

27/11

NZLR X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.113/84

BETWEEN

MYERS

1451

Appellant

A N D

THE SOCIAL SECURITY
COMMISSION

Report 3 NZLR

264

Respondent

Hearing: 29th October, 1984

Counsel: R.W. Bell for Appellant
D. Jones for Respondent

Judgment: 29th October, 1984

(ORAL) JUDGMENT OF VAUTIER, J.

This appeal relates to the "liable parent" provisions of the Social Security Act 1964. It is an appeal to this Court in respect of a decision of District Court Judge F.W. Bremner, Esq., given on 20 January, 1984 in the District Court at Auckland. In this he declined to uphold an objection by the appellant made to a notice of required contribution of \$10 per week in respect of a child born on 1973. The hearing of the objection was held in the District Court in accordance with the provisions of s.27R of the Act with the objector

(in this case in person) and the Social Security Commission' represented by the Social Security Department, the only parties before the Court. The Department, however, called the mother of the child as a witness and the objector himself gave evidence. In the notice of objection thus brought before the Court the appellant sets out his grounds of objection in this way:

"Hardship:

I believe the minimum required by law of \$10 per week is too high, as can be seen from my Self Assessment forms.

I also believe that the beneficiary's husband should be liable to contribute to the maintenance of the child."

Both counsel at the hearing of this appeal were in agreement that questions as to ability to pay and financial hardship could not be taken into account either by the District Court or this Court, these being matters determinable under the statutory scheme by the Commission itself. The Judge in the District Court, however, accepted at the hearing that the ground relied upon by the objector and to be considered by the Court were those which appeared in s.27P(b)(i) and (b)(iv) of the Act. It is to be noted that the section in question expressly provides that an objection may be made on grounds set out in the section but on no other grounds. The section in question, it should be noted, was being considered in the District Court prior to the amendment made in 1983 by No.138 s.6.

The two provisions to be considered were accordingly:

- "(b) That in respect of any such child, the contribution should be reviewed because -
- (i) Some other person (not being the beneficiary) is also liable in law to contribute to the maintenance of that child; and
 - (iv) Of any other matter (not being or relating to the financial ability of the objector to pay any contribution fixed by section 27K(1) of this Act or properly assessed in accordance with the Twentieth Schedule to this Act) that could be taken into account on an application under the Family Proceedings Act 1980 for the payment of maintenance by the liable parent in respect of that child:"

The facts before the Court were that the objector was the natural father of the child in question, being a child conceived as a result of a de facto relationship between him and the child's mother. It was agreed by counsel that the judgment contained an error in referring to the objector as having been married to the child's mother. The objector had originally contributed to the maintenance of this child but on 24 April, 1975 the child's mother married a Mr Mason, the child of course then being aged only two years. The objector then ceased to contribute, the evidence showed, because he was told by the mother of the child that she did not wish him to contribute towards the child's maintenance. The mother said in evidence that she told the objector this because

she was asked to do so by her husband. She further said that her husband preferred to contribute fully himself towards the maintenance of the child.

In January, 1983, however, the mother of the child and her husband separated and Mrs Mason applied for and obtained a domestic purposes benefit and it was this of course which led to the assessment of contribution in accordance with the statutory provisions in question. It was not and could not be suggested that the objector had no liability in law to maintain the child; he was clearly a liable parent within the meaning of that term as defined in s.27I of the Act. The aspect on which the appeal turns arises in connection with the facts of this particular case as indicated in the following paragraphs in the judgment:

"In January of this year Mr and Mrs Mason separated and this was due to arguments that the couple were having, such arguments in being over the child . It appears that she has become very difficult after she inadvertently ascertained that Mr Mason who treats her as his child and the same as the other children of the marriage found that he was not her real father. Mrs Mason maintains that her husband would prefer to contribute for and contribute in full. She says in answer to a question from the Court that her husband does not want the objector around, further that the presence of the objector and the Department's demand for a contribution towards 's maintenance is creating difficulties. She says that we, that is, she and her husband, are trying to get back together and that they can get back together if they can resolve the problems that they have over . It was clear from the tenor of her evidence that one of the problems in respect of which is

preventing a reconciliation is the Commission's demand that the objector contribute towards her support."

Also:

"At the conclusion of the hearing I was concerned that at least on the face of it the Commission was by its actions preventing in some degree a husband and wife from proceeding to a reconciliation, that children were being kept apart from their parents and that an opportunity to reduce the payments of moneys to the wife were being neglected because the Commission wished to obtain \$10 per week from the objector."

In the end the conclusion reached by the Judge was that he could -

...find no grounds whatsoever unfortunately, which would permit me to allow the objection. However, I am still concerned that for the sake of \$10 the Commission is passing up the opportunity of having the husband and wife reconciled with the obvious benefits to the children and also the cessation of the total amount of the benefit which is presently being paid to the wife."

It is appropriate here to mention that counsel has stated that since the hearing on 8 November, 1983 Mr and Mrs Mason have in fact become reconciled and have resumed cohabitation. The case is still, of course, to be considered in the light of the situation as presented to the District Court.

Mr Bell for the appellant now contends that the learned Judge was in error in concluding that the statutory provision did not enable him to do anything about the matter upon which he had thus expressed some

concern. In Mr Bells' submission this arose because he overlooked a provision of the Family Proceedings Act 1980 to which I will shortly refer.

The first matter to be considered, however, relates to the ground referred to in s.27P(b)(i). I think that in the judgment although this is referred to as the second ground which has just been referred to by the Judge as that arising under s.27P(iv), he actually intended to refer here to the ground under s.27P(b)(i). The reason for the reference to the second ground, I think, is simply that it is the second ground in the objection itself to which he is there referring.

I did not understand Mr Bell to contend that the Judge was in error in concluding that the fact of Mr Mason being a person also liable in law to contribute to the maintenance of the child did not in itself provide a ground for allowing the objection. I agree that having regard to the definition in s.2 of the Family Proceedings Act of a child of the marriage and to the provisions of s.60(c)(ii) and s.72 (1) of that Act Mr Mason clearly was a person liable in law to contribute towards the maintenance of this child. Accordingly, in an appropriate case in my view an objection could have been founded upon and a review of the contributions sought on the basis of Mr Mason being a person also so liable. I agree also that s.27P(b)(iv) does not limit the Court simply to reviewing

the quantum of the assessment. That, I think, is made clear, as Mr Bell submitted, by s.27S(2) which empowers the Court -

"...after hearing an objection on any of the grounds set out in section 27P(b) of this Act, the Court is satisfied that the contribution should be reviewed, the Court shall determine the degree (if any), expressed as a percentage, to which the objector is liable in law, to maintain the child to whom the objection relates, and shall, by order, direct the Commission to review the contribution on the basis that the objector is liable in law to maintain that child only to the degree specified in the order or, as the case may require, that the objector is not liable in law to maintain that child"

Although the draftsmanship may be open to a little criticism it seems clear that by reason of the inclusion of the words "if any" the percentage can be assessed at zero percentage or, of course, the Court can act under the express provision declaring the objector not liable. I am in agreement with Mr Jones, however, that the mere fact that there is another person liable does not mean that the Court can simply allow the objection in toto on that ground. As I have said I did not understand Mr Bell really to be contending that on the facts of this case.

I am also in agreement that where, as here, the minimum amount has been fixed, then the existence of another person liable will in all ordinary circumstances become of no moment. There is certainly no basis in my view here upon which it can be said that the Court was obliged to review this contribution fixed, as it was at

the minimum amount, simply because of Mr Mason's current liability. That, I agree, must be regarded as solely a matter for administrative action of the department. Although the matter is expressed somewhat differently in his judgment I am of the view that the Judge was clearly right in concluding that he could not act in any way here on the basis of s.27P(b)(i). It is the other ground, however, which really raises the substantive point in connection with this appeal. Section 27P(b)(iv) expressly empowers the Court to take into account any other matter that could be taken into account on an application under the Family Proceedings Act 1980 for the payment of maintenance by the liable parent so long as it is not related to the financial ability of the objector to pay the contribution fixed by s.27K.

In terms of s.72 of the Family Proceedings Act which is the section under which the liability of the parent of a child to pay maintenance is to be assessed by the Court, there are two provisions of relevance, namely subsections (2) and (3) which read:

- "(2) In determining the amount that is payable by a parent for the maintenance of a child, the Court shall have regard to all relevant circumstances affecting the welfare of the child, including -
- (a) The reasonable needs of the child; and
 - (b) The manner in which the child is being educated or trained, and the expectations of each parent as to the child's education or training.

- (3) In determining the amount that is payable by a parent for the maintenance of a child, the Court shall also have regard to the following circumstances:
- (a) The means, including the potential earning capacity, of each parent:
 - (b) The reasonable needs of each parent:
 - (c) The fact that either parent is supporting any other person:
 - (d) The contribution (whether in the form of oversight, services, money payments, or otherwise) of either parent in respect of the care of that or any other child of the marriage:
 - (e) The financial and other responsibilities of each parent:
 - (f) Where the person against whom the order is sought is not a natural or adoptive parent of the child -
 - (i) The extent (if at all) to which that person has assumed responsibility for the maintenance of the child, the basis on which that person has assumed that responsibility, and the length of time during which that person has discharged that responsibility; and
 - (ii) Whether that person assumed or discharged any responsibility for the maintenance of the child knowing that that person was not a natural parent of the child; and
 - (iii) The liability of any other person to maintain the child:
 - (g) Any property and income of the child:
 - (h) Where the child has attained the age of 16 years, any earning capacity of the child."

Mr Bell has drawn my attention to two decisions of District Court Judge B.D. Inglis, Esq., namely Blake v. Rhodes and P. v. Social Security Commission, both reported in Vol. 2 FLR at p.117 and 455 respectively. In these decisions the Judge has expressed the view that notwithstanding that both these subsections open with the words "In determining the amount that is payable", the clear intention evidenced goes beyond simply

enabling the Court to consider matters of quantum. In the first case mentioned he expressed the view at p.120-121 that the provisions in question must be regarded as going a good deal further than merely affecting quantum and he adheres to that view in the second case mentioned saying, at p.458, that the provisions do not limit the Court to a consideration only of quantum but enable liability also to be considered for the reasons he has mentioned. I am in agreement with the views thus expressed. In the present case the Judge, it is true, seems to have considered only s.72(3) of the Family Proceedings Act 1980 and has, as has been pointed out, gone through each of the sub-paragraphs (a) to (b) and concluded that none could be said to have relevance here in a way which would enable the Court to uphold the objection.

Mr Bell did not seek to controvert those conclusions but his point was that the Judge should instead have acted in terms of subsection (2) and should have had regard to all the relevant circumstances, including the welfare of the child and, within the scope of that provision, should have considered such matters as the emotional benefits for the child in Mr and Mrs Mason being reconciled and a two-parent home again established with the general benefits for the development of character and so on which are generally regarded as flowing from such a situation.

Mr Jones, on the other hand, submitted that even though subsection (2) could be looked at, the subsection, having regard to its phraseology as a whole should be construed as limited to circumstances affecting the material welfare of the child. He referred to the express reference to the reasonable needs of the child and the manner in which the child was being educated and drew my attention to the definition in the statute of the word "maintenance" to which the subsection is of course directed which is confined to tangible needs such as money, property, services and provision for the actual education and training of the child. I think there is a good deal of force in that argument but I do not think it is really necessary in this case for me to reach a firm conclusion on that matter.

I am, on the record of the evidence that was presented to the Court, quite unable to reach the conclusion that the fact of the Social Security Commission requiring this parent to make this quite nominal contribution towards the actual amount which the department was paying out by way of Social Security benefit to the mother would be likely to play any real part at all in the reconciliation or non-reconciliation of this husband and wife. The matter of course was presented to the Court on hearsay evidence. Mr Mason himself did not appear to state the actual situation as far as he was concerned. The mother herself, when asked the question -

"Does Mr Mason wish to contribute fully towards the child?"

simply answered-

"He would prefer it that way, yes."

And later in her evidence she spoke of the disagreements over the child as related to the question of access and more particularly to the question of the child herself wanting to see her father. These emotional matters I can well understand could play some possible substantial part. The fact, however, of the contribution to the money which the department was paying I cannot accept as falling in any way into the same category. It is, I think, taking a very strained view of the whole situation. One has to bear in mind, of course, that if there was any such thought ever present in Mr Mason's mind and it was influencing him in any degree at all, he had only to effect the reconciliation and go back to live with his wife of some eight years standing to bring that situation to an end because the Liable Parent Scheme here being considered is only applied to the situation while a benefit is being paid.

In these circumstances, while I reach the same result by a somewhat different path, I am quite unable to conclude that the Judge was wrong in deciding that the objection could not be upheld.

The appeal is accordingly dismissed. I
allow \$50 costs to the respondent against the appellant.

A handwritten signature in cursive script, appearing to read 'W. K. [unclear]', is written in the center of the page.

SOLICITORS:

Buddle Weir & Co. Auckland, for Appellant.

Meredith Connell & Co. Auckland, for Respondent.