Decision No. [2015] NZSAAA 01

Reference No. SAA 006/14

IN THE MATTER of the Education Act 1989 and the Student Allowances Regulations 1998

AND

IN THE MATTER of an appeal by XXXX of XXXX against a decision of the Chief Executive, Ministry of Social Development

BEFORE THE STUDENT ALLOWANCE APPEAL AUTHORITY

Neil Cameron

HEARING on the papers

DECISION

The appeal is dismissed

REASONS

Overview

[1] This is an appeal against the decision of the Secretary on review to uphold the decision by StudyLink to decline the appellant's application for a Student Allowance under the "*One Parent*" category.

The issue on appeal

[2] The issue is whether the appellant's mother's partner falls within the definition of "*step-parent*" in the Regulations so as to require his income to be included as part of the appellant's "*parental income*" in assessing his eligibility for an allowance.

Factual background

[3] In early 2014 the appellant applied for a Student Allowance to support his study in 2014. As he was aged under 24 and childless his eligibility depended upon an assessment of his "*parental income*". After some discussion with StudyLink, his mother submitted a One Parent Application (OPA) requesting that this be assessed on the basis of her income alone, giving as the ground the fact that, due to a history of domestic violence and a lack of contact for at least the last six years, the relationship between the appellant and his biological father had broken down. At the same time she attached letters from herself and her current partner outlining the nature of their relationship and emphasising that she and she alone was responsible for the appellant's financial and parenting needs. Both she and her partner stressed that neither they nor the appellant saw her partner as having any obligations towards the appellant or as being in any way his parent or step-parent.

[4] In early April the application was declined on the basis that the relationship described by the parties amounted to a de facto relationship thereby rendering her partner the appellant's "*step-parent*" for the purposes of the parental income calculation. It is accepted that including the partners income in this calculation would render the appellant ineligible for an allowance. In May the appellant sought a review of this decision and appointed his mother to act as his agent. Following the usual exchange of submissions the matter came before the Student Allowance Review Panel for an advisory hearing in September. At the hearing the appellant's mother made further submissions essentially repeating her view that the relationship was not a de facto one and that her partner was in no sort of parental role vis-à-vis the appellant. On the 23rd September the Secretary upheld the original decision, concluding that the parties' "*financial interdependence* [as evidenced by their joint purchase of the property in which they were living and their sharing of its basic running costs] *when viewed in conjunction with the emotional commitment and co-habitation show a merging of lives that equates to a marriage type de facto relationship*". In reaching this decision the Secretary was supported by the views of the two advisory members of the Review panel who agreed that there was "*a significant level of financial interdependence*" and that " *although the purchase of* [their] *property could not link the couple as de facto … with the admission of a romantic, mutually exclusive relationship where* [both] *cohabit together*" the test was met. In early October the appellant's mother lodged a Notice of Appeal disputing the finding of financial interdependence and repeating that her partner had no role whatsoever in the *"physical, emotional or financial upbringing"* of the appellant.

Relevant legislation and caselaw

[5] Regulation 4(1) of the Student Allowances Regulations 1998 requires that a student's parental income be assessed if the student *"is single, younger than 24, without a supported child or children, and applies for an allowance* …". Where a student has more than one living parent the income of both parents is assessed. Nevertheless where a student's parents are no longer living together the Ministry may approve assessment on the basis of one income alone where a student can establish "*independence*" from the other parent. However such independence can only be established where one or more of the factors listed in reg 4(4) is satisfied. In this case it is accepted that these provisions apply to the appellant's situation and accordingly that the income of his biological father should not be considered for the purposes of assessing his eligibility. Where a biological parent is excluded from the calculation in this way the extended definition of "*parent*" in the Regulations may require the income of other persons in the same position as a biological parent to be taken into account instead. The term "*parent*" in the Regulations "*includes a guardian and a step-parent, and any person acting in place of a parent of that student*". "*Step-parent*", which is the relevant term in this case, is defined as

> *"A person −*
>
> *(a) who is not the student's father or mother, or a person acting in place of a parent of the student; but*
>
> *(b) who is married to, or in a civil union or in a de facto relationship with, the mother or father of the student or person acting in place of the parent of the student."*

[6] A *"de facto relationship"* is defined by s 29A of the Interpretation Act 1999 as:

"… a relationship between two people (whether a man and a woman, a man and a man, or a woman and a woman) who −

(a) live together as a couple in a relationship in the nature of marriage or civil union; and

(b) are not married to, or in a civil union with, each other; and

(c) are both aged 16 years or older.

…

In determining whether 2 people live together as a couple in a relationship in the nature of marriage or civil union, the Court or person required to determine the question must have regard to –

(a) the context, or the purpose of the law, in which the question is to be determined; and

(b) all the circumstances of the relationship."

[7] In [2010] NZSAAA 03 the Authority determined that under the Regulations as then drafted the requirement in the Interpretation Act that the question of whether a relationship was properly considered to be "*in the nature of marriage or civil union*" be considered in the light of the "*context, or the purpose of the law, in which the question is to be determined*" meant that a relationship in which there was no prospect or expectation of the non-biological "*parent*" providing any form of parental assistance, financial or otherwise, to the student could not be considered to be a de facto relationship for the purposes of Student Allowance eligibility. In reaching this decision the Authority accepted the policy rationale described by the Ministry at the time as underlying the parental income assessment requirement which was "*that parents who can afford to do so have a responsibility to contribute to the living costs of their children under the age of 24 while they are studying*". In response the Ministry sought to "*clarify*" the Regulations in 2012 by including "*step-parent*" in the definition of "*parent*" in reg 2 and by providing the extended definition of "*step-parent*" quoted above. In doing this the Ministry was undoubtedly seeking to make it clear that a relationship that would otherwise be considered to be de facto in nature must also be considered a de facto relationship for Student Allowance purposes irrespective of whether the relationship was such that the non-biological "*parent*" could be said in any way to have assumed any financial responsibility towards the student. Accordingly it is now clear that in this case the fact that the appellant's mother's partner has never had any part in the upbringing of the appellant and is accepted by the parties as having no financial obligations or responsibility towards him is irrelevant. It is simply the nature of his relationship with the appellant's mother that is crucial.

[8] The assessment of whether a relationship should be considered "*in the nature of marriage*" is a matter of judgment in each case taking account of all the relevant circumstances of the relationship. In *Thompson v the Department of Social Welfare* [1994] 2 NZLR 369 at 374 Tipping J outlined the general approach to be taken in such cases:

"Inherent in the concept of a relationship in the nature of marriage are both mental and physical aspects. In deciding whether such a relationship has been entered into it will generally be helpful to consider the physical aspects first. Once they are determined the mental question can be addressed. As to the physical aspects of the relationship the questions in the following list will be relevant:-

(1) Whether and how frequently the parties live in the same house.

(2) Whether the parties have a sexual relationship.

(3) Whether the parties give each other emotional support and companionship.

(4) Whether the parties socialise together or attend activities together as a couple.

(5) Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.

(6) Whether the parties share household and other domestic tasks.

(7) Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.

(8) Whether the parties run a common household, even if one or other partner is absent for periods of time.

(9) Whether the parties go on holiday together.

(10) Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple.

A negative answer to one or more of the questions will not necessarily mean the absence of a relationship in the nature of marriage. Nor will positive answers to a number of the questions necessarily mean its presence. The weight and effect of all the answers must be assessed. In some cases other matters not on the list may well be relevant and require assessment in the overall picture.

The ultimate decision will always be one of fact and degree. … the answer may well be influenced by the nature of the people involved, their attitudes to life and the standards and values which they themselves adopt. …

Once the physical or factual aspects of the relationship have been examined the mental ingredient must be considered. That ingredient involves some commitment by the parties to their relationship. It need not necessarily be a commitment intended to last forever or indefinitely. Nor need it be a commitment to a long term relationship. But it must, at least, be a commitment for the foreseeable future. Any lesser commitment would, in my judgment, be neither sufficient for nor consistent with a relationship in the nature of marriage. …

After the mental and physical aspects have been considered the flavour of the essential issue can be captured by asking whether the parties have so merged their lives, for the time being, that they are, for all practical purposes, living together as a married couple. While a degree of analysis is necessary, the ultimate question must be answered in a broad practical way … to ensure that those who choose to enter into what effectively amounts to a married state, but without getting legally married, are not to be treated more favourably for benefit purposes, either as to entitlement or as to quantum, than those who are married not only in fact (de facto) but in law (de jure)."

[9] More specifically in *Ruka v The Department of Social Welfare* [1997] 1 NZLR 154 the Court of Appeal emphasised that in cases where the provision of benefit assistance is in issue the question of the "*financial interdependence"* of the parties will be crucial. In crude terms in the absence of at least a degree of financial interdependence between the parties the achievement of the basic policy concern of striking a balance between private and state income support found in much welfare legislation becomes impossible.

The basis of this appeal

[10] In arguing that the relationship between her and her new partner is not one "*in the nature of marriage*" the appellant's mother says that while there is an emotional commitment between the parties and they are in fact living together in a house which they jointly own, the short duration of the relationship and the lack of financial interdependence means that it has not yet achieved de facto status. In addition she makes it very clear that her partner has assumed no parental obligations in relation to the appellant and indeed that, given the appellant's past exposure to violence from his biological father, he would not tolerate any such relationship even if her partner were minded to offer it. She is also clear that she is solely responsibie for the the appellant's financial support. Throughout her submissions she has never varied from her initial description of the relationship in her OPA:

> "*My relationship with* [my partner] *has a short history and* [the appellant] *has not lived with us for long,* however *while he was with us I met all his needs both financial and as a parent. This is documented through my bank accounts to include my paying of* [his] *share of power, water, phone, food, clothing etc. This also included my taking full responsibility for* [his] *domestic needs*.
>
> [My partner] *and myself are financially independent … through separate bank accounts and bank records that show all our payments, including the independent payments that I make as* [the appellant's] *parent*.
>
> *Because of the short timeframe that I have been with* [my partner] *I do not consider myself in a de facto relationship with him, and definitely do not consider* [him] *to be a step-parent in any form or to act as a parent to* [the appellant] *in any form.*
>
> [My partner] *and I have invested in the property we live in as tenants in common, I hold the majority of the shares in the property, and the resulting mortgage is split accordingly along with the rates and insurance … . Should he or I default on our independent share of payments then the legal process is outlined in our agreement. There is no allowance for either party to 'step in' and make payments on behalf of each other.*
>
> [The appellant] *has no benefit* [from my partner's] share *of the property and in the event of* [my partner's] *death his shares are left to in the first instance his parents and then his godchildren*."

[11] In her submissions on appeal she equates their living and financial arrangements to that of housemates rather than de facto partners:

> *"Any person living with another person albeit renting, boarding, or tenants in common, will have a mutual agreed financial arrangement as to what costs will be paid by each party. This does not constitute financial interdependence as is being purported to in the findings of this case."*

[12] In his letter supporting her application her partner makes essentially the same points. Insofar as his relationship with the appellant is concerned he emphasises that overall he has spent very little time with the appellant, even during the five month period in which he lived with the two of them:

> "*It was agreed that my relationship with* [the appellant] *would not be one that involved any form of parenting, support or emotional contact as this was not appropriate* [for him], *and given the circumstances I totally supported this*.
>
> *Financially it was also agreed that* [the appellant's mother] *and myself would remain independent of each other and she would support* [the appellant] *in meeting all of his needs*. *Between* [the appellant's mother] *and I we are 'tenants in common' this pertains to the house we live in, we have shares in the property, and pay mortgage and rates accordingly.* [She] *has the majority of the shares and it is up to her discretion as to the amount of rent* [the appellant] *is to pay should he return to the house. I do not meet any of* [her] *expenses and she will not meet any of mine*."

[13] In his submissions to the Review Panel he says:

> "*I do not offer financial support to* [the appellant's mother] *on any level. I will not meet her financial commitments, ie share of power, phone, water, rates, food or running or maintenance costs, clothing, holidays or social events. She would not meet my financial costs under any circumstances. When I answered* [to a question from the StudyLink report writer as to whether she would meet his financial obligations in relation to the mortgage payments if he was unable to do so] [that] *I guessed she would I did not realise this flippant response would be taken seriously given that it would not happen. When I discussed it later with* [her] *I told her that the truth would be* [she] *would ask/tell me to move out. … I have no shares in* [the house] … *I am not being subsidised by* [the appellant's mother] *re my mortgage repayments as she has shares and I simply do not. The mortgage is determined by the balance owed.*"

Despite owning the house jointly with the appellant's mother and having his name on the mortgage, the reason the partner had no shares in it at the time of the application was that he had been unable to sell his own house and was accordingly in no position to make a capital contribution to the joint purchase.

[14] In her comments on the Ministry's Regulation 37(2) report the appellant's mother also states, unfortunately without giving any reasons, that their living together as a couple does not meet the definition of "*co-habitation*" and reiterates that their financial arrangements do not amount to "*financial interdependence*". She also rejects as "*a complete fabrication of the facts*" based simply on the prior "'*assumptions*' *of the writer*". the Ministry's statement that the evidence suggests that they are emotionally committed to each other, socialise together, provide support, share household tasks and overall have a long-term commitment to one another. She concludes that neither the Secretary nor the Ministry have produced any concrete evidence of the requred relationship's existence.

[15] Finally in her submissions on the Ministry's Regulation 37(2) Report the appellant's mother raises two privacy concerns resulting from Ministry's handling of the case. Although neither concern is directly relevant to this appeal and I accordingly do not propose to discuss them here, the Ministry has responded to them in its supplementary submissions. It is unclear to me whether this response has been communicated directly to her. If it hasn't, it needs to be.

The Ministry's Submissions

[16] In supporting StudyLink's decision the Secretary on Review concluded that despite the appellant's arguments to the contrary, the financial arrangements surrounding the purchase of their property did in fact indicate a degree of financial interdependence sufficient to support an argument that the relationship had achieved de facto status. While such interdependence alone would plainly not be sufficient to establish this

> *"*[t]*his financial interdependence when viewed in conjunction with the emotional commitment and cohabitation show a merging of lives that equates to a marriage type de facto relationship."*

[17] In supporting and expanding on this, the Ministry's Regulation 37(2) Report refers to the criteria discussed by Tipping J in *Thompson v the Department of Social Welfare* [1964] and argues that

> *" …* [t]*he appellant's mother and her partner are considered to be in a de facto relationship because of the following reasons:*
>
> *Cohabitation:*
>
> - *The appellant's mother and her partner live together as a couple and have been doing so since July 2013.*
>
> *Financial Interdependence:*
>
> - *They have invested in a house even though it is as 'tenants in common'. This indicates a commitment to live together with well-defined financial responsibilities for both individuals.*
>
> - *While living together they must be pooling their finances for the benefit of both. Flatmates who live together have financial intermingling for the benefit of all parties, but the commitment is for the period of flatting. The appellant's mother and* [her partner] *are committed for a long term.*
>
> - *In this instance the appellant's mother and her partner have committed to a relationship with a mutually agreed financial arrangement. This could be compared to people entering into matrimony with a pre-nuptial agreement.*
>
> *Emotional commitment:*
>
> - *They have stated that they are committed to each other and from the submissions it is evident that they are committed to a long term relationship. … .*

- *They socialise together and would be viewed by others as a couple.*
- *They give each other emotional support and companionship.*
- *Living together they would be sharing household tasks.*
- *The appellant's mother states that they would be a de facto couple in three years, this indicates a long term commitment."*

[18] In response to the appellant's argument that the parties have taken extreme steps to maintain their financial independence, the Ministry states that they nevertheless still have "*a clear financial structure*" which

> "[i]*n no way detracts* [from] *the existence of the relationship between both parties nor undermines their commitment to each other. Despite the financial arrangements they have between themselves they would be considered a couple by family and friends and in all probability would introduce themselves as a couple."*

Furthermore such a structure is not unusual among couples – *"the arrangements made by the couple concerning the purchase of their house as tenants in common is in itself not an unusual manner of holding property, even among de jure (legally married) couples*".

[19] In justifying the inclusion of de facto partners in the definition of "*step-parent*" for Student Allowance purposes in 2012 the Ministry notes that this change represents the Government's expectation

> *"… that married, civil union and de facto couples financially support each other and be treated as a single financial unit – this principle applies to other forms of Government support such as benefits. This same approach should apply for all parents living in a relationship of a similar nature (eg married/civil union/de facto partners) when assessing parental income."*

Discussion

[20] In essence the appellant's argument is that although the parties are currently living together as a couple in the same house and are fully committed to one another, the relationship is nevertheless in its early stages and has not yet matured into a full "*de facto*" relationship. This is evidenced by the short duration of the relationship and what they describe as the "*extreme steps*" that they have taken to keep their finances separate and to ensure that one party is not financially dependent on the other.

[21] Insofar as the appeal depends on the assertion made by the appellant's mother in her comments on the Ministry's Regulation 37(2) Report that StudyLink, the Secretary and the Ministry have all based their assessment of the relationship on "*false assumptions"* and "*fabrication of the facts*" I reject that view. Although the Ministry's case is to some extent based on inferences or assumptions about the parties likely living arrangements – for example the inference that since they are living together as a couple they are likely to share the mundane domestic tasks of everyday life or that they "*socialise together and would be viewed by others as a couple*" – most of the statements it relies on about the relationship are in fact derived from the parties own

letters and submissions. Even those that aren't are in fact logical, common-sense extensions of those submissions that have gone essentially unchallenged by the parties. For example it is implicit in the parties description of themselves as "*a couple*" that they are committed to each other and to their future together and accordingly do provide the suggested "*emotional support and companionship*". In this context it is significant, as the Ministry points out in its supplementary submissions, that beyond the blanket characterisation of the Ministry's case as based on mere "*assumption*", no effort has been made to present any form of concrete alternative narrative. If the parties, for example, do not share the everyday tasks involved in running the household or do not in fact socialise together or present themselves as a couple to friends and acquaintances, it would have been easy enough to say so.

[22] The issue in this case does not concern the ability or willingness of the appellant's mother's partner to assume any parental responsibilities towards the appellant. The question is simply whether the relationship between the two partners is a *de facto* relationship in the sense that it is a relationship "*in the nature of marriage*". This does not turn on the relationship between the appellant and his mother's partner. While the arrangements that a couple might make for the care and treatment of the children of one or other of the parties may be relevant to the assessment of whether a relationship is one in the nature of marriage, that is a factor that is only likely to be significant where the children have not yet achieved independence from their parents. In this case the appellant is 18 and has left home which in itself suggests that the question of parental responsibility is unlikely to be relevant. Furthermore given the appellant's previous history with his father, the refusal of all parties to contemplate any sort of parental relationship between him and his mother's new partner is perfectly understandable. This factor is irrelevant to any consideration of whether the parties should be seen as in a de facto relationship for the purposes of the Student Allowance process.

[23] In its submissions on this appeal the Ministry has placed considerable significance on "*the financial interdependence*" of the parties. This also appears to have been the major issue discussed at the Review Panel hearing and the Secretary's decision to uphold StudyLink's initial assessment of the nature of the relationship is heavily based on a finding that there was indeed a considerable degree of financial interdependence. To some extent this emphasis is not surprising since the internal guidelines applied by StudyLink in assessing the relationship also appear to emphasise financial interdependence as the major factor. In essence the Ministry's view is that financial interdependence is indicated by the fact that the parties have invested together in a house as "*tenants in common*", albeit in unequal shares, and that they are "*pooling their finances for the benefit of both*" in meeting the everyday expenses of that arrangement (eg interest, rates, insurance and power).

[24] On the other hand the appellant's mother argues that the purchase of the house does not show a significant degree of financial interdependence since the house is owned independently by each tenant and in any case her partner does not yet own any significant share in the house because he has been unable to sell his own property and realise the equity from it so as to contribute. She also disputes that there is anything unusual about their domestic financial arrangements that would indicate that they are in a de facto relationship. Although they contribute jointly to the basic costs of running the household they are each responsible for their own purchases of personal items, including a proportion of the food. In making these arguments the she equates the

position in financial terms to that of housemates, albeit housemates who have purchased the property they share rather than rented it. Both she and her partner are also clear that, like housemates, neither party is financially dependent on the other in the sense that one would support the other if they were unable to meet their financial commitments in relation to their living arrangements.

[25] While the appellant's argument that she and her partner are essentially simply housemates insofar as their financial arrangements are concerned is difficult to dispute, that, I'm afraid, does not progress her case very far. From her own description of the parties living arrangements it is undeniable that a degree of financial interdependence nevertheless exists. Her partner is not simply a guest in the house. As the Court in *Thompson* made clear single factors like financial interdependence or the lack of it can never be determinative of the issue. All other relevant physical and mental circumstances must still be considered and balanced in order to ascertain "whether *the parties have so merged their lives, for the time being, that they are, for all practical purposes, living together as a married couple".* Even if it is realistic to regard the financial arrangements entered into by the parties here as potentially incompatible with their being seen as "*living together as a married couple*", the other elements of their relationship provide a context that strongly suggests otherwise.

[26] Whether or not they were financially independent of one another, the parties had been living together in the same house as a couple for five months at the time the application for an allowance was made. Prior to that they had renewed an earlier relationship that the appellant's mother describes as having ended due to "*commitment issues*". They then initially dated for two months, looking "*towards a future as a couple*" as her partner put it, before arranging/agreeing to sell their individual properties and jointly purchasing a new home for themselves and, initially at least, the appellant to live in together. From her partner's comments it is clear that in deciding to purchase a house together and establish a "*common household*" they were marking a transition from "*dating*" to a longer term commitment as a couple. While people may sometimes purchase property as housemates or simply for companionship, the purchasing of property "*as a couple*" would normally be seen as more consistent with a decision to "*merge lives*" and to live together in a state akin to marriage. It evinces an intention to mutually commit to a shared life as a couple. Furthermore there is nothing in the evidence to suggest that the commitment underlying this decision was anything other than a *"commitment for the foreseeable future"* – even though the appellant's mother states on a number of occasions that she regarded the relationship as being in its early stages at least at the time of the initial application. The issue is the nature of the commitment not its duration. As the Ministry comments in its supplementary submissions, there is nothing in the evidence to suggest that level of commitment involved in this purchase was any less than that normally "*to be expected of people who have entered into a relationship and purchased a home together, whether it is in their view in the early stages or not*".

[27] As a couple it is reasonable to suppose that the parties have an ongoing sexual relationship and give each other the sort of emotional support and companionship consistent with a functioning marital relationship. There is no suggestion in their evidence that this is not the case or that their relationship is not an exclusive one. Nor is it suggested that the parties do not socialise together or attend activities as appropriate as a couple. Indeed the appellant's mother's statement in her OPA that the appellant "*will not attend any social gatherings that involve my new relationship*" strongly suggests that they do.

[28] Given this, it is clear that the parties cannot be seen simply as housemates or cohabiting friends. Rather they are living together and relating to each other in much the same way as any legally married couple would. In terms of the physical and mental elements identified by Tipping J in *Thompson* (above [8]) I am satisfied that the parties must be seen as having chosen to "*enter into what effectively amounts to a married state, but without getting legally married"*. While they have undoubtedly retained a significant degree of financial independence from each other they have clearly committed to a shared life as a couple for the foreseeable future. In terms of the policy underlying the 2012 amendment there is no reason why they should "*be treated more favourably for* [student allowance] *purposes, either as to entitlement or as to quantum, than those who are married not only in fact (de facto) but in law (de jure)"* (see Tipping J, above [8]). The appellant's mother's partner is accordingly covered by the definition of "*step-parent*" in the Regulations and his income must be taken into account for the purposes of calculating the appellant's parental income under reg 4(1).

The appeal is dismissed. The decision of the Secretary on Review to uphold StudyLink's decision to decline the appellant's One Parent application is confirmed.

DATED at WELLINGTON this 30th day of January 2015

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Neil Cameron
Student Allowance Appeal Authority