

X

20/11

reported
3 NZFLR 208.

NZLR

No Special
Consideration

BETWEEN

REID of 56
Stafford Street, Cambridge,
Tax Inspector

Appellant

14.25

A N D

THE SOCIAL SECURITY COMMISSION
a statutory body established
pursuant to the Social
Security Act 1964, of
Wellington

Respondent

Hearing: 25th October, 1984.

Counsel: D. J. Sharp for Appellant.
Miss A. E. A. Callaghan for Respondent.

Judgment: 12.11.84

JUDGMENT OF TOMPKINS, J.

The Appellant has appealed pursuant to s.27T of the Social Security Act, 1964, against the decision of the District Court at Hamilton, on his objection to the assessment by the Respondent of his liability to make a contribution pursuant to the liable parent scheme.

The Appellant married K ("the beneficiary") on the , 1980.

The beneficiary had been married before to S
They had two children, born
on the 1973, and born on the
1975. They were divorced on the 1979.

The Appellant and the beneficiary separated on the 18th June, 1983, so they lived together for just under three years.

Following the separation the beneficiary was granted a domestic purposes benefit of \$127 per week. By notice dated the 5th September, 1983, the Appellant was assessed by the Respondent as a liable parent to make a contribution of \$50 a week.

The Appellant objected to this contribution. The grounds stated in his notice were:-

- " 1. That the objector is not liable in law to maintain the two dependent children named in the notice of the required contribution. The objector is not a natural parent of the children and has not adopted them. The objector married the children's mother in July, 1980, and has not, since that time, assumed responsibility for the maintenance of the children.
2. That the contribution should be reviewed because -
 - (i) (a) Some other person is also liable in law to contribute to the maintenance of the children.
 - (b) The Accident Compensation Commission as a result of the death of the children's natural father provide maintenance under s.123 of the Accident Compensation Act, 1972, in the sum of \$20 per week, and that this sum has been provided both prior to Reid's marriage to the beneficiary and subsequent to it.
 - (ii) The children named in the notice of the required contribution are not the children of the liable parent by birth or adoption. It should be noted that during the marriage the children were provided for by the payments which were made by the Accident Compensation Commission and from work undertaken by the beneficiary. The objector has not taken responsibility for maintaining the children in the financial sense. As such the objection should be accepted and the assessment either withdrawn or substantially amended. "

The Respondent determined not to allow in full the notice of objection. The objection therefore came before the District Court at Hamilton on the 18th January, 1984. By a

judgment delivered that day the learned Family Court Judge held that the Appellant is liable in law to contribute to the children and that the contribution should be reviewed by fixing his contribution at 50% of the amount assessed by the Respondent.

It is against that determination that the Appellant has now appealed. He contends that the District Court should have directed the Respondent to review the contribution on the basis that the Appellant is not liable in law to maintain and

In support of the first ground of objection it was submitted by Mr. Sharp, for the Appellant, that he was not liable in law to maintain these two children because he was their stepfather. A stepfather, it was submitted, is not a liable parent unless and until he has been held liable to maintain the children in proceedings under the Family Proceedings Act, 1980.

It is necessary to examine the relevant statutory provisions under both Acts.

S.27I, being the interpretation section to those sections of the Social Security Act and the Twentieth Schedule that impose a liability to contribute by liable parents, includes these definitions:-

" 'Dependent child' in relation to a beneficiary means a child who is being cared for by the beneficiary and in respect of whom a family benefit is for the time being payable under s.32 of this Act.

'Liable parent' in relation to the dependent child of a beneficiary means every person (other than the beneficiary) who is liable in law to maintain the dependent child, whether or not that person is also liable in law to maintain the beneficiary. "

A step-parent can be liable to maintain a step-child

under the Family Protection Act. S.60, the interpretation section relating to Part VI of that Act, being the part relating to maintenance, includes -

- " (c) A reference to a parent of a child includes a reference -
- (i) to a natural or adoptive parent of the child; and
 - (ii) in the case of a child of the marriage, to a party to the marriage who is not a natural or adoptive parent of the child.
 - (iii) For the purposes of an application under s.74(b) of this Act, to a step-parent of the child even though the child to whom the application relates is not a child of the marriage. "

S.74(b) provides that an application for a maintenance order in respect of a child may be made only by a person who has lawful care of the child or by a social worker against a parent or parents of the child.

The expression "child of the marriage" is defined in s.2, being the interpretation section that relates to the whole of the Family Proceedings Act, as -

- " (ii) includes, in relation to any proceedings under this Act, a child (whether or not a child of the husband or wife) who was a member of the family of the husband and wife at the time when the husband and wife ceased to live together, or at the time immediately preceding the institution of the proceedings, whichever first occurs. "

Then s.72 provides that each parent of the child is liable to maintain the child in the circumstances set out in subs.(1), the details of which are not relevant to the issue to be determined on this appeal.

Finally, s.76 of that Act empowers a Family Court to make orders for the future maintenance of the child as set

out in subs.(1). Subs.(2) provides:-

" The Court shall not make an order under this section pursuant to an application under section 74(b) of this Act against a step-parent of a child unless the Court is satisfied that -

(a) Either -

(i) no natural or adoptive parent of the child is alive; or

(ii) no natural or adoptive parent of the child can be found who is capable of providing proper maintenance for the child; and

(b) The child has at some time lived with the step-parent as a member of the step-parent's family. "

So a step-parent can be liable under the Family Proceedings Act to maintain a step-child if -

- (1) The child is a "child of the marriage" as defined in s.2.
- (2) The requirements of s.72 are fulfilled; and
- (3) The liability is not excluded by s.76(2).

The issue arising on this ground of objection turns on the meaning "liable in law" in the definition of liable parent in s.27I of the Social Security Act.

Mr. Sharp in support of his submission that a parent is liable only after he or she had been held liable in proceedings under the Family Proceedings Act, emphasised the words "in relation to any proceedings under this Act" in the definition of "child of the marriage" to which I have already referred. Their effect, he submitted, was that the definition only applies to proceedings under the Family Proceedings Act. It cannot apply to impose a liability under the Social Security Act.

This aspect of the definition was referred to by Judge B. D. Inglis, Q.C., in P. v. Social Security Commission

(1984) 2 N.Z.F.L.R. 455. He emphasised these words in the definition because he considered they appeared to suggest that any liability on a step-parent to maintain a step-child imposed by s.72 can be related only to maintenance proceedings under the Family Proceedings Act. He considered that that was in marked distinction to the liability of a parent to maintain his or her own child which is enunciated by s.72 in quite general terms which go beyond the confines of maintenance proceedings as such under the Act. However, he preferred to reserve his opinion on these issues because they were not necessary to decide the case before him.

In Littlewood v. George Wimpey & Co. Ltd. (1953) 2 All E.R. 915, Denning, L.J. considered the meaning of "liable" in the context of the Law Reform (Married Women and Tortfeasors) Act, 1935. He said at p.921:-

" The critical question is: what is the meaning of the word 'liable'? There are two rival views. One is that 'liable' means 'held liable'. According to this view a person is not liable for the damage unless and until he has had judgment entered against him. The other view is that 'liable' means 'responsible in law'. According to this view a person may be liable for the damage even though he has not been sued for judgment. In my opinion the ordinary meaning of the word 'liable' in the legal context is to denote the fact that a person is responsible at law. Thus when it is said . . . that a master is liable for the wrongdoing of his servant, that means that he is responsible for it in a court of law. "

In Kent v. Social Security Commission (MFP 07813/83, Family Court, Upper Hutt, 16.2.84) Judge Inglis seemed to have adopted the first of Lord Denning's meanings. At p.6 of the unreported judgment he said:-

" I think, therefore, for the reasons I have given that 'liable in law' as it is used in the definition of 'liable parent' in s.27I of the Social Security Act, means a parent whose liability to contribute to his children's maintenance has been established by proper legal process I consider that the term

'liable in law', as it is used in s.27I, means 'bound or obliged by law', the question whether a parent is 'bound or obliged by law' depending on the extent of his obligation as assessed in terms of the whole of s.72. "

However, some three months later, in P. v. Social Security Commission (supra) he appeared to adopt the second of Lord Denning's two meanings. Having expressed the view, with which I agree, that the question whether a parent is a liable parent cannot be answered merely in terms of status, he went on to say at p.459:-

" But even if the objector is a 'parent' within the meaning of s.72(1), the question whether he is a 'liable parent' is not answered affirmatively unless and until it is found that a court, applying the principles in the Family Proceedings Act insofar as they are made applicable by s.37S(2), would hold that a maintenance order could properly be made against him in respect of the child. "

I agree with the second approach. I do not agree with the first. In my view a person is liable in law to maintain a dependent child within the meaning of s.27I when the facts are found to be such that he would be held liable to do so in a court of law.

Thus on the hearing of an objection under s.27P, on the ground that the objector is not liable in law to maintain a dependent child, the court finds the facts that would have been relevant to proceedings brought against the objector for a maintenance order under the Family Proceedings Act. If the facts as found would have rendered the objector liable to maintain the child under that Act, the objection fails. But if the facts as found could not give rise to a liability under that Act, then the objection succeeds. He would then be held not to be a liable parent.

To interpret "liable in law" in s.27I to mean a parent whose liability had been already established by proceedings under the Family Proceedings Act, would defeat the statutory objective of the liable parent scheme. The purpose of that scheme is to enable the Commission to assess and, subject to the right of objection, to collect a liable parent's contribution without the need first to establish that parent's liability under the Family Proceedings Act.

Nor do I see any difficulty arising out of the words "in relation to any proceedings under this Act" in the definition of child of the marriage in the Family Proceedings Act. Once it is recognised that a court hearing an objection under the Social Security Act is deciding whether the liable parent would have been liable to maintain the dependent child had proceedings been brought under the Family Proceedings Act, then it is not only appropriate but essential that the court takes into account all the relevant provisions in the latter Act, including any definitions enacted for the purposes of, or in relation to, any proceedings under that Act. It is only by doing so that the court hearing the objection can decide whether the parent would have been liable to maintain the dependent child. If on the facts as found an objector step-parent would have been liable to maintain the dependent child had proceedings been brought under the Family Proceedings Act, then he is a liable parent for the purposes of the Social Security Act.

The learned Family Court Judge found as a fact that the two children were members of the family of the Appellant and the beneficiary at the time when they ceased to live together. Hence they were both children of the marriage in terms of the Family Proceedings Act. Then she found that although there was a liability in law on the part of Mr. (until he died)

the beneficiary chose not to enforce that liability. For the reasons set out in her judgment, she considered that the Appellant had assumed or discharged some responsibility for the maintenance of the children knowing that he was not a natural parent of the child - a circumstance relevant to determining the amount of maintenance that would be payable pursuant to s.72(3)(f)(ii) of the Family Proceedings Act.

Mr. had died from drowning as the result of an accident that occurred on the 1981. Hence the provisions of s.76(2) of the Family Proceedings Act cannot operate to exempt the Appellant from a liability to maintain the children that he may otherwise have had.

On these facts, which were not disputed on the hearing of this appeal, it is apparent that the Appellant would have been liable to maintain the two children had proceedings been brought against him for such maintenance under the Family Proceedings Act. It follows that the learned Family Court Judge was correct when she found that he was liable in law to maintain the dependent children and hence was a liable parent. Consequently she was correct in dismissing the first ground of objection.

The second ground of objection is based on s.27P(b)(i) and (ii). An objection may be made on the grounds that 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; or
- (ii) That child is not the child of the liable parent by birth or adoption. "

The first ground arose because of payments made to the beneficiary by the Accident Compensation Commission for the

two children. These payments are made because of Mr. 's accidental death by drowning on the , 1981. Since about August or September, 1981 (the beneficiary was unsure of the date) the Commission has paid to her \$19.94 on behalf of the two children. These payments have been used by the beneficiary for the maintenance of the children. In addition the Commission paid a lump sum of \$640, which is being held by the New Zealand Guardian Trust Co. Ltd. on behalf of the children. The interest is retained by the trustee.

The learned Family Court Judge held that the Accident Compensation Commission could not be regarded as "some other person" for the purposes of s.27P(b)(i). In his submissions on the appeal Mr. Sharp finally abandoned this ground of objection. For myself I would be inclined to the view, contrary to that expressed by the learned Family Court Judge, that the Commission could be regarded as "some other person". "Person" is not defined in the Social Security Act. By s.2 of the Acts Interpretation Act, 1924, "person" includes a corporation sole which the Commission is. The payments, I assume, are being made pursuant to s.65(2) of the Accident Compensation Act, 1982, which imposes on the Commission an obligation to pay earnings related compensation to each child of a deceased person while the child remains a minor and while the child would, in the opinion of the Commission, have been totally or partially dependent on the deceased person if that person were living. Provided, therefore, the facts are within s.65(2)(b) of the Accident Compensation Act, 1982, there would, in my view, be a liability in law to contribute to the maintenance of the children. However, this issue was not fully argued before me and it is not necessary to determine it for the purposes of deciding this appeal.

This is because there can be no doubt that the second ground of objection that the children are not children of the

Appellant by birth or adoption is undoubtedly made out.

The Appellant having made out a ground upon which the contribution should be reviewed then, pursuant to s.27S(2) it is for the Court to 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.

For the reasons I discussed in Battersby v. The Social Security Commission (M.153/84, Hamilton Registry, November, 1984) this assessment requires the Court to take into account all the matters that would be relevant on an application under the Family Proceedings Act for the payment of maintenance by the liable parent in respect of that child. These are the matters set out in s.72 of that Act. What the Court is required to assess is what should be the liable parent's percentage of the total cost of maintaining the child. A separate assessment should be made for each child.

In making this assessment all the circumstances contained in s.72(2) and (3) should be taken into account by the court hearing the objection. Of particular relevance in the circumstances of the present case, is s.72(3)(f) -

- "(f)(i) Where the person against whom the order is sought is not a natural or adoptive parent of the child - 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. "

The learned Family Court Judge found that the

Appellant had assumed responsibility for the maintenance of the children. More particularly, she found that the beneficiary and the Appellant, during the first year of the marriage while Whatford was alive, chose not to enforce against him any liability to contribute towards the maintenance of the children. Instead, apart from some minor earnings by the beneficiary, and after Whatford's death the Accident Compensation payments, the Appellant assumed responsibility for the maintenance of the children. He discharged that responsibility to that extent for the three years of the marriage. He did so, of course, knowing that he was not the natural parent of the two children.

The learned Family Court Judge also took into account the nature of the relationship between the Appellant and the two children. As she rightly observed, it was to his credit that following his marriage to the beneficiary he obviously established an affection for the children. That bond has continued down to the present time. He is anxious to maintain a contact with and to have access to the children.

Although she did not accept that the Accident Compensation Commission was "some other person" for the purposes of s.27P(b)(i) of the Social Security Act, she considered the payments by the Accident Compensation Commission to have a high degree of relevance, presumably pursuant to s.72(3)(f)(iii) of the Family Proceedings Act. With that I agree. She considered the payments from that source to amount to almost 50% of the cost of the support of the children.

The evidence relating to the other relevant circumstances referred to in s.72(2) and (3) is sparse. It does not disclose any circumstances relating to the reasonable needs of the children, nor their education or training, that would bear on the total cost of their maintenance. Nor is there much evidence relating to the means, needs and financial and other

responsibilities of the beneficiary and the Appellant. Subject to his desire to exercise access, to which I have already referred, it is the beneficiary who makes the major contribution to the children in the form of oversight. But the Appellant does contribute \$16 a week towards the outgoings of the house in which the beneficiary and the children live.

Taking into account the payments from the Accident Compensation Commission and accepting that they amount to almost 50% of the support of the children, the receipt by the beneficiary of the child benefit, and the contribution from the Appellant towards the outgoings of the house, the relatively short period of three years for which the Appellant assumed some responsibility for the maintenance of the children, the fact that he is their step-father, but also the nature of his relationship to them, I have concluded that the Appellant's share of the total cost of maintaining each child, expressed as a percentage, should be assessed at 35%.

The learned Family Court Judge directed that the contribution should be fixed at 50% of the amount assessed by the Respondent. For the reasons that I discussed in Battersby v. The Social Security Commission (supra) this is not the appropriate order for the court to make. It is for the Commission, not the court, to review the contribution on the basis of the court's assessment.

Accordingly the appeal will be allowed. There will be an order directing the Commission to review the contribution on the basis that the Appellant is liable in law to maintain each child only to the degree of 35%.

The Appellant is entitled to costs on the appeal, which I fix at \$250.

Solicitors:

Garrard & Osmond, Cambridge, for Appellant.