

30 January 2015

Ms Leigh Barber
<mailto:fyi-request-2338-66ffec76@requests.fyi.org.nz>

Dear Ms Barber

Official Information Act Request

Thank you for your request of 11 December 2014, asking for the following information under the Official Information Act 1982:

Section 65 2 (1) (ii) of the 1982 act has regard to WERC to dependants. There seems to be two levels of dependency; a spouse is considered either totally or partially dependant. How is the level of either total or partial dependency determined? What steps does a claims handler take to make this determination?

Please find enclosed an extract from ACC's 1990 Claims Manual, which gave guidance to staff on how to implement the provisions of the Acts in force at the time; including the 1982 AC Act in which you make reference to.

ACC is happy to answer your questions

If you have any questions about the information provided, ACC will be happy to work with you to resolve these. Please address any concerns by emailing GovernmentServices@acc.co.nz or in writing to Government Services, PO Box 242, Wellington 6140.

You may also make a complaint to the Office of the Ombudsman. You can call them on 0800 802 602, 9am to 5pm weekdays, or write to:

The Office of the Ombudsman
PO Box 10 152
WELLINGTON 6143

Yours sincerely

Government Services

5.0 DEPENDENCY

The word "dependant" is defined in s.2 and is used in two senses:

- (i) It signifies a person whom the deceased had a legal duty to support in whole or in part, i.e., a dependant as of right, whether or not actual support was being provided.
- (ii) It also signifies a person whom the deceased had a moral duty to support and who was actually being supported by the deceased, i.e., a dependant in actual fact.

The claims handler is to establish whether (i) or (ii) applies at the time that dependency has to be determined, and then consider whether each dependant has entitlement under the provisions of the Act (see 1.0).

In the context of the Act, dependency means reliance upon another for maintenance and support in a financial sense - either in money or money's worth. The deceased must have had a legal duty to provide support, or, in the absence of a legal duty (i.e. have a moral duty) must have provided regular support by actually providing or, alternatively, bearing the costs or expenses of the dependant's food, clothing, shelter, custodial care, educational needs and other matters necessary for everyday needs. Thus, in fatal claims, a dependant is one who depended or relied upon, or looked to or was entitled to look to the deceased for necessary maintenance and support. (See Appeal Division 114/84 re Durney).

The financial support given (other than the requirement of a maintenance agreement or court order) must have been provided on a regular basis. The giving of an occasional gift does not denote financial support for dependency purposes.

Payment of ERC under s.65 is based on dependency related to earnings of the deceased (refer 6.0). Assessment of lump sums under s.82, on the other hand, is based on financial dependency which includes dependency on any form of income and is not restricted to earnings within the definitions detailed in s.52 (refer 10.0).

In the absence of proof to the contrary, s.85 provides that:

- A female spouse (as defined in s.65) is presumed to be totally dependent on the male spouse; and

- Any child under the age of 16 years living in the household is presumed to be totally dependent on each of its parents.

It should be noted that "proof" is necessary to displace the statutory presumptions. The burden of proof is higher than that normally applicable to claims. (Refer Part 3 : PIBA).

In all other cases the degree or extent of dependency is a question of fact to be decided on the circumstances of each individual case.

Generally, dependency must exist immediately before the date of accident. However, in respect of a spouse (see 5.1) who becomes dependent upon the deceased after the accident but before the date of death the Corporation has a discretion to treat that spouse as being dependent as at the time of the accident - s.65(3). Note also that a child of the deceased born after the death is to be treated as a dependant subject to satisfactory evidence of paternity.

There are three main categories of dependants: spouses; children; and other dependants. The Act sections relating to fatal claims may apply to one category but not to others, therefore care must be taken to ensure that each dependant has been properly classified. The categories of dependants and the methods of establishing the degrees of dependency are described in the following paragraphs. Refer 6.0 for calculation of entitlement to ERC, and 10.0 for entitlement to lump sums.

5.1 Spouses

A spouse is defined in s.65(1) as either of a man or a woman who:

- are married to each other; or
- not being married to each other, have cohabited immediately preceding the date of death of the deceased person, and, in the opinion of the Corporation, have entered into a relationship in the nature of a marriage.

A dependent "spouse" may therefore be the de jure widow or widower or a partner in a de facto relationship. The Corporation will accept the "de facto" spouse as satisfying the requirements of s.65(1)(b) where the spouse and the deceased have cohabited immediately preceding the date of death of the deceased person:

- for a period of not less than 2 years; or
- for a period of one year where there is a child born of whom they are the natural parents and financial support is established.

In all other cases, a de facto spouse must prove as a matter of fact that he or she had entered into a relationship in the nature of a marriage. There must be corroborative evidence to substantiate the de facto relationship, in addition to the survivor's statement. The following additional information may be relevant when considering the existence of such a relationship:

- pre-death statements to friends, relatives and business colleagues of the existence and permanence of the relationship;
- the duration of the relationship;
- the wording used in a will made by the deceased in favour of the survivor and/or the survivor in favour of the deceased;
- the survivor's adoption of the deceased's surname not only with the deceased's knowledge but with the deceased's consent;
- the naming of the survivor as the deceased's next-of-kin for employment purposes;
- concrete evidence of an intention to marry, e.g., a pre-marriage contract;
- joint ownership of assets;
- joint responsibility for financial commitments;
- dealings with the Department of Social Welfare in which the survivor and/or the deceased have described themselves as being involved in a de facto relationship. If the de facto relationship has been denied by either party in their dealings with Social Welfare a presumption of dependency is unlikely.

Note: If a claimant fails to satisfy the Corporation as to the existence of a de facto relationship, any dependency must be considered under s.65(2)(c).

In determining the degree of dependency of a spouse under s.65(2)(a)(i) and (ii) the following rules should be applied.

5.1.1 De Jure and De Facto Spouse Living with the Deceased at the Date of Death

The status of the spouse will initially be established for:

- a de jure spouse by completion of form C36 and receipt of a marriage certificate copy;
- a de facto spouse by completion of form C36, a statutory declaration(s) and such other evidence as may be considered relevant.

When the status of the surviving spouse is established on either a de jure or de facto basis the degree of dependency on the deceased's earnings is considered.

Female surviving spouse:

Claims handling experience has shown that income up to \$10,400 p.a. (\$200 p.w.) does not rebut the presumption of total dependency under s.85(1). Therefore the female spouse will be regarded as totally dependent provided that her income did not exceed this figure. Income exceeding that figure does not of itself lead to a presumption of partial or no dependency but the degree of dependency then becomes a matter of fact. (Refer P.S. 5.1.)

Male surviving spouse:

There is no presumption of dependency in favour of the male spouse under s.85. Therefore, dependency will be determined on the facts of each case. (Refer P.S. 5.1.)

5.1.2 Separated de Jure Spouse

This category refers to a spouse who was legally married to, but not living with the deceased, at the time of the accident.

Status of the spouse is determined by reference to form C36, the marriage certificate, advice from the Department of Social Welfare, copies of any maintenance order or agreement and any evidence of payments (whether as a result of a maintenance order or agreement, or otherwise) made in respect of the separated de jure spouse by the deceased on a regular basis. (Often payments made are not split up into entitlements for each person - see 5.2.2, 3rd para).

The fact of separation will generally displace the presumption of total dependency in favour of the female spouse under S.85. Accordingly, the dependency of both male and female separated spouses must be considered on the facts of each case. Any dependency in this category, if established, will generally be partial. (Refer P.S. 5.2.)

If a maintenance agreement or Court Order was in force immediately prior to the date of death that required the deceased to pay maintenance in respect of the separated de jure spouse, the spouse's level of dependency is to be assessed at the amount of the maintenance payment, regardless of whether regular payments were being made or not, but only to the level of ERC assessed. This includes those cases where the spouse was receiving the domestic purposes benefit and the deceased was required to pay the maintenance to the Department of Social Welfare.

(Note: Payment of maintenance to the Department of Social Welfare under the Liable Parents Contribution Scheme relates to dependent children only. Refer 5.2.2.)

Actual support provided directly to the separated de jure spouse on a regular basis will also establish dependency. Note that this may be in addition to the formal maintenance payment.

Note: Watch for class funds and relative needs - refer 7.0.

5.1.3 Separated de Facto Spouse

Note: A separated de facto spouse does not meet the criteria defining "spouse" under s.65(1)(b) and, therefore, has to be considered under s.65(2)(c), i.e., "other dependant". (See 5.3.)

5.2 Children of the Deceased

This class of dependant includes:

- a child born in wedlock to the deceased, or
- a child legally adopted by the deceased, or
- a child born out of wedlock to the deceased (subject to admission or proof of paternity/maternity), or
- a posthumous child of the deceased (subject to proof of paternity).

Status as a child of the deceased is determined by reference to form C36, birth certificates, information from the Department of Social Welfare about children who are in Social Welfare care (either as wards of the State or under the Liable Parents Scheme) and details of payments actually made by the deceased to or for the child (where relevant). (Refer Appendix I.)

Section 85 provides that it shall be presumed in the absence of proof to the contrary that any child under the age of 16 years living in the household of both its parents is totally dependent on each of its parents.

5.2.1 Child Living in the Deceased's Household

As an administrative guide total dependency will exist if the child was living with the deceased parent as part of his/her family where:

- the child is under 16
 - and has no separate income; or
 - has a separate income but that income is not being used by the child for his or her own maintenance and support in whole or part; or
- the child is over 16
 - and a Family Benefit is being paid (or would be paid if applied for) in respect of the child, and the child has no separate income, e.g., a child at secondary school; or

- has separate income but that income is not being used for the child's maintenance and support in whole or part, e.g., a university student who received a bursary and also worked during university holidays would substantially use his or her earnings for study purposes rather than day to day living expenses.

A child (either under or over the age of 16) living in the deceased's household who was in full time work and earned an income in excess of the "Minimum Adult Wage" would not normally be totally dependent. (Refer to Part 17 : Standard Information, page 41, for details of the "Minimum Adult Wage"). A child over the age of 16 who is not working or studying is eligible for the Unemployment Benefit and would not normally be totally dependent.

Earnings or income which are considerable but still below the Minimum Adult Wage would warrant consideration of partial dependency according to the amount of those earnings or income and the purpose for which the earnings or income was used, e.g., a child who earns half the Minimum Adult Wage and spends this income on clothes, a car and all leisure and sporting activities would be partially dependent but the child who earns the same amount and spends his or her own income on study expenses would be totally dependent.

The extent of dependency always relates to the actual financial support being provided by the deceased person (refer 5.0). In many cases it may be difficult to establish the monetary equivalent of the support that the deceased actually provided, e.g., the child paid \$35 per week for board and lodging but, as this did not cover all the costs of food, power and accommodation, the deceased met the difference. As a guide, the claims handler should estimate the amount that the child would need to support him/herself away from home (i.e., the cost of board or rent, food, power, clothing and transport) and calculate the proportion of this amount that the deceased provided (refer P.S. 5.3).