IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M. No. 153/84

X

N2LR

2014

reported 3 NZFLR 198


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BETWEEN J[illegible] BATTERSBY of Hamilton, Chemistry Technician

Appellant

A N D THE SOCIAL SECURITY COMMISSION

Respondent

Hearing: 25th and 26th October, 1984.

Counsel: W. J. Scotter for Appellant.
P. J. Morgan for Respondent.

Judgment: 8-11-84

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JUDGMENT OF TOMPKINS, J.

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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 Social Security Commission of the Appellant's liability to make a contribution pursuant to those provisions in the Act known as the liable parent scheme.

The Appellant married the beneficiary on the [illegible]. They have three children, C[illegible] born on the [illegible], J[illegible] born on the [illegible] and D[illegible] born on the [illegible].

The Appellant and the beneficiary separated on the [illegible]. The terms of that separation are set out in an agreement dated the [illegible]. The Appellant and the beneficiary agreed that they should have joint custody of the three children, with reciprocal access rights. The beneficiary agreed to apply for the Domestic Purposes Benefit

and the Appellant agreed to enter into arrangements with the Department of Social Welfare for the payment of contributions to the Liable Parent Contribution Scheme. The beneficiary undertook that she would not seek maintenance for herself or the children of the marriage while she is in receipt of the Domestic Purposes Benefit. The former matrimonial home was to be transferred to the Appellant, who agreed to pay to the beneficiary $10,000 in cash and a further $7,500 after five years, the latter sum to be secured by a second mortgage over the matrimonial home.

The beneficiary sought and was granted a Domestic Purposes Benefit. The Respondent then assessed the Appellant's liability to make a contribution at $93 a week. The Appellant gave notice of his wish to object against that decision on the ground -

> " My wife and I have joint custody of our three children and share all responsibility for them and expenses involved. "

The hearing of the objection proceeded on the assumption apparently by counsel, and certainly by the learned Family Court Judge, that this objection was on the ground set out in s.27P(b)(iii) of the Act, namely, that the contribution should be reviewed because -

> " (iii) The liable parent has already provided for the maintenance of that child whether by way of settlement of property, lump sum maintenance or otherwise. "

At the hearing before me both counsel considered that this was not the appropriate ground. With that I agree. Para. (iii) applies where the liable parent has <u>already</u> provided for the maintenance of the child in one of the manners set out. It is designed for the situation where, for instance, a father

has made a settlement under the Matrimonial Property Act, 1976, so generous as to contain an element of provision of maintenance for the child. It is not claimed by the Appellant that he has in some way already provided for the maintenance of the children either under the terms of the agreement or otherwise. He has agreed to have joint custody of the three children. He has put that agreement into practice. But this without more cannot amount to having already provided for the maintenance of those children. And the objection is not that he has already provided for their maintenance, but that by continuing to exercise his right of joint custody he will, at least to that degree, provide for their maintenance in the future.

In my view the objection comes within para.(iv) of s.27P(b), that is, that the contribution should be reviewed because -

> " (iv) Of any other matter (not being or relating to the financial ability of the objector to pay any contribution fixed by s.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. "

In his decision the learned Family Court Judge pointed to the difficulty in applying the Act to the joint custody situation. He concluded that some allowance should be made because of the joint custody based, in respect of the two older children, on the amount of time they spend with the Appellant, and in respect of D on the number of meals per week he has with the Appellant. The learned Family Court Judge concluded his decision -

> " The evidence satisfies me that the two eldest children spend approximately half of each week with their father and, using the meals guideline, that D spends some 20% of each week with his father. There are a total, of course, of 300 percentage points involved and on that

> calculation the time spent by the three children with their father amounts to some 120%.
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> That, of course, cannot be the complete answer because of the requirement that Mrs. Battersby accepts responsibility for clothing and for medical expenses for the children, and I think that in that regard there should be a deduction of 10% for each child, reducing the total percentage down to 90% of 300%.
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> The net effect of that is that the reduction in the assessment should be of the order of 30% for the three children treated globally. If, in fact, the correct assessment is $93 per week, and there is some doubt as to that because of the lack of co-operation shown by Mr. Battersby which resulted in the default assessment, then the $93 per week should be reduced by 30%.
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> That may or may not transpire to be the net effect once the arithmetic is taken into consideration but that is the direction I give to the Commission, that whatever assessment there is, be reduced by 30%. "

It was submitted by the Appellant that this approach was not correct. The reason Mr. Scotter advanced was that it appears to be based on the assumption that where there is a true joint custody situation where each parent has a child in his or her actual custody for exactly the same time and contributes in equal shares to all clothing and other costs, one parent can still be required to pay to the Department one-half of the contribution that he would be required to pay if the child were in the full time custody of the other parent. It was Mr. Scotter's submission that this was incorrect. He contended that in that situation no contribution should be paid. The application of this approach to the findings and assessment made by the learned Family Court Judge should result, Mr. Scotter contended, in the contribution being reduced by 60%, not 30%.

Mr. Morgan, for the Respondent, agreed that the approach adopted by the learned Family Court Judge was not correct, but he also submitted that Mr. Scotter's approach only compounded the error. He submitted that neither approach accorded with the manner in which the Court should decide an objection as prescribed by s.27S.

Subs.(2) of that section sets out how the Court should deal with an objection on any of the grounds in s.27P(b). It provides:-

> " (2) If, 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. "

There are thus three steps involved in determining an objection to which this subsection relates.

First, the Court must be satisfied that the contribution should be reviewed. This involves the objector satisfying the Court that the objection should be upheld upon one of the grounds contained in s.27P(b). The onus rests on the objector (s.27R(5)(b)).

Secondly, having been so satisfied, the Court then determines 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. Where, as here, the ground of the objection is that contained in s.27P(b)(iv), the assessment requires the Court to take into account all the matters that would be relevant on an application under the Family Proceedings Act, 1980, for the payment of maintenance by the liable parent in respect of that child. These are the matters set out in s.72 of the Family Proceedings Act. It is thus a broad enquiry involving such of the s.72 matters as may be found relevant to the circumstances of the particular case. They will include such circumstances as, for example, the reasonable needs of the child, the manner in which the child is being educated, the means

and needs of each parent, and their financial and other responsibilities. In circumstances such as the present, the contribution (whether in the form of oversight, services, money payments, or otherwise) of either parent in respect of the care of any of the children of the marriage will be important, but this should not be considered the sole relevant circumstance. As was stated by Ongley, J. in Anderson v. The Social Security Commission (M.47/82, Nelson Registry, 10.9.84) -

> " . . . . the question to be decided on an objection under s.27P(b) is not a monetary assessment at all, but an assessment of a percentage of the total cost of maintaining the child for which the objector is to be liable in law. "

The enquiry is similar to that which the Court would be required to undertake if the beneficiary were applying for a maintenance order for the child under the Family Proceedings Act. The only significant difference is that the answer is expressed as a percentage of the total cost of maintaining the child, rather than in dollar terms. But everything that would be relevant to determining the amount of maintenance payable by the liable parent in respect of that child, would also be relevant in determining that percentage. The only qualification to this process is that the Court should not take into account any matter being or relating to the financial ability of the objector to pay any contribution fixed by s.27K(1) or properly assessed in accordance with the Twentieth Schedule.

It follows from this approach that where the objection relates to more than one child, then the Court is required to determine the degree of the objector's liability in law separately for each child. This must be so once it is recognised that it is the percentage of the total cost of maintaining the child that is being assessed, not the percentage of the assessed contribution. In many cases the percentage for each child will be the same, but in other cases - and this may

well be one - an objector's liability for one child may well be greater or lesser than his or her liability for others. Thus there must be a separate assessment for each.

Thirdly, the Court, by order, directs the Commission to review the contribution on the basis that the objector is liable in law to maintain each child to the degree specified, including that he is not liable at all. It is therefore for the Commission, not the Court, to make the adjustment to the contribution. Further, the direction to the Commission is "to review" the contribution. It, of course, does not follow that the contribution must necessarily be reduced by the degree specified in the order. The effect of the order on the contribution will depend upon the manner in which the contribution has been assessed in accordance with para. 2(c) of the Twentieth Schedule to the Act. In some cases the Commission's review may result in the contribution being reduced by the degree specified in the order, but in others it may not. Depending upon how the contribution has been assessed, it is even possible that where a Court has determined that an objector is liable to maintain a child to a degree less than 100%, the contribution may nevertheless be confirmed. The obligation of the Commission following the making of the order by the Court, is contained in s.27S(7) which requires the Commission, within seven days of the order, to -

> " (a) Review the contribution in accordance with the terms of the order; and
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> (b) Cancel, vary or confirm the contribution as may be necessary; and
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> (c) Advise the objector in writing of the result of the review. "

The learned Family Court Judge in determining the objection in the manner that he has, has not, in my view, followed s.27S(2). He has assessed the extent to which the Appellant is liable to maintain the children solely by reference

to the joint custody arrangements. He has not taken into account such of the other circumstances set out in s.72 of the Family Proceedings Act that may be relevant to this case. For instance, no reference is made to the reasonable needs of the children, the manner in which they are being educated, and the means, needs, and financial and other responsibilities of each parent. These are all relevant to the determination except that the Court cannot have regard to the financial ability of the Appellant to pay the contribution fixed.

In fairness to the learned Family Court Judge I should point out that counsel for the Appellant and the Respondent in the District Court seemed not to have appreciated the nature of the enquiry required. The evidence presented by them related primarily to the way in which the joint custody agreement had worked. Also, the Judge's approach would have been affected by his belief, encouraged by counsel, that the ground of the objection was that in s.27P(b)(iii).

In view of the nature of the enquiry to which I have already referred, it would be in my view generally inappropriate to endeavour to assess the degree of an objector's liability by the type of mathematical approach adopted by the learned Family Court Judge in this case. Further, although in doing so he considered each child separately, in the end he arrived at an assessment of 30% for the three children treated globally. As I have indicated, I consider it is necessary to arrive at a separate assessment for each child.

Finally, he directed the Commission to reduce the contribution by the assessment to which he had arrived, namely, 30%. That is not the Court's function. As I have stated, it is for the Commission, not the Court, to review the contribution in the light of the assessment made by the Court.

For these reasons I do not consider that the conclusion to which the learned Family Court Judge arrived can stand.

Mr. Morgan, for the Commission, submitted that if the learned Family Court Judge's conclusion is to be set aside, then this Court should determine the Appellant's liability to maintain each child on the evidence before the Court. I have considered this suggestion, but find that the evidence is insufficient to enable this to be done. The evidence tendered does not deal with those circumstances set out in s.72 of the Family Proceedings Act relevant to the present case. For example, the evidence given by the beneficiary does not set out her financial circumstances. There is no evidence concerning where she is living and the cost to her of that accommodation, whether by way of rent, mortgage payments, or otherwise. There is no evidence of the beneficiary's income other than that she is in receipt of the Domestic Purposes Benefit and the Family Benefit for the children. The earnings and outgoings of the Appellant are set out in the evidence, but the Court cannot assess his proportion of the total cost of maintaining each child without having the same information from the beneficiary. There may also be other circumstances relevant to the assessment of that liability as a percentage of the total cost for each child.

Therefore I consider that the proper course is, as Ongley, J. found it necessary to do in Anderson's case, namely, to exercise the power in s.77A of the District Courts Act, 1947, by ordering a re-hearing of the objection in the District Court. The parties can then put before the Judge all the evidence necessary to enable him to make the assessment in the manner I have indicated.

The Applicant is entitled to costs which I fix at $200.

Solicitors:

Harkness, Henry & Co., Hamilton, for Appellant.

Crown Solicitor, Hamilton, for Respondent.