[2017] NZSSAA 073

Reference No. SSA 045/17

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Christchurch 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 6 December 2017

Appearances

The Appellant in person

For Chief Executive of the Ministry of Social Development: Ms R Shaw

DECISION

The issue and legislation

[1] In this case, the two parents of a child live apart, they each had approximately equal time where the child was in their day-to-day care, and both were in receipt of a benefit. One parent or the other is entitled to have the dependent child taken into account when determining the level of support they receive under their benefit. In this case, XXXX (the appellant) appeals the decision of the Chief Executive, upheld by a Benefits Review Committee. Their decision was to take the dependent child into account only in relation to the mother's benefit, and not his.

[2] Section 70B of the Social Security Act 1964 (the Act) governs this issue. It provides that in circumstances where the parents of a dependent child are:

[2.1] living apart,

[2.2] beneficiaries, and

[2.3] both have primary responsibility for the care of the child for at least 40% of the time;

[2.4] then, only the parent who has greater responsibility is entitled to have the child taken into account in relation to their benefit rate and entitlement.

The other parent simply receives no support in relation to the child or children.

[3] The legislation has unequivocally established a regime where one parent or the other will have the care of the child taken into account in relation to their benefit. Obviously, the policy alternative was to apportion the entitlement based on the time the dependent child spends with each parent or some similar means of sharing. That is not the case and, accordingly, the regime prefers one parent over the other, and allocates the whole of the support relating to the dependent child to that parent.

[4] The regime sets out the following factors to consider:

[4.1] A decision has to be made as to which of the parents "has the greater responsibility for the child".[1] That will be the preferred parent.

[4.2] When deciding which parent has "the greater responsibility for the child", the decision maker "shall have regard primarily to the periods the child is in the care of each parent". In addition the following factors are also taken into account:[2]

[4.2.1] how responsibility for decisions about daily activities of the child is shared;

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[1] Social Security Act 1964, s 70B(1).
[2] Section 70B(2).

[4.2.2] who is responsible for transporting the child to and from school and supervision of leisure activities;

[4.2.3] how decisions about education or health care are made;

[4.2.4] the financial arrangements for the child's material support; and

[4.2.5] which parent pays for the expenses of the child.

[5] In the present case, during the relevant period, there is no dispute the appellant had the care of the dependent child for 157 days and the mother of the child had the child in her care for 141 days.

[6] Both parents gave evidence at the hearing regarding the general circumstances.

[7] Accordingly, the task for the Authority is to have primary regard to the greater period of time the child was in the appellant's care, and then have regard to the further factors identified on the basis of the evidence we have heard. We must then make an overall evaluation as to whether the appellant or the child's mother had the greater responsibility for the child at the relevant time.

[8] We note that where it is not possible to ascertain that one parent has greater responsibility, then the circumstances prior to the current shared care arrangement can be taken into account. In this case, we are able to make a determination as to which parent has had the greater responsibility for the child under the statutory test.

The parties

[9] In accordance with the usual practice of this Authority, it has regard to the fact that both parents are affected by decisions made under s 70B of the Act. Accordingly, both parents are treated as parties; however, the Authority is flexible as to how the respective parents choose to participate in the hearing. In the present case, the mother of the child was content to take the role of a witness called by the Ministry in support of the position the Ministry has taken. However, given her interest in the appeal we regard her as a party.

Discussion

The evidence

[10] The background circumstances are not contentious. The period in issue begins on 12 July 2016. At this point, the appellant applied to have his 11-year-old daughter included in his jobseeker support benefit (with medical deferral). At that time, the care arrangements for the child were the subject of a parenting order issued on 28 November 2015. That parenting order was a consent order made by the Family Court. There has been no suggestion that there were breaches of the parenting order. Equally, the terms of the parenting order were essentially intended to result in co-parenting on an equal basis between the appellant and the mother of the child. However, the parenting order is not as straightforward as being a simple week about for each parent, or a 2-2-5-5 day arrangement. The order relates to school terms, it provided the child was in the care of the appellant for the first week of school holidays. The result has been that down to 2 May 2017, when the parenting order was replaced with an order putting the child in the full-time care of her mother, the child spent more than two weeks' additional time in the care of the appellant.

[11] The parenting order included the following provision addressed to the parents:

> While exercising the role of providing day-to-day care for a child, you have exclusive responsibility for the child's day-to-day living arrangements, subject to any conditions stated below and to any Court order.
>
> If you are a guardian, unless your role or another guardian's role was modified by a Court order, you must act jointly (e.g. consulting whenever practicable with an aim of reaching agreement) when making guardianship decisions for a child.

[12] There was general agreement as to the background circumstances. The appellant and the mother of the child have never lived together. In the early stages of the child's life, the mother had a clearly greater responsibility and role for the child; some of the time, the appellant was outside New Zealand. Over the years prior to the parenting order of 28 November 2015, the appellant's role in the day-to-day care of the child had increased. Immediately preceding that parenting order, the arrangement was essentially one where the appellant would have the day-to-day care of the child for six days and the mother for eight days, in rotation.

[13] There was some dispute as to the balance of responsibilities between the appellant and the mother of the child during the period in issue. The mother of the child emphasised the following:

[13.1] The arrangements under the parenting order were “close to a 50/50 shared custody arrangement”.

[13.2] The mother considered that the appellant’s living arrangements were less than satisfactory.

[13.3] In terms of transporting the child to and from school and other activities, the respective parent would take responsibility during the time the child was with that parent.

[13.4] The mother contended that she provided more clothes for the child. She also contended that she took responsibility for doctor’s visits and produced a letter from one of the doctors.

[13.5] Despite the “shared parenting order, I felt I was still the primary caregiver as I had to monitor [the child’s] needs and her care even when she was living with her father”. She claimed that the father failed to ensure that the child was showered and clean or that she went to bed at an appropriate time on school nights.

[13.6] The mother claimed that “Barnardos became involved when [the child] was arriving at the school without breakfast and not enough for her lunch during the time she was with [her father]”.

[13.7] She said there were issues regarding the child’s school uniform and glasses.

[13.8] She also claimed that she paid all her school fees.

[14] The appellant disputed all of the claims regarding disparity in terms of the care arrangements. As an overall observation, the appellant pointed out that there was a documented history of the Family Court orders progressively resulting in him receiving more time with the child. Ultimately, the parenting order relating to the time in question gave him greater time with the child. He said there had been an ongoing series of disputes in the Family Court

regarding the care of the child, and him having increased care was the outcome. If the picture of neglect painted by the mother in her evidence was the truth, it was implausible that the Family Court would have given him increasing time with the child as was in fact the case.

[15] He said that some of the claims made by the mother were issues that the Family Court had already dealt with, such as the claim relating to the child not going to bed early enough, he said that in fact it was a one-off situation where the child attended a public fireworks display with him.

[16] The appellant made allegations that the mother of the child was neglectful, in part, due to her mental health. In relation to the medical matters, he said that rather than the mother taking the greater responsibility, instead, he had been concerned that she had failed to recognise the gravity of medical events. He said, for example, that the child had developed a streptococcal infection in her throat, which can potentially lead to serious complications. He said he had taken the child to the doctor, obtained the necessary antibiotics and her mother was non-compliant in administering the antibiotics, notwithstanding their importance. The mother had produced a letter from a doctor which stated:

> I have been looking after [the child] since end 2014 alongside other doctors within our practice.
>
> I have seen [the child] for various medical complaints and mental health issues over the period 2016-2017 and every time she was accompanied by her mother …

[17] The information is obviously of limited value given that it is the observations of one doctor in a group practice "alongside other doctors" and does not refer to the full range of consultations.

[18] When the issue relating to clothing was explored, it seemed that both parents accepted that each had a school uniform at their respective homes and, largely, each had a full set of clothes for the child at their respective home.

[19] There was overt conflict between the appellant and the mother regarding providing food for the child. In relation to the Barnados incident, the appellant said that occurred long before the period of time in question, and had nothing to do with the child arriving at school without breakfast. Instead, he said that the Barnados' involvement related to the mother's mental health and her ability to care for the child.

[20] The appellant produced receipts to show that he had purchased spectacles for the child, other receipts showing he purchased school materials and paid for art classes.

[21] In relation to school fees, which were approximately $65 per month, the appellant said that he had understood that these fees were $100 per annum and he had paid half of them. The mother produced invoices for the school fees directed to her.

Our evaluation of the evidence

[22] In our view, the parenting order accurately records the standard basis on which shared care arrangements operate, and the duties and rights of a guardian. The terms of the order are quoted above at paragraph [11], and they provided that while exercising the role of providing day-to-day care for a child, the parent with the child has exclusive responsibility for the child's day-to-day living arrangements. There were no material conditions set out in the order altering that position. In terms of guardianship obligations and rights, parents "must act jointly" when making guardianship decisions for a child.

[23] The evidence before us does not provide a foundation for us to reach a conclusion that lawfully, or otherwise, the parents in this matter departed from those principles. It is not possible to elevate the evidence from the respective points of view to evidence where we should prefer one perspective over another. On the contrary, the evidence was the typical accusation and counter-accusation that is all too common where parents have long standing disagreements over custody arrangements. Each parent's perspective is partisan; with insight into the other parent's duties and contribution conspicuously absent from both competing narratives.

[24] The only element of the evidence where we could say that, on the balance of probabilities, the mother provided a greater contribution was that she paid the school fees and the appellant paid a smaller amount. However, the appellant gave a plausible explanation that he paid what he believed were half the school fees. It would only be speculation to conclude more than the fact that the appellant had not been fully informed of, or misunderstood, the situation relating to school fees, but contributed what he understood was half the fees. It is of course notorious that in contested parenting matters one parent will seek to dominate the relationship with a school, medical services,

dental services and other matters, motivated by disempowering the other parent. We do not and cannot make any positive findings as to how the circumstances arose in this particular case, we simply conclude that the appellant willingly contributed what he believed were half the school fees.

[25] We have considered the decision of the High Court in *D v Chief Executive of the Ministry of Social Development*.[3] That decision makes it clear that the terms of s 70B mean, simply, what they say. This Authority, when reconsidering the decision made by the Chief Executive, must "have regard primarily to the periods the child is in the care of each parent". In this case, that parent was the appellant. It was not a case of equal rotation; over a period of time, the child spent more than two-weeks additional time in the care of the appellant.

[26] We now consider each of the remaining factors in s 70B(2):

[26.1] We must determine how the responsibility for decisions about the daily activities of the child were shared. The answer to that is clear, both for the reasons expressed in the parenting order, and the actual way in which matters worked (on the evidence of both parents). The parent who had exclusive responsibility for the child's daily activities was the parent with whom the child was living with at any given time. That means that as the child was with the appellant for a greater part of the time, so he had greater responsibility in that regard.

[26.2] The next consideration is who was responsible for taking the child to and from school and supervising the child's other activities. Again, that is day-to-day care both in terms of the parenting order and in terms of the evidence that fell to the parent with whom the child was living at any given point of time. The appellant had the greater responsibility because the child was with him for more of the time.

[26.3] The next factor is how decisions about the education or health care of the child are made. In terms of education, that is primarily a guardianship matter. As the parenting order noted, that is to be addressed jointly. There is no difference between either parent in that regard. In terms of the health care of the child, major decisions would be guardianship matters. In terms of day-to-day responsibility, on the

[3] *D v Chief Executive of the Ministry of Social Development* [2013] NZHC 1520.

evidence, we are satisfied that primarily fell to the parent with whom the child was at the time when the event occurred. We do not accept the evidence of either parent regarding the other being neglectful in that regard; neither version allowed us to find one version was preferable on the balance of probabilities.

[26.4] The next factor is the financial arrangements for the child's material support. Both parents during the material time were in receipt of support under the social security regime. The mother of the child was in fact enjoying the benefit of the child being included in her benefit and the appellant was excluded. We find that the appellant's contributions were greater in as much as the child was with him more of the time. We cannot make a finding that there was any disparity in terms of other aspects (subject to school fees which we discuss in the following paragraph).

[26.5] The final factor to consider is which parent paid for which expenses of the child. The only element of disparity we could identify was the school fees. The fees were a relatively modest amount of money. Of course, we take it into account; however, we also take account of our finding that the appellant believed he was paying half of the school fees. Given those circumstances, this element cannot have great weight.

[27] It follows that we must conclude the appellant did have the child for the greater period of time during the disputed period and we must have primary regard to that factor. The appellant had the child for greater periods of time and each parent carried responsibility for day-to-day matters for the time the child was with them. Accordingly, we find the majority of the remaining factors also point to the appellant having the greater responsibility. The guardianship issues are neutral. The only aspect which we find favours the mother was the school fees in the circumstances discussed. In our view, that is not sufficient to displace the primary and supplementary factors, all of which either favour the appellant, or are neutral.

Observation

[28] Given the terms of the legislation, it is inevitable that the period of time a child spends with their respective parents will often be primarily determinative as to which parent is entitled to have the care of the child taken

into account. Where these matters are contentious, it is unlikely that parents will voluntarily share the additional funding provided. It is not uncommon for one parent to be significantly disadvantaged by the outcome of decisions in cases like the present one, and that is further magnified when there are larger numbers of children.

[29] We are required to, and do, make decisions in cases such as this without regard to the needs of the parent who gets no support for their care of their children. In some cases, compelling evidence before the Authority establishes, for example, that a parent who gets no support cannot provide the same quality of food for their children as the other parent. The inequity and potentially harmful effects on family relationships are obvious. We urge the Chief Executive to ensure that these concerns are taken into account in his Ministry's legislative work programme.

Conclusion

[30] We are satisfied that the appeal must be allowed. The appellant is entitled to have the child taken into account when assessing his entitlement to a benefit and the rate of benefit payable during the period between 12 July 2016 and 2 May 2017. The Authority reserves leave for any party to apply to have the Authority make a determination as to the sums of money and, if necessary, the Authority will make orders in that regard.

Dated at **Wellington** this 19th day of December 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member