17/6 102 LR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M No. 88/89

1729

BETWEEN E

Appellant

AND THE DIRECTOR-GENERAL OF SOCIAL WELFARE

Respondent

Hearing 16 August 1989

Counsel P S Rollo for Appellant
Marie Grills for Respondent

Judgment 13th November 1989

JUDGMENT OF HARDIE BOYS J

This is an appeal against the disallowance, by reserved decision delivered on 26 May 1989, of an objection to the calculation of the appellant's contribution as a liable parent towards the cost of a domestic purposes benefit in respect of his wife and two children. The appeal was out of time, but no point was taken about that, and leave to proceed is granted.

The Social Security Commission is required to assess a liable parent's contribution on a purely arithmetical basis, in accordance with the provisions of s 27K of, and the 20th Schedule to the Social Security Act 1974: see s 27N(1). But the approach the Court is to take in dealing with an objection, where as here the objection is

brought under s 27P(b), is not so exact. If after hearing such an objection the Court is satisfied that the contribution should be reduced, it fixes the degree of the objector's liability in law to maintain the child in terms of a percentage, and the Commission applies that percentage to the contribution otherwise payable (which presumes 100% liability).

The only grounds of objection are those contained in s 27P, and para (b) deals with four situations. The first two situations - where some other person is also liable to contribute to the child's maintenance, and where the child is not the natural or adopted child of the objector - are not relevant, but the next two are, for although the Judge in his decision referred only to the first of them, Mr Rollo informed me that he had relied on the second as well, as he certainly did in this Court. They are set out in subparagraphs (iii) and (iv) as follows:

> " (iii) [Because] The liable parent has already provided for the maintenance of that child, whether by way of settlement of property, lump sum maintenance, or otherwise; or
>
> (iv) [Because] 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:"

Mr F advances three matters as coming within one or the other of these subparagraphs. It will be

convenient to deal with each separately, but first I set out some general background. The parties separated on 12 August 1987. The husband moved from the matrimonial home and the wife remained there wih the two children, then aged 10 and 6. She kept the car. On 21 August 1987 the husband consented to a custody order in favour of the wife; and he also consented to an order under s 21 of the Domestic Protection Act 1982 giving her occupation of the home and furniture until 25 September 1987. On that date he consented to an order continuing her right of occupation until further order. Probably in November - for his objection was dated 27 November - the assessment of his liable parent contribution was made, requiring a first payment on 11 December 1987. On 9 March 1988 outstanding matrimonial property issues were resolved at a further hearing. There was an equal division, and the wife was to acquire the car and the husband's share in the equity in the home as at January 1989. To achieve equality, $22,695 was payable by the wife to the husband. Of this she was to pay $15,000 in cash in January 1989, whilst the balance of $7,695 was to be settled by the husband on the wife as trustee, to be applied by her for the benefit of the children, in the acquisition, provision and maintenance of a family home for their accommodation for a period of ten years; the intention being that the trust fund would then be treated as fully expended. The wife's occupation of the home was again extended, although now by virtue of an order

under the Matrimonial Property Act, until the final payment and settlement were completed. The husband has had access to the children from the time of the separation, for alternate weekends, for an evening meal once a week, and for parts of the school holidays. Besides providing their food and meeting other incidental expenses during these periods, he has purchased some items of clothing for them.

I now turn to the three matters upon which the objection was based.

Cash payments

Over the 6 weeks following the separation, the husband paid the mortgage instalments on the house, totalling $654, and loan repayments on the car, totalling $288. He contends that these payments ought to have been taken into account; as should the contribution he makes to the children's maintenance when they visit him for access. Apart from mentioning that Mr H relied upon it, the Judge did not deal with this latter contribution in his judgment. As to the former, he stressed the limited period over which the payments were made, but held against Mr H on the basis that the words "or otherwise" in subparagraph (iii) are to be construed eiusdem generis and so, taking their flavour from the words "settlement of property, lump sum maintenance" refer only to provision of a capital nature. It may well be that the Judge applied the same reasoning to the expenditure incurred during access.

In adopting this view of subparagraph (iii) the Judge accepted the authority of the judgment of the Family Court in Bedford v Social Security Commission (1984) 1 FRNZ 137; although I suspect he meant to refer to Priston v Social Security Commission (1981) 1 NZFLR 7, where that was the decision, because it seems to me that the point was left open in Bedford. The Priston decision has not gone unchallenged: see Ludbrook's Family Law Service para 8P.10; and in Anderson v Director-General of Social Welfare (1988) 3 FRNZ 557 the decision was to the contrary, Priston not being mentioned. Anderson also shows that subpara (iv) may provide an alternative or additional means of having periodic payments brought into account; as indeed Mr Rollo contended for in this case.

There is however a very simple answer to Mr H contention in respect of the payments he made over the 6 week period and that is that this was well before his liability to contribute under the Act began. The purpose of the liable parent scheme is to enable the State to recover part of what it pays for children's maintenance by way of the domestic purposes benefit. One of the purposes of the objection procedure is to provide relief against double payment: a parent who pays maintenance in one form is not to be called upon to pay it in another as well. Therefore the fact that the liable parent has already made maintenance provision can be relevant only insofar as that provision extends to the period in which the benefit is

payable. As is said in Ludbrook, the subparagraph deals with past provision for future maintenance. Otherwise, the provision is of no more relevance than the fact that the parent has provided maintenance before the separation. Thus the payments the husband made during the 6 week period, being in respect of no more than a contemporaneous obligation, are irrelevant.

This reasoning obviously does not apply to the continuing expenditure during access periods. However I have considerable reservations as to whether a continuing non-contractual periodic provision is what is contemplated by subparagraph (iii). It is the past tense that is used: "has already provided". These words, followed by the examples of a settlement or a lump sum maintenance payment, to my mind indicate that the provision must have been made by the time of the objection. Although it must be a provision that has continuing effect for the future, it must already have been put in place. There seems no reason to limit the provision to one of a capital nature, so long as it amounts to provision already made for the future. A helpful example is Ludbrook's, of a payment of school fees in advance.

Although subparagraph (iii) is thus not available to the appellant, subparagraph (iv) clearly is. It seems to have been accepted in the Family Court that the regular sustenance of children during access justifies a reduction

in the contribution, although occasional voluntary payments do not: Boulton v Social Security Commission [1982] FLN 141, Weatherhead v Social Security Commission (1985) 1 FRNZ 446. This is simply an application of the criterion for assessing children's maintenance set out in s 72(3)(d) of the Family Proceedings Act 1980: "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". The distinction between what qualifies, and what does not because it is occasional and voluntary, may not always be easy to draw. Access itself is voluntary, as is the incurring of any expenditure in the course of it. It must in the end be a matter of degree, depending on the facts of the particular case. Here, I consider that there is sufficient frequency and length of visit to qualify. On the other hand, occasional purchases, such as of clothing, cannot.

Provision of exclusive rights of occupation

This was the sole ground set out in Mr H ' original notice of objection, but the Judge did not deal with it separately from the matter of the payments for the first 6 weeks of the separation. However this ground extends well beyond that period. It was Mr Rollo's case that the husband had provided maintenance in terms of subparagraph (iii) by his willingness to allow the wife and the children to remain in the house for over 16 months, from the separation until his share was paid out at the beginning of 1989.

Mrs Grills accepted that the provision of the home in this way - by a spouse allowing his capital to be "locked in" for a period - can amount to a provision of maintenance for a child whose home it also is: see for example Kennard v Kennard (1984) 3 NZFR 140. But Mrs Grills submitted that it must be a legally binding arrangement of more than a temporary nature in order to qualify under subparagraph (iii). As I have said earlier, what is required is a provision for the future, which of necessity involves either an obligation that is enforceable or one that has been carried into effect (as in Baars, mentioned below).

Mr H consented to an order on 21 August and again on 25 September. At the time the assessment was made, and at the time he lodged his assessment, the order was in force. As from 25 September 1987 it was liable to be terminated at any time by further order. Whether the extension from 9 March 1988 to the date of final settlement was with Mr H ' consent is not clear, although it was part of the overall arrangement which must have been proposed by him, for he was commended for it by the Judge at the time. Throughout the whole period, apart from the first six weeks, Mrs H was paying the outgoings on the property.

It is to be remembered that what we are concerned with is maintenance of the children. An order under the Domestic Protection Act may be made only if it is necessary

for the protection of the applicant or is in the best interests of a child: s 21(2). As I understand it, it was the second ground that was availed of here. Maintenance of the child is not necessarily implicit in that ground, although consent to an order may certainly involve some provision of maintenance. Arrangements in respect of matrimonial property can only flow on into the area of children's maintenance if they are clearly in excess of what the custodial parent would otherwise be entitled to: Roderick v Social Security Commission (1984) 3 NZFLR 7 (Hillyer J) and Loakman v Social Security Commission (1988) 4 NZFLR 485, 487. Where it is an occupation order that is involved, the telling consideration is that it is only because the spouse has the custody of the children that he or she is able to remain in the home: Anderson at p 561.

The issue is rather evenly balanced here, but I have concluded that the case comes within subparagraph (iii). The wife's right to remain in the home, and the husband's consent to her doing so, must clearly have been due to her having the children. It was largely for their benefit that the interim orders were made. Whilst it was terminable by the Court, it was unlikely that the Court would terminate it without a long-term solution that also protected the children's interests; as in fact occurred. And of course while the order was in existence, it was enforceable against the husband.

Settlement of capital sum

There cannot be any doubt that the settlement of the fund of $7,695 is of the kind contemplated by subparagraph (iii), but the Judge held that he could not have regard to it as a ground of objection because it was effected after the date of assessment of the appellant's contribution. In coming to this conclusion, the Judge followed the decision of Robertson J in Baars v Social Security Commission (1988) 4 NZFLR 642. There, the assessment had been made and was being paid at the time the spouses entered into the settlement. Robertson J referred to the differing views that had been expressed in the Family Court: on the one hand that the provision must be in existence at the time of the assessment; and on the other that the provision had only to be made before the objection was lodged, and not necessarily before the assessment. The Judge preferred the former view. He gave two reasons. The first was the use of the clear and unambiguous word "already"; and the second was the existence of s 27ZH. This section provides for the contribution to be reviewed by the Commission on the application of the liable parent when there has been a change of circumstances since the contribution was calculated, or where "evidence that was not considered when the contribution was calculated would justify a different contribution".

There is something to be said for both views. The words of s 27P(b) "the contribution should be reviewed

because ... the liable parent has already provided" may certainly be thought to suggest that the provision must ante-date the calculation of the contribution, but some of the force is taken from that suggestion by the fact that the provision could not have affected the calculation; it is not something the Commission is entitled to take into account in its strictly arithmetical exercise. It is to be noted that there is no time limit on the making of an objection, so that there is no impediment in that respect to the objection procedure being used to deal with an eventuality that has come about since the assessment was made. Furthermore, it is the most practicable way of dealing with such an eventuality. If the view preferred by Robertson J is right, it means that a person in the position of Mr F must apply to the Commission for a review under s 27ZH. But the Commission cannot have regard to the subject matter of the objection, and so the contribution will remain the same. There must then be another objection, and the objection will go to the Court. That seems an unnecessarily roundabout procedure. In my opinion it makes more sense of s 27ZH to treat it as primarily applicable to a review of those matters to which the Commission had regard in making the original assessment, rather than to those which can be the concern only of the Court on an objection. This view is reinforced by the fact that subs (1) of s 27ZH requires the Commission itself to review every contribution from time to time, and it of course may have regard only to those limited

matters which are its concern. And to construe s 27P(iii) consistently with that view does no violence to the language of that section. For the section defines the grounds of objection to an assessment that has been received; and to read "already" as referring to the date of the objection is entirely consistent with the wording: "an objection ... may be made [on the ground] that the liable parent has already provided ...".

In thus respectfully differing from Robertson J, I take some comfort from the fact that my conclusion, although not necessarily my reasons, is the preferred view of the authors of Butterworth's Family Law Guide 3ed, 239.

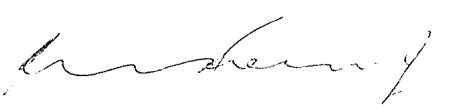
My conclusion therefore is that the appellant was entitled to have the settlement of $7,695 taken into account for the purposes of his objection.

Result of the appeal

The appeal is thus largely successful. However I do not consider that I am in a position finally to determine the matter. The outcome of a successful objection is that the Court fixes a percentage. As has been said more than once in the cases, the percentage is in relation to the total cost of maintaining the child: Anderson v Social Security Commission (1984) 3 NZFLR 225, Battersby v Social Security Commission (1984) 3 NZFLR 198. As in those cases, there is insufficient material before this Court to enable

the exercise to be undertaken. It is not correct, for example, to say that because the father has access for 20% of the time, the appropriate percentage is 80%: although that approach seems to have been taken in some instances. Here, there is no information as to the total cost of maintaining the child, and little as to the value of the appellants' contribution, and so there is no basis for arriving at a percentage. I therefore adopt the course taken in Anderson and Battersby and order a rehearing of the objection in the Family Court. I am only sorry that because of the unavoidable delay there has been in the preparation of this judgment, this will mean that the matter will be unduly protracted. I was informed - although obviously I could not take account of it - that the Commission has already undertaken a review, and it may be that it will be possible for agreement to be reached.

The appellant is entitled to costs which I fix at $300.



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