

**IN THE HIGH COURT OF NEW ZEALAND  
TAURANGA REGISTRY**

**CIV 2009-485-43**

IN THE MATTER OF      an appeal by way of case stated from the  
   determination of the Social Security Appeal  
   Authority held in Auckland under s 12Q of  
   the Social Security Act 1964

BETWEEN                      MICHAEL ERIC WOLFAARDT  
   Appellant

AND                              THE CHIEF EXECUTIVE OF THE  
   MINISTRY OF SOCIAL  
   DEVELOPMENT  
   Respondent

Hearing:                      11 June 2009

Counsel:                      M E Wolfaardt In Person  
   L M Fong for Respondent

Judgment:                    25 June 2009

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**RESERVED JUDGMENT OF RONALD YOUNG J**

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*In accordance with r11.5 I direct the Registrar to endorse this judgment  
with the delivery time of 10.00 a.m. on the 25<sup>th</sup> day of June 2009*

**Introduction**

[1]      The appellant's former wife applied for and obtained a Domestic Purposes Benefit on 21 June 2003 and their children were included within that benefit. In November 2005 the appellant, Mr Wolfaardt, lodged an application for a Domestic Purposes Benefit but that was declined on the basis that the children's mother was receiving a Domestic Purposes Benefit.

[2] The decision to decline Mr Wolfaardt's application for a benefit was confirmed by the Benefits Review Committee ("the Committee") and in turn before the Society Security Appeal Authority ("the Authority").

[3] Arising from that decision an appeal by way of case stated is brought to this Court. The questions of law identified by the Authority were:

- [i] did the Authority err in law by determining that s 70B(1) of the Social Security Act 1964 allows only the parent with greater responsibility for the care of the child to be taken into account in assessing the parents' entitlement to a benefit, regardless of whether the benefit sought by the other parent is the same as that received by the parent with greater responsibility?
- [ii] As a matter of law did the Authority err in upholding the Chief Executive's decision to decline the appellant's application for a Domestic Purposes Benefit on 30 November 2005?

### **Background facts**

[4] It seems that in April 2003 the parties agreed to a shared custody arrangement for their three children following their separation. However, for a short period in May and June 2003 the appellant was granted a Domestic Purposes Benefit but that benefit was suspended when the children returned to their mother's care and she then applied for them to be included within her benefit. She continued to receive a benefit from that date until 26 April 2006.

[5] The appellant appealed against the decision to suspend his benefit. The dispute ultimately came before the Authority who concluded that the mother had primary responsibility for the care of the dependent children prior to the separation and thus the appellant was not eligible for the Domestic Purposes Benefit.

[6] Subsequently, in early 2005, the parties agreed to an amended custody order. The children were to be in the appellant's care for 158½ days per year (44% of the time) and in the mother's care for the remaining 56%. On 30 November 2005 Mr Wolfaardt again applied for a Domestic Purposes Benefit. That application was declined.

[7] In the meantime, Mr Wolfaardt complained that his ex-wife was living in a de facto relationship and therefore should not be in receipt of the Domestic Purposes Benefit. Investigation was undertaken but ceased when the mother cancelled her benefit and returned to work. Mr Wolfaardt again applied, on 27 February 2006, for a Domestic Purposes Benefit but that was declined.

[8] An internal review in March 2006 upheld the decision of 30 November 2005 to refuse the appellant's application for a benefit. The Committee confirmed the decision of 30 November 2005 and Mr Wolfaardt subsequently unsuccessfully appealed to the Authority from this decision. This appeal follows from the Authority's decision of 13 September 2007.

[9] To return to the case stated. The Authority identified the relevant facts as:

[5] The appellant and his former wife share custody of their three children aged 16, 12 and 9 years.

[6] The children were included in their mother's Domestic Purposes Benefit which she had received continuously from 21 June 2003.

[7] The issue of whether or not the appellant should receive Domestic Purposes Benefit was considered by the Society Security Appeal Authority in decision number 082/04 issued on 29 July 2004.

[8] On 30 November 2005 the appellant lodged a further application for Domestic Purposes Benefit. The application was declined on the basis that the children's mother was in receipt of Domestic Purposes Benefit.

[9] The appellant was in receipt of sickness benefit paid at the single rate at the time of this decision.

[10] The appellant lodged a further application on 27 February 2006. This application was also declined. The appellant was in receipt of Unemployment Benefit at the single rate at the time of this decision. The appellant also sought a review of that decision.

[11] The decision to decline the application on 30 November 2005 was reviewed internally. At this time it was calculated that the children were in the appellant's care 44% of the time. As a result the decision to decline Mr Wolfaardt's application for Domestic Purposes Benefit was considered to be correct and the matter was referred to a Benefits Review Committee.

[12] On 1 June 2006 the appellant lodged a further application for Domestic Purposes Benefit. This application was granted as the

appellant's wife had ceased to receive the Domestic Purposes Benefit on 26 April 2006.

[13] The decision to decline the application of 30 November 2005 was upheld by the Benefits Review Committee. The decision of 27 February 2006 did not appear to have been considered by a Benefits Review Committee. The appellant then appealed to this Authority.

[10] The Authority also to set out in full the summary of its findings in the case stated:

[14] the issue before the Authority related to the situation at the time of the appellant's application for Domestic Purposes Benefit in November 2005.

[15] The appellant accepted that a custody arrangement dating from January 2005 resulted in the children being in Mrs Wolfaardt's care for a greater period of time. There was no evidence to demonstrate that despite Mrs Wolfaardt having the children in her care for a greater period of time that the appellant somehow had greater responsibility for the dependent children of his marriage to Mrs Wolfaardt.

[16] The Authority was satisfied that as at November 2005 Mrs Wolfaardt retained a greater responsibility for the children. As a result on Mrs Wolfaardt was entitled to have the children taken into account in assessing entitlement to a benefit.

[17] Mrs Wolfaardt met the residence criteria for Domestic Purposes Benefit in that she had one child born in New Zealand at the time of her application for Domestic Purposes Benefit and a second child born a short time later.

[18] Section 12J (of the Social Security Act 1964) gives the appellant the right to appeal against any decision which affects him. A decision not to investigate an allegation made against Mrs Wolfaardt, which affects her entitlement to benefit, is a decision which may affect Mr Wolfaardt as a result of the provisions of s 70B of the Act.

[19] The information given by the appellant and Mrs Glassey at the hearing falls far short of establishing that Mrs Wolfaardt and Mr Wilson were living in a relationship in the nature of marriage at the relevant time.

[20] It was clear that the information gathered by the Ministry to the point where Mrs Wolfaardt cancelled her Domestic Purposes Benefit was not sufficient to enable the Chief Executive to make a decision to cancel her benefit on the basis that she was living in a relationship in the nature of marriage.

[21] Section 70B applies in the situation where both parents are beneficiaries.

[22] Section 3(1) defines 'beneficiary' as meaning "*a person who has been granted a benefit; and includes a person in respect of whom a benefit or part of a benefit has been granted*".

[23] The definition of 'benefit' in s 3(1) includes Accommodation Supplement.

[24] The Authority accepted that the provisions of s 70B are not limited to Domestic Purposes Benefit.

[25] The provision does not require that the benefit sought by the parent who does not have greater responsibility for the child be the same as that which is received by the parent with greater responsibility for the children.

[26] As the person with greater responsibility for the children, if Mrs Wolfaardt continued to receive Accommodation Supplement (which is defined as a benefit) after her Domestic Purposes Benefit was cancelled and the Wolfaardt children were taken into account in assessing her eligibility for and the rate of this benefit then the appellant would be precluded from being paid a benefit which took the children into account.

[27] The rate of Accommodation Supplement for a couple not in receipt of a parent benefit living in a de facto relationship with dependent children involves a calculation which takes into account the Family Support payable in respect of the first dependent child under 16 years of age. If therefore the Family Support paid in respect of the Wolfaardt's eldest child is used to make this calculation it can be said that a dependent child of the appellant and Mrs Wolfaardt has been taken into account in assessing the entitlement payable at any one time.

[28] The issue for the Authority at the end of the day is to consider whether it should direct the Chief Executive to reopen the investigation in relation to Mrs Wolfaardt. The decision to investigate is discretionary.

[29] In this case even had her Domestic Purposes Benefit been cancelled in November 2005, Mrs Wolfaardt and Mr Wilson would have been eligible for Accommodation Supplement. Ministry records indicate that Mrs Wolfaardt continued to receive Accommodation Supplement when her benefit was cancelled. As a result the appellant would still have been precluded from receiving a benefit which took his dependent children into account.

[30] The Authority concluded that from the appellant's point of view there was little to be achieved from reopening the investigation.

[31] The Authority concluded that the Chief Executive was correct to decline the appellant's application for Domestic Purposes Benefit on 30 November 2005 and that the investigation of Mrs Wolfaardt under the circumstances should not be reopened.

## First Question

[11] I turn, therefore, to the first question in the case stated. The statutory regime, which governs benefits in the appellant's circumstances is as follows.

[12] Section 70B of the Social Security Act 1964 provides:

### **70B Entitlement to benefits in cases of shared custody**

- (1) If the parents of a dependent child—
  - (a) Are living apart; and
  - (b) Are both beneficiaries; and
  - (c) Each has the primary responsibility for the care of that child for at least 40 percent of the time—

only the parent whom the [[chief executive]] is satisfied has the greater responsibility for the child shall be entitled to have that child taken into account by the [[chief executive]] in assessing that parent's entitlement to a benefit and the rate of benefit payable at any one time.
- (2) In deciding which parent has the greater responsibility for the child, the [[chief executive]] shall have regard primarily to the periods the child is in the care of each parent and then to the following factors:
  - (a) How the responsibility for decisions about the daily activities of the child is shared; and
  - (b) Who is responsible for taking the child to and from school and supervising that child's leisure activities; and
  - (c) How decisions about the education or health care of the child are made; and
  - (d) The financial arrangements for the child's material support; and
  - (e) Which parent pays for which expenses of the child.
- (3) If the [[chief executive]] is unable to ascertain that one parent has the greater responsibility for the child than the other, only the parent whom the [[chief executive]] ascertains was the principal caregiver in respect of the child immediately before the parents began living apart shall be entitled to have that child taken into account by the [[chief executive]] in assessing that parent's entitlement to a benefit and the rate of benefit payable.
- (4) If the [[chief executive]] is unable to ascertain which of the parents has the greater responsibility for the child or which of them was the

principal caregiver before the parents began living apart, the parents shall agree between themselves as to which of them shall be entitled to have that child taken into account by the [[chief executive]] in assessing entitlement to a benefit and the rate of benefit payable; and until the parents reach agreement the child shall not be taken into account in assessing the entitlement to a benefit of, or the rate of benefit payable to, either parent.

[13] This section's purpose, therefore, is to identify which of the parents of a dependent child are entitled to a benefit and to have the children taken into account in their rate of benefit, given only one parent will qualify.

[14] The ss (1) pre-requisites apply in this case. The parents of the children were living apart, they were both beneficiaries and each had care of the children for at least 40% of the time.

[15] Given those ss (1) circumstances were present then only the parent who qualified in terms of ss (1), (2), (3) or (4) could receive the benefit described.

[16] Subsection (2) identifies those factors the Chief Executive must and may have regard to in assessing who has greater responsibility for the children. If, however, the Chief Executive is unable to decide which parent has the greater responsibility then ss (3) provides for an alternative way to assess who is entitled to the relevant benefit. This alternative is based on who the Chief Executive considers was the principle caregiver immediately before the parties began living apart. Subsection (4) provides for a further alternative system to resolve any evidential impasse in ss (2) and ss(3).

[17] As the Authority said ([10] above, at [16] of the Authority's decision) as at November 2005 the appellant's wife had a greater responsibility for the children and, therefore, ss (1) and (2) were satisfied.

[18] To return, therefore, to the first question posed by the case stated. The focus of the question is on whether the principle behind s 70B – that only one parent in the relevant circumstances is eligible for a benefit which takes into account the care of the children – applies whether the benefit sought by the parents are the same or not.

[19] There is nothing to suggest in the wording of s 70B that it is restricted to a particular benefit or that its provisions apply only where the parties have sought the same benefit.

[20] Section 70B uses the word “benefit” or “benefits” throughout. No specific form or type of benefit is mentioned. There is nothing in the context or purpose of the section to suggest it should be limited to particular types of benefits or only where both parties are in receipt of the same benefit. Interpreting the section in this way would require the Court to ignore the words of the section and to read into the section that which is not there.

[21] The answer to the first question posed in the case stated is, therefore, no.

## **Second Question**

[22] As to question two this is not expressed appropriately as a question of law by way of case stated. It poses the question whether, in deciding the appellant’s application for a benefit, the Chief Executive (and therefore the Authority) erred in law. No effort is made to identify the alleged error of law. Left in this state this Court is potentially required to consider each of the steps required of the Chief Executive by law before a decision can be made whether to grant the appellant a benefit. This is far too “broad” a brush for the case stated process which, given an agreed set of facts, is designed to focus on a discrete question of law. What was required, therefore, was the identification of what part of the decision made by the Chief Executive was wrong in law, which, in turn, gave rise to the refusal to grant the benefit.

[23] I appreciate the difficulty the Authority would have experienced given the appellant represented himself and wanted to make a wide ranging attack on everything that was done relating to granting his ex-wife a benefit and refusal to grant him a benefit.

[24] To briefly answer however, the broad question posed:



[25] To obtain a Domestic Purposes Benefit the appellant needed to bring himself within the statutory requirements for such a benefit.

[26] Section 27B provides:

**27B Domestic purposes benefits for solo parents**

(1) In this section the term applicant means—

(a) A woman who is the mother of one or more dependent children and who is living apart from, and has lost the support of or is being inadequately maintained by, her [[spouse or partner]]:

[[ (b) a single woman who is the mother of 1 or more dependent children: ]]

...

[[ (f) A man who is the father of 1 or more dependent children whose mother is dead or who for any other reason are not being cared for by their mother. ]]

[[ (2) Subject to the provisions of [this Act], an applicant shall be entitled to receive a domestic purposes benefit if the [chief executive] is satisfied that—

[[ (aa) the applicant meets the residential requirements in section 74AA; and ]]

[[ (a) The applicant either—

[[ (i) is or has been legally married or in a civil union; or ]]

[[ (ii) Has attained the age of 18 years; and ]]

[[ (b) The applicant is caring for a dependent child or children; and

[[ (c) the applicant is not living together with his or her spouse or partner or with the other parent of the child, as the case may be. ]]

[27] Subsection (2)(b), therefore, requires the applicant to be caring for a dependent child or children before a Domestic Purposes Benefit can be granted. Section 3 of the Act defines a dependent child as:

**Dependent child**, in relation to any person, means a child—

- (a) Whose care is primarily the responsibility of that person; and
- (b) Who is being maintained as a member of that person's family; and
- (c) Who is financially dependent on that person; and
- (d) Who is not a child in respect of whom payments are being made under section 363 of the Children, Young Persons, and Their Families Act 1989—

but, for the purposes of [[Schedule 3, Schedules 6, 8, and 9, Schedule 16, and Schedules 17 and 18]], does not include a child in respect of whom an orphan's benefit or an unsupported child's benefit is being paid:]

[28] The difficulty for Mr Wolfaardt is essentially the same problem he faced under s 70B. The definition of a dependent child (a pre-requisite to obtaining a benefit) requires that Mr Wolfaardt be primarily responsible for that child. The Authority and the Chief Executive have, for understandable reasons, concluded Mr Wolfaardt was not primarily responsible for the children.

[29] Mr Wolfaardt, therefore, would not qualify for a Domestic Purposes Benefit. As I have said, this is essentially the same question already addressed by me with regard to the first question relating to primary care of the children.

[30] The second aspect of Mr Wolfaardt's case relating to question two is that he seemed to proceed before the Authority on the assumption that if he could establish his ex-wife was in a relationship in the nature of the marriage and therefore not eligible for a Domestic Purposes Benefit, then he would somehow become entitled to such a benefit.

[31] As has been illustrated, whatever Mrs Wolfaardt's position Mr Wolfaardt has to independently qualify for a Domestic Purposes Benefit which, for reasons already given, he cannot do.

[32] In any event even after Mrs Wolfaardt no longer received the Domestic Purposes Benefit she was in receipt of an Accommodation Supplement. Such a supplement is a form of benefit and therefore s 70B would still apply.

[33] For the reasons given, therefore, the answer to question two is no.

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Ronald Young J

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