

[2018] NZSSAA 16

Reference No. SSAA 070/17

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
XXXX against a decision of
a Benefits Review
Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Wellington, on 12 March 2018

Appearances

The Appellant in person

Mr R Signal for the Chief Executive of the Ministry of Social Development

DECISION

Preliminary

[1] This case concerns the situation where a grandparent is the day-to-day caregiver for her grandchildren. The appellant's concern is that she needs a greater level of financial assistance to provide the care that the children require. Her concerns have been further heightened by the differing level of assistance that applies to the respective grandchildren. The two different types of assistance are, first, an unsupported child's benefit provided under the Social Security Act 1964 (the Act), and on the other

hand, the assistance provided when a child is in a custody arrangement with Oranga Tamariki. The appellant has found that the level of assistance provided for children under the care of Oranga Tamariki, pursuant to orders made under the Oranga Tamariki Act 1989 (the Oranga Tamariki Act), is adequate. In contrast, she says there are serious financial burdens when the only support is a social security benefit provided under the Act.

- [2] The particularly acute difficulty for the appellant is that she and her wife both work. The income from working disentitles them to further assistance under the Act, however they are only able to work because they pay significant childcare costs.
- [3] While the appellant has asked the Authority to examine the legal issues, she appreciates the Ministry's position in relation to the legislation does appear to be correct. She wishes to have the Authority set out her circumstances, so she is in a better position to pursue the relevant policy issues.

The Facts

Background

- [4] The factual circumstances are not contentious. We note we had the benefit of a representative of Oranga Tamariki providing evidence regarding the support available from that body, and how it applied in this particular case.
- [5] The appellant's daughter has three children. Throughout the years that the appellant's daughter has been a mother, she has had difficulties with drug and alcohol abuse, made poor choices; and been in relationships which have not been positive for her children. The oldest of the children is seven and the youngest approximately six months old.
- [6] The oldest child was in a series of unsatisfactory care arrangements and developed serious psychological and social difficulties, because he lived in abusive situations. The middle child was also in unsatisfactory circumstances, although the appellant intervened at an earlier stage, and his difficulties have not been as great. In the case of the youngest child, Oranga Tamariki intervened and obtained an order gaining custody of

that child the day or the day after he was born. He has been in the appellant's care since that time.

- [7] The appellant and her wife married relatively recently. They are both committed to the care of the three children. However, they also have other financial responsibilities such as providing for their anticipated retirement, and while they are both willing to sacrifice to provide for the children, they also expect recognition that they are not the parents of the children. In their view, the parents of the children bear primary responsibility for the children; and they do not agree with the choices the parents have made. They believe it is the primary responsibility of the State to assist with the care of the children; in the default of the parents doing so, they are willing to sacrifice and help as whanau as best they can. However, given they are not responsible for the parents' decisions and do not have any power to control the parents, they rely on the State to address those issues. They note the children's mother has had significant financial support to address the consequences of her poor decisions, and they would prefer to see the support directed to her children instead.

The three children

- [8] The specific circumstances that apply to the children are that for some time the oldest child has been in the care of the appellant pursuant to an order of the Family Court which gives her day-to-day care. The financial support available in respect of this child is an unsupported child's benefit which is paid to the appellant. It is not necessary to identify the precise amount of the benefit; it is sufficient to note that the amount varies with age and is approximately \$150 per week. The appellant and her wife together earn more than \$1,800 per week, meaning there is no other form of assistance available. The appellant and her wife have incurred significant costs relating to childcare arrangements because they are both working. Due to the psychological and social difficulties this child has faced, they have also spent a lot of money to help with those problems. They have sought to enrich his social environment, actively seeking out opportunities to assist the child to develop better social skills and to support his psychological welfare. These initiatives have involved a range of expenses.

- [9] The second child has been with the appellant and her wife for some time, although not under a court order. Oranga Tamariki have been involved. Initially, Oranga Tamariki's view was that because the appellant and her wife were providing a safe environment for this child it was neither possible nor appropriate to intervene and seek a custody order under the Oranga Tamariki Act. More recently, that position has changed and Oranga Tamariki are now of the view it is appropriate to apply for an order because the appellant and her wife cannot permanently provide a safe environment without financial assistance. Financially, the situation is similar to the situation with the eldest child. In the absence of Oranga Tamariki having an order for custody, the extent of the financial support is an unsupported child's benefit, which is in the order of \$150 per week. The main differences are that the second child suffered less psychological trauma, so the additional expenses are less; there is also a prospect of a court order that will provide relief by providing access to further funding.
- [10] The youngest child has been subject to a court order which placed the child under a custody arrangement under the Oranga Tamariki Act. Due to this order, he has in fact been placed with the appellant and her wife in a whanau care arrangement since his birth. Whether the foster care arrangements are whanau or non-kin the financial support is the same. The basic level of support is similar to the unsupported child payment. The intention is that Oranga Tamariki meets the essential costs of supporting the child, but there is no payment for the provision of care by the caregiver.
- [11] Entitlement to support provided by Oranga Tamariki is not income or asset tested for either whanau or non-kin caregivers. Accordingly, for the third child, in addition to the basic level of support, Oranga Tamariki will generally pay the actual and reasonable costs of providing childcare. Care provided when the appellant and her wife are at work is covered, and there are additional payments for clothing and a range of other needs. The additional support will typically double the payment, although the precise figures are dependent on the age and needs of the child. The appellant finds that these payments are adequate to ensure she and her wife are not financially disadvantaged to a great extent. There is however no component of payment to them for providing the support. Accordingly, under the custody arrangement with Oranga Tamariki, instead of about

\$150 per week for support, the appellant and her wife receive about \$300 which approximates their actual costs.

Discussion

The legal position

[12] At the hearing, the Ministry explained the reason for the limits on the assistance that can be provided to the appellant. The starting point is that because the benefits are generally income tested, the only potential support that might be available is childcare assistance which is provided for in s 61GA of the Act. The essential effect of that section is to provide that the principal caregiver of a dependent child is eligible for financial assistance if they satisfy the criteria prescribed under regulations made under s 132AC of the Act. The relevant Regulations are the Social Security (Childcare Assistance) Regulations 2004. Regulation 18(1) provides that a childcare subsidy is payable to a person at the appropriate rate stated in Schedule 1 of the Regulations.

[13] Schedule 1 of the Regulations imposes an income test. There is no assistance if there is a household income (before income tax) of \$1,600 or more per week, where there are two dependent children. That is the position in this case (at least until the second child is supported under an arrangement with Oranga Tamariki).

[14] We must inevitably conclude that the effect of the legislation is to deprive the appellant of any entitlement to assistance beyond the unsupported child's benefit.

The practical effects

[15] The practical effect is that, for children in whanau care but not under a custody order in favour of Oranga Tamariki, the level of support is about \$150 per week. For children under a custody arrangement with Oranga Tamariki, the cost of the actual care is recognised as being approximately twice that, and is provided by Oranga Tamariki.

[16] For obvious reasons, there are significant thresholds before Oranga Tamariki can or should obtain a custody order in relation to a child in safe and appropriate care. Generally, the threshold is that a child or young

person is “in need of care or protection”; orders under the Act are not appropriate unless there are concerns regarding the welfare of the child.

- [17] It is not the function of this Authority to determine the appropriate policy settings in relation to the care of children; our function is to make decisions relating to entitlement under the Act. In this case, it has been necessary and appropriate for us to identify the different types of support available, depending upon which of the respective regimes is engaged, where a grandparent is the primary caregiver for grandchildren. However, we have neither the jurisdiction nor the expertise to go further. We also note that this Authority has no role in deciding when Oranga Tamariki can, or should, exercise its powers.

Order

- [18] For the reasons we have explained above, we must necessarily dismiss this appeal as there is no further entitlement available to the appellant under the Act.

Dated at Wellington this 26th day of March 2018

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member