

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

CIV 2008-404-6896

UNDER the Legal Services Act 2000
IN THE MATTER OF an appeal against the decision of Legal Aid
Review Panel, Auckland and dated 8
September 2008
BETWEEN BRIAN WILLIAM NICHOLL
Appellant
AND LEGAL SERVICES AGENCY
Respondent

Hearing: 10 June 2009

Counsel: Appellant in Person
G D S Taylor for Respondent

Judgment: 15 June 2009

RESERVED JUDGMENT OF RONALD YOUNG J

*In accordance with r11.5 I direct the Registrar to endorse this judgment
with the delivery time of 2.15 p.m. on the 15th day of June 2009*

Introduction

[1] The appellant, Mr Nicholl, says the Legal Services Agency (“the Agency”) and the Legal Aid Review Panel (“LARP”) were wrong to take into account his interest in a trust when assessing whether to require him to make a contribution to his grant of legal aid.

[2] The appellant sought legal aid to pay for legal advice and, if justified, proceedings regarding an accident compensation claim. In his application for legal

aid he mentioned he was paying the mortgage and other expenses with respect to a house he lived in. After enquiry he told the Agency the house was owned by a trust. When the Agency asked for a copy of the trust deed he initially refused but after the matter came before this Court he relented and provided a copy of the deed to the Agency.

[3] On 17 March 2008 the Agency granted the appellant legal aid. They took into account the appellant's interest in the trust which owned the house, and imposed a contribution almost equal to the grant. As a condition of the grant the appellant was required to obtain authorisation for a statutory charge over the house property. The contribution, therefore, would be repayable only upon the sale of the house.

[4] The LARP found no error in the Agency's decision, concluding it was neither manifestly unreasonable nor wrong in law to take into account the appellant's interest in the trust.

[5] In this appeal from LARP's conclusion, the appellant submits the decision is wrong in law. He emphasises that the trust is, in law, a separate entity from himself. The appellant says, therefore, the Agency could not take into account any interest that he may have in the trust itself.

Discussion

[6] The relevant statutory regime is the Legal Services Act 2000 ("the Act") and the Legal Services Regulations 2000 ("the Regulations") but prior to the 2006 amendments. This amendment came into force on 1 March 2007 and applies to applications for legal aid made on or after that date. The appellant's application for legal aid, which is behind this appeal, was received by the agency on 28 July 2006 pre-dating the commencement of the 2006 amendment.

[7] The respondent's case is that the Act and the Regulations as then in force entitle the Agency, when valuing an applicant's assets, to take into account the value of any interest the applicant may have in a trust.

[8] I turn, therefore, to the relevant statutory provisions. The relevant purpose of the Act is set out in s 3(a) as follows:

3 Purpose of Act

The purpose of this Act is to promote access to justice by—

- (a) providing a legal aid scheme that assists people who have insufficient means to pay for legal services to nonetheless have access to them; and

...

[9] The Act provides for the Agency to grant legal aid where the applicant's disposable income does not exceed the specified amount (s 9(1)). Further, the Act authorises the Agency to refuse legal aid if the applicant's disposable capital exceeds the specified amount and the Agency considers the applicant can afford to proceed without legal aid (s 9(2)).

[10] Section 15 of the Act provides that any grant of legal aid may be subject to a contribution towards the cost of services provided (ss (1)) and that a charge may be registered with respect to particular property (ss (3)). The amount of contribution is to be determined in accordance with the regulations made under the Act (s 17).

[11] Section 113(1) of the Act authorises the making of regulations and provides as relevant here:

113 Regulations

...

- (i) making provision, in respect of the disposable income or disposable capital of an applicant for legal aid, for all or any of the following:

...

- (v) taking into account any benefit to which the applicant is or may become entitled in connection with property held on trust:

[12] Regulation 7 provides:

7 Amount of contribution for purpose of section 17 of Act

- (1) The contribution payable by an applicant for legal aid in respect of a civil matter is \$50, plus the amount determined under subclause (2).

- (2) The contribution payable by every applicant for legal aid (whether for a civil matter or a criminal matter) is the total of the following amounts:
- (a) \$1 for each complete \$2 of the first \$1,000 of the applicant's disposable income; and
 - (b) \$2 for each complete \$3 of the applicant's disposable income that is more than \$1,000 but less than \$2,000; and
 - (c) all of the applicant's disposable income that is more than \$2,000; and
 - (d) \$2 for each complete \$3 of the applicant's disposable capital that is less than \$2,000; and
 - (e) all of the applicant's disposable capital that is more than \$2,000.

[13] Regulation 7(2) (d) and (e) therefore provide that an applicant is liable to pay a contribution toward the cost of legal services of \$2 for every \$3 of disposal capital under \$2,000 and all of the disposable capital over \$2,000.

[14] As to disposable capital this is defined in clause 3 of Schedule 1 of the Act as relevant:

3 Meaning of disposable capital

- (1) In relation to an applicant for legal aid for a criminal matter, **disposable capital** means that person's total assets after deducting the amount of any debts secured against those assets and after deducting, —
- (a) if the person has an interest in a home, the amount of the value of that interest:
- ...
- (2) In relation to an applicant for legal aid for a civil matter, **disposable capital** means that person's total assets after deducting the amount of any debts secured against those assets and after deducting—
- (a) the amounts listed in paragraphs (d) to (f) of subclause (1); and
 - (b) such proportion (if any) of the value of the assets referred to in any of paragraphs (a) to (c) of subclause (1) as in the opinion of the Agency it would be inequitable not to include; and

- (c) the value of the subject-matter of the proceedings, unless the Agency determines a proportion of that value that should be included in the assessment of the person's total assets.

[15] And in determining the value of the disposable capital Regulation 6 provides as follows:

6 Determining Disposable Capital

...

- (2) For the purpose of valuing an applicant's assets in accordance with Clause 3 of Schedule 1 of the Act, —

...

- (b) the value of any interest in a reversion or remainder (whether legal or equitable) in any property, or in a trust or other fund (whether the applicant's interest is held solely, jointly, or in common, and whether it is vested or contingent) must be computed in a manner that is both fair and reasonable.

[16] One matter arises relating to the wording of Regulation 6. In Regulation 6(2)(b) the interests identified as being relevant in determining the value of assets include the reversion or remainder "in a trust or other fund" whether the applicant's interest is amongst other matters "vested or contingent". As the respondent points out, a beneficiary in a discretionary trust has neither a vested nor a contingent interest in the trust in law. The question is, however, whether the use of the word "contingent" in this statutory context was intended to convey the same meaning as in trust law. The appellant submits it does. What counts against that submission is that the statutory purpose of these provisions relating to the interests of applicants in a trust property. The scheme of these provisions seems to ensure that those who have such an interest and may therefore benefit, are, on a fair and reasonable basis, to have these interests taken into account in assessing whether they are eligible for legal aid. This is to be irrespective of the type of interest in the trust whether vested or contingent.

[17] I accept the respondent's submissions, therefore, that what was intended by the use of "contingent" in this context is its "lay" meaning – whether a benefit is received is dependent upon the occurrence of an event – here dependent upon the trustees making the decision to benefit the beneficiary.

[18] Further, I do not consider the words “vested or contingent” in any event are intended to define all of the type of interests an applicant may have in a trust. I am satisfied that the words in the second set of parenthesis in Regulation 6(2)(b) are simply examples rather than an attempt to identify a finite class of ways in which an applicant’s interest may be held.

[19] It is instructive to consider how Regulation 6 was recast in the 2006 amendments. The equivalent regulation is Regulation 8.

[20] Regulation 8(3) and (4) provide as follows:

8 Determining capital and disposable capital: valuation of assets

...

- (3) Any interest in a reversion or remainder (whether legal or equitable) in any property must be computed in a manner that is both fair and reasonable.
- (4) Any interest in any trust or other fund (whether the applicant's interest is held solely, jointly, or in common, and whether it is vested or contingent), or any benefit that the applicant might receive in connection with any trust (for example, a discretionary trust), must be assessed with regard to—
 - (a) how the trust arose or was created; and
 - (b) the terms and conditions of the trust; and
 - (c) the person or persons who have power to appoint and remove trustees or beneficiaries; and
 - (d) the history of the trust's transactions (for example, distributions); and
 - (e) any changes in the membership of the trustees; and
 - (f) any changes in the class of beneficiaries; and
 - (g) the source of income or capital that the trust receives.

[21] As can be seen the Regulation 6(2)(b) has been divided in the 2006 Amendment into sub-regulations (3) and (4). Sub-regulation (4) now explicitly identifies, as an applicant’s asset, any benefit in a discretionary trust. It is difficult to ascertain whether the inclusion of an express provision relating to the

2006 Amendment was to clear up any uncertainty in Regulation 6 or to cover a gap in Regulation 6 relating to discretionary trusts.

[22] In my view the more likely inference is clarification. It is clear from s 113(i)(v) that it anticipated regulations which would make provision in the calculation of disposable capital for any benefit to which an applicant is or may become entitled to in connection with property held on trust. A benefit to which an applicant for legal aid may become entitled to in a trust is contingent in the sense I have mentioned in this judgment. The use of the word may point to a discretionary interest. Identifying such an interest in s 113 supports the proposition that a discretionary interest was intended to be covered by Regulation 6 and that Regulation 8 of the 2006 amendment did more than clarify Regulation 6.

[23] For those reasons, therefore, I am satisfied that the appellant's discretionary interest in the trust is covered by Regulation 6(2)(b).

[24] This mixture of statutory and regulatory provisions therefore allow an applicant's interest in a trust to be taken into account when assessing (amongst other matters) whether any grant of legal aid should be subject to a contribution by the applicant.

[25] Section 17 authorises a contribution towards a grant of civil legal aid assessed on a formula provided for in the Regulations. Section 113 authorises the making of regulations which, in calculating disposable capital, may take into account any benefit an applicant is entitled to with respect to property held on trust.

[26] The Regulations set a formula for contributions where there is disposable capital. In valuing assets the value of any persons interest in a trust and therefore disposable capital is to be computed on a fair and reasonable basis (Regulation 6(2)(b)).

[27] To return to this case, therefore, the LARP said:

[28] It is apparent from the wording of the legislation that Parliament intended the Agency to be able to take an interest in trust property

into account in assessing an applicant's disposable capital for the purposes of the Act.

[29] The Panel accepts the Agency's submission that the Applicant has the requisite interest in the trust property in question. The Applicant is a primary beneficiary under the trust, and has the power to remove and appoint trustees. It was neither manifestly unreasonable nor wrong in law for the Agency to take the Applicant's interest into account in assessing his disposable capital.

[30] The Panel can find no flaw in the calculations used to assess the Applicant's contribution.

[28] Regulation 6 therefore allows a fair and reasonable computation of the value of the applicant's interest in a trust and that interest is disposable capital. The difficulty for the Agency is to practically assess what a fair and reasonable computation of the value of the interest should be.

[29] Regulation 6 was amended in 2006. The 2006 amendment deleted the words "fair and reasonable" as regards computing the value of any interest in any trust and substituted a set of criteria to assess any benefit the applicant might receive in any trust. Regulation 8(4) of the 2006 Amendment provided in this assessment regard should be had to the factors set out in (a) to (g). See [20].

[30] These factors can sensibly be used in this case as a non-exhaustive guide in assessing what is fair and reasonable computation of the value of the appellant's interest in the trust.

[31] In this case it is instructive (as LARP did) to look at the terms of the trust deed. The trust is known as the Riverby Lodge Trust Limited. The settlor of the trust was the appellant, Mr Brian Nicholl. The trust was formed to purchase the property at 33 Mill Road, the appellant's current residence, for the benefit of the primary beneficiaries. The primary beneficiaries include the appellant, together with his wife, children, grandchildren, mother, brother and sisters.

[32] The trustees are appointed by the appellant. They can distribute all or any part of the trust fund to the discretionary beneficiaries which also includes the settlor, the appellant.

[33] The trustees have a duty to consider the settlor's family (which includes the appellant) in priority to other beneficiaries. The Guardian, who is Fletcher Law Trustees Limited, has a number of supervisory powers set out in the trust deed. The Guardian is accountable only to the settlor (the appellant) who appoints the Guardian and may remove the Guardian.

[34] This summary of the interests of the appellant in the trust amply illustrates that, given the appellant's pivotal role in the operation of the trust, and in his capacity to benefit from the trust, it was fair and reasonable for the Agency and the Review Panel to assess his interest in the trust as substantial.

[35] The Agency took what I understand to be the full value of the property at \$271,000, deducted the mortgage debt and concluded the full net value of the property was all of the appellant's interest in the trust property. They applied the statutory \$2,000 capital exemption and reached a calculated capital contribution of \$176,919 by the appellant to his legal aid grant.

[36] This calculation assumes that it was fair and reasonable to include the appellant's interest in the trust at full value of the house. Although as I have illustrated the appellant does have a substantial controlling interest in the trust, others also have interest as beneficiaries.

[37] Regulation 6 requires the value of the applicant's interest in the trust to be computed on a fair and reasonable basis. In this case a modest discount of perhaps 20 to 25% to reflect the fact that others have an interest in the trust was, in my view, appropriate. At least in undertaking this assessment, the Agency and LARP had to illustrate they had assessed what was a fair and reasonable interest in the circumstances. Incorrectly, in my view, the Agency and LARP simply proceeded as if the whole of the value of the trust property (the house) was the applicant's interest. I do not consider this was correct.

[38] However, even if a 25% discount applies to the equity in the house of \$176,919 the position would remain unaltered in terms of the appellant's contribution.

[39] For the reasons given, therefore, I am satisfied that the LARP was correct when it took into account an interest the appellant had in a trust and correct when it assessed contribution of \$859 against the legal aid grant of \$860.

[40] The appeal is, therefore, dismissed.

Ronald Young J

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