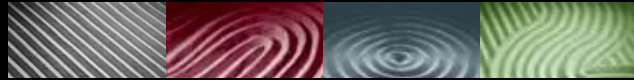


MILLER THOMSON LEGAL NOTES



"Foster Parenting " by Nick de Koning

"Foster Parenting Considered Self-Employment for Purpose of SABS"

Across Canada, foster parents provide a temporary home for children in the care of their local Children's Aid Society. Children may need foster care for a few days, few weeks, several months or several years.

Approximately seventy thousand children are in foster care in Canada.¹

Should foster parenting be considered a form of self-employment? In the context of statutory accident benefits under the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996* (the "Schedule"), one arbitrator at the Financial Services Commission of Ontario has concluded that it can.

In *Joyce Butts and Pembridge Insurance Company*, FSCO A05-002829, Arbitrator Kominar was called upon to determine whether stipends received from the local Children's Aid Society could constitute "remuneration or profit" so as to establish that the Claimant was engaged in "self-employment." If so, the Claimant would be entitled to a income replacement benefit.

The Claimant was seriously injured in an accident of July 2, 2003. She applied for various Statutory Accident Benefits from Pembridge Insurance Company.

Prior to the accident, she provided foster care for three children. She and her husband had been acting as foster parents on a regular basis for several years prior to the accident. Apart from the foster parenting, the Claimant had not been employed in any formal sense for several years. The Claimant had received O.D.S.P. benefits for several years, but the evidence was that she was quite capable, prior to the accident, of caring for children both physically and emotionally in the remote northern Ontario location where they lived. The evidence was that the Claimant and her husband were very good foster parents. Mrs. Butts' competence as a foster parent was not an issue. The real issue was the proper characterisation of the funds paid by the local Children's Aid Society to her. Mrs. Butts claimed that the funds were, for all intents and purposes, self-employment income. She argued that, by living in a remote location where there were few opportunities for lavish spending, by exercising economies of scale from fostering several children, and through frugality, there was a "surplus" which could be likened to a "profit" or "remuneration."

Arbitrator Kominar accepted the Claimant's characterization of the payments. He found that the Claimant and her husband were easily able to make ends meet when they fostered children. The evidence was that foster parenting allowed the entire family, including the foster children, to live a better quality of life. The family always economized by purchasing bulk foods. The Claimant's husband testified that expenses for housing and utilities were relatively fixed whether they had the foster children or not, and with several foster children in the

home, there were sufficient economies of scale to generate a surplus and generate a better lifestyle for all in the household. Arbitrator Kominar found that this "surplus" on the particular facts of this case, could be considered a "profit" or "remuneration" within the broad definition of employment in Section 2(5) of the Schedule. This could be considered self-employment (although not employment, as such).

In coming to this conclusion, Arbitrator Kominar accepted the contention of the insurer which was that the stipends were not intended to be income or a windfall to the foster parent. Nevertheless, Arbitrator Kominar also noted that the stipends are not a direct function of specific expenses any given foster parent incurs as a result of caring for any given child and the stipends are not characterized, strictly speaking, as a reimbursement obligation. The obligation on the part of the foster parent was to properly care for children in their care with the assistance of the stipend they received. Arbitrator Kominar concluded that that foster parents living in areas of the province where the basic cost of living was lower than elsewhere could end up receiving more funding than actually needed to properly care for the children. This surplus could be considered a profit.

This decision introduces some challenges for accident benefits insurers. Stipends received for foster parenting are not required by law to be reported as taxable income. As such, insurers may not rely on Section 64.1 of the Schedule which establishes that unreported income is not included in calculation of an income replacement benefit. Furthermore, where a person claims to be self-employed in this fashion, a professional accountant will probably be necessary to establish the possible income replacement benefit. The accountant's task is significantly more challenging given that a foster parent would not be likely to keep any kind of formal records as a typical business would. In such a case, insurers should conduct as thorough an investigation as is possible to understand the given family's lifestyle, the specific needs of the children in care, the typical expenses, the amount of the stipend in question, whether the Claimant has a real expectation of a surplus, and the efficiency in running a household which the foster parent would demonstrate.



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