indicated that the children's parents were in daily contact with them.

The Appeals Officer concluded that given all the facts of the case, including the regular contact with their parents, the children could not be considered to have been abandoned by their parents and could not therefore be considered to be orphaned within the meaning of the governing legislation

Outcome: Appeal disallowed.

2021/66 Guardian's Payment (Contributory) Eligibility

Summary Decision

Question at issue: Eligibility - definition of 'orphan'

Background: The appellant's application for Guardian's Payment (Contributory) in respect of her niece was disallowed by the Department on the grounds that the child was not considered to be an orphan within the meaning of the governing legislation.

Consideration: In accordance with Section 2(1) of the Act a child is regarded as an orphan if both of the child's parents are dead, or one parent is either dead or unknown or has abandoned and failed to provide for the child, and the other parent is unknown or has abandoned and failed to provide for the child.

The Appeals Officer was satisfied based on documentation provided by Túsla (the Child and Family Agency) that the mother had abandoned the child. In her application form the appellant indicated that the child's father provided weekly financial support of €20. The Department contended that the arrangement whereby the father of the child paid €20 per week towards her care did not constitute parental abandonment.

The Appeals Officer outlined that the legislation does not contain a definition of what constitutes abandonment of a child. The Appeals Officer noted that the input from the father in relation to the upbringing and welfare of his child was minimal and it appeared from the evidence that he had no input in the past. Notwithstanding that the child's father paid €20 per week towards the child's financial support the Appeals Officer was satisfied that the child's father had effectively abandoned his daughter and she was an orphan within the meaning of the governing legislation.

Outcome: Appeal allowed

2022/58 Guardian's Payment (Contributory) Eligibility

Question at issue: Eligibility – orphan

Background: The appellant had been the main carer of her grandson for almost a year at the time of her claim for Guardian's Payment. Up to then, the child's mother had access to the child for part of the week but her circumstances changed and she was not in a position to continue this. The pair agreed on shared guardianship and the appellant was awarded temporary guardianship through the Courts. While the child's father lived in the same household as the child, he had health issues and was unable to care for the child. He contributed some financial support. The claim for Guardian's Payment was disallowed on the grounds that the child was not considered to be an orphan within the meaning of the governing legislation.

Consideration: In accordance with Section 2(1) of the 2005 Act a child is regarded as an orphan if both of the child's parents are dead, or one parent is either dead or unknown or has abandoned and failed to provide for the child, and the other parent is unknown or has abandoned and failed to provide for the child.

The Appeals Officer noted that the child's mother had agreed to a shared guardianship arrangement, awarded on a temporary basis by the Court. Coupled with the facts that the child's father lived in the same household as the child, and provided some financial support, the Appeals Officer concluded that the child could not be considered to have been abandoned by his mother and father. He therefore did not satisfy the definition of "orphan" as defined in social welfare legislation.

Outcome: Appeal disallowed

2022/59 Guardian's Payment (Non-Contributory) Eligibility

Question at issue: Eligibility – orphan

Background: The appellant was disallowed her application for Guardian's Payment (Non-Contributory) (GNPC) in respect of her three grandchildren on the grounds that the children were not considered to be orphans within the meaning of the governing legislation, as the care arrangement was private. The appellant was the children's primary carer and legal guardian with their mother's consent, and under Tusla supervision. The mother was a single parent and 'unwell'. She continued to have contact with the children and had provided for certain items.

Consideration: In accordance with Section 168 of the 2005 Act, GNCP is payable in respect of an orphan. Section 2(1) of the Act regards a child as an orphan if both of the child's parents are dead, or one parent is either dead or unknown or has abandoned and failed to provide for the child, and the other parent is unknown or has abandoned and failed to provide for the child. The Department's guidelines state that abandonment and failure to provide includes a lack of financial support for or towards the care of the child, and the failure of a parent's duty to provide for the emotional and physical necessities of life required by the child.

In her grounds for appeal, the appellant outlined the mother's addiction and mental health issues . She did not receive any financial help from their mother, and she made all decisions required to raise the children including moving schools to make a fresh start. The appellant contends that the circumstances amount to abandonment.

The Appeal's Officer noted that the Courts and Tusla regard the appellant as the children's legal guardian and primary carer. Their mother had expressed difficulty with care and consented to this legal guardianship. The Appeals Officer accepted that the care arrangement was private however, also concluded that given the mother's circumstances, that this one of necessity and not convenience. The Tusla support informed this view. The Appeals Officer considered that the mother's intermittent contributions could not be equated with financial support at the level required by the children.

By the time of appeal, contact had become by chance only. The Appeals Officer concluded that even if the advised weekly contact did exist this could not constitute provision of the necessary physical supervision, emotional support, and other necessities of life for the children. The Appeals Officer concluded that the appellant fulfils these parental duties and makes all decisions regarding their upbringing and that their mother has abandoned and failed to provide for the children within the meaning of the definition of "orphan" as set out in Section 2 (1) of the 2005 Act. The children are therefore considered to be orphans for the purposes of GPNC.

Outcome: Appeal allowed

2023/4.2.2 Guardian's Payment (Contributory)

Question at Issue: Entitlement and whether an overpayment should be assessed.

Outcome: Appeal Partially allowed

Background: The appellant was in receipt of Guardian's Payment (Contributory) for their granddaughter. The scheme area carried out a review of the appellant's continuing entitlement to Guardian's Payment (Contributory) payment and concluded by way of a revised decision that the appellant was not entitled to receive Guardian's Payment (Contributory) for their granddaughter since the child's father began residing with the appellant since August 2022. An overpayment was raised in respect of payments made since August 2022.

In the grounds for appeal, the appellant said they were the appointed guardian of their grandchild since July 2018. The appellant said that the child's father moved back into their home in August 2022 when they were out of the country. As an emergency stop gap, the appellant said that the child's father was allowed to stay as he found himself homeless.

The Appeals Officer held an in-person hearing at which the appellant stated that the child's father was only using their address to claim a social welfare payment. The appellant stated that they had let the child's father live in their house or otherwise he would be homeless. The appellant said they believed

there had been no change in circumstances as all financial, education and health issues are both financed and managed by the appellant and not by the child's father

Consideration: Section 2 (1) of the Social Welfare Consolidation Act 2005 (as amended) defines an orphan as a qualified child where either both of their parents are dead, or 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 child's father started residing with the child in August 2022. As the child was therefore residing in the same house as their father, they cannot be considered an orphan within the meaning of the legislation. As a result, the appellant was no longer entitled to Guardian's Payment (Contributory)

The Appeals Officer was satisfied that a genuine explanation had been advanced by the appellant for their belief that there had been no change in circumstances. The Appeals Officer revised the effective date to the date of the revised decision and therefore no overpayment arose.

"The appellant was in receipt of Guardian's Payment (Contributory) for their granddaughter. The scheme area carried out a review of the appellant's continuing entitlement to Guardian's Payment (Contributory) payment and concluded by way of a revised decision that the appellant was not entitled to the payment as the child's father was residing with the appellant."

2023/4.2.15 Guardian's Payment (Non-Contributory)

Question at Issue: Whether the child in respect of which the application was made met the definition of orphan to be considered a 'qualified child', as set out in the legislation.

Outcome: Disallowed

Background: The appellant was the grandmother of the child applied for. The child's mother also lived with both and was in receipt of Child Benefit and an Increase for Qualified Child (IQC) on her primary payment in respect of the child.

The appellant indicated her daughter was not capable of caring for the child due to mental health difficulties and that she (was caring for the child with the understanding and support of relevant agencies. A letter of support of same was provided. The appellant related she had to give up her own employment to take on the role of primary care giver. The department did not award the claim as it was not considered that the child satisfies the definition of an 'orphan' under the prevailing legislation. Information provided on appeal reiterated previous detail, but also related further updates in relation to the medical situation on the child and their mother. Letters of support for the application were received from medical and statutory interlocutors.

Consideration: The Appeals Officer examined the question as to whether the child claimed for met the definition of 'orphan' under the law, which is prescriptive. A claim for a Guardian's Payment under the legislation is only payable where the child meets that description, amongst other criteria. The Appeals Officer considered the appellant's contentions regarding the decision, acknowledging that the appellant was granted an order in the District Court appointing her a temporary guardian when her daughter, the child's mother, is incapable.

The Appeals Officer noted the very real parenting role and responsibility carried out by the appellant, not only in respect of her grandson, but also of her own daughter, the mother of her grandson. The Appeals Officer noted that the prevailing legislation is prescriptive in defining what an 'orphan' means in the context of the legislation. It states that an 'orphan' means a qualified child— … where that child is not residing with a parent, adoptive parent, or stepparent'. In this appeal, it was not disputed that

the child's mother resides with the child.

The Appeals Officer concluded that the legislation does not anticipate, or cater for, the exceptional circumstances described in the appeal, and could not find in law that the appellant's grandson, met the definition of 54 'orphan' under the prevailing legislation.

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