APPEAL #

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated May 23, 2012 which held that the appellant's children do not meet the definition of "dependent child" under Section 1 (1) of the *Employment and Assistance Act* as they do not reside in the appellant's residence for more than 50% of each month. Therefore the children cannot be added to the appellant's income assistance file.

## PART D – Relevant Legislation

Employment and Assistance Act – Section1
Employment and Assistance Regulation – Section 5

## PART E – Summary of Facts

The appellant is the parent of twins born in 2009 who are approximately 2 1/2 years of age. One of the children has significant special needs including severe haemophilia and a secondary diagnosis of neurologic sequelae from a neonatal intracranial bleed.

The appellant and her spouse separated. A joint custody and guardianship arrangement was signed in September and filed with the Court in November, 2011 setting out an arrangement whereby the children would live an equal time with each of the parents, changing residences on a weekly basis. This arrangement is described as joint custody, shared on a 50/50 basis. The documents submitted, as well as the appellant's evidence at hearing, indicate that the ongoing care of the children and in particular the child with significant health issues required that the appellant give up employment.

There were a number of support documents before the ministry at reconsideration including the following:

- the Court Order, filed November 3, 2011

- E-mail dated April 23, 2012 from a Social Worker with the Ministry of Children and Family Development setting out the child's main health issues (as above) and a number of additional issues including:
  - poorly controlled seizures
  - cortical visual impairment and possible visual field defect
  - significantly decreased muscle tone in the mid body/trunk and around the head neck
  - left hemiplegic cerebral palsy
  - based on MRI results, it is likely the child will have little function over the left body and significant visual and intellectual impairment
  - need for G tube feeding
  - need for medical supplies and equipment
  - physio therapy needs
  - need for daily administration of Factor 8 Fusion to address effects of haemophilia

- Letter from a Pediatric Doctor dated March 27, 2012, setting out the health conditions of the one child as having severe hemophilia, cerebral palsy, and developmental delay. The letter states the child must attend numerous appointments on a regular basis (which are listed) and stating the appellant would benefit from a bus pass to facilitate travel.

- Letter from the child's Infant Development Consultant, with the Health Authority, dated 24 April, 2012. The letter states the Consultant has been involved with the family since November 2009. The consultant sets out the child's health conditions and states that the appellant makes appointments for and attends a number of specialists' appointments with the child, regardless of which home the child is residing in at the time. The letter states there are multiple therapies scheduled in any given week. In addition, the Consultant states there are other community activities that the appellant brings both children to on a weekly basis. The Consultant states it has been the appellant who has stayed with the child during periods of hospitalization and post discharge recovery.

- Letter from the appellant's Mental Health Therapist, with the Health Authority, dated 24 April, 2012. The letter states that when the appellant's children are not residing with her she is very involved with the day-to-day activities of both children.

- Letter from Social Worker with the Ministry of Children and Family Development E-mail dated May 18, 2012. (The same person who was the author of the e-mail dated April 23rd.) The letter again sets out

the appellant's circumstances and the health conditions of the child. In this letter the social worker states the child has now become mobile and is therefore more susceptible to falling injuries. The Social Worker states that the appellant has been and will continue to be the primary parent available to accompany the child during hospitalizations.

The appellant's advocate presented a written submission at the hearing the overview of which is set out in part below:

⇒ The appellant is a single parent of twins one of whom has significant special needs necessitating constant specialized care. The appellant has a joint custody and guardianship agreement; it is the appellant who is responsible for the significant level of care required by one of the children, resulting in the children being in the appellant's custody more than 50% of the time.

It was confirmed at the hearing that the children sleep at each parent's house 50% of the time. However it was submitted that it is the appellant who is the sole parent responsible for accompanying the child with significant health issues to his various appointments and hospitalizations regardless of which home the children are residing in at the time. On those days when the children are not sleeping in the appellant's home and the appellant accompanies the children (or child) to appointments she takes the children from the other parent's home and returns the children to the other parent's home once the appointments have concluded. It was further submitted that these appointments could take approximately 2-3 hours (including travel and waiting time) and occur up to 5 times a week. In addition, it was submitted that the appellant is physically responsible for the children an average of 4-10 hours a week outside of her allotted custody hours.

The appellant reviewed the calendar of appointments which the appellant attended with the child with significant health issues during the last week the children were residing with the other parent which included four appointments over three days. In addition to accompanying the children to appointments, the appellant also stayed with the child with significant health issues during a five week hospitalization in another city in 2011 and recently accompanied the child on a two-day charity sponsored medical examination in the US during the ex-spouse's custody time. The trip to the US is expected to be the first of a series.

The Ministry representative relied upon the Reconsideration Decision which concluded that because the children do not reside in the appellant's place of residence more than 50% of each month the children cannot be determined as dependent children and cannot be added to the appellant's income assistance file.

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## PART F – Reasons for Panel Decision

The decision to be made at appeal is whether the ministry's decision at reconsideration was reasonably supported by the evidence before them.

At issue is the application of the wording of the following provision:

***Employment and Assistance Act***

**Part 1 -- Introductory Provisions**

**(A) Interpretation**

**1** (1) In this Act:

**"dependent child"**, with respect to a parent, means a child, other than a child who is 18 years of age and is a person with disabilities, who resides in the parent's place of residence for more than 50% of each month and relies on that parent for the necessities of life, and includes a child in circumstances prescribed under subsection (2);

On behalf of the appellant the advocate argues that "resides" should be more than simply the roof under which a child is sleeping, and should include who is attending to the child's needs. Citing established case law, the advocate encouraged the panel to interpret the legislation with a benevolent purpose in mind and to construe the legislation in a fair, large and liberal construction and interpretation as best ensures the attainment of its object and to give a liberal interpretation where ambiguities arise. The advocate asked this panel to find that appellant is eligible to receive income assistance as a single parent with two dependent children, given the evidence provided by the appellant, the Social Worker, the Infant Development Consultant, the Therapist and the Doctor.

The ministry's position is that the custody of the appellant's two children is shared equally between the appellant and the children's' other parent with the children residing in each home for equal amounts of time. Therefore, the children do not reside with the appellant for more than 50% of the time and cannot be considered dependent children as defined in s. 1 of the EAA.

It is undisputed that the children sleep in the appellant's residence 50% of each month. It is evident that the appellant is a caring parent. There is no dispute that the appellant spends a good deal of time on the needs of the children, and in particular the child with significant health issues, even on days when the children sleep in the other parent's home.

However sympathetic this panel may be to the appellant's situation, we are charged with interpreting and applying the legislation. Setting aside the age threshold which these children clearly meet, a "dependent child" must then meet a two part test:

1. the child must reside in the parents place of residence more than 50% of the time
   and
2. the child must rely on that parent for the necessities of life

No evidence was submitted to the panel at the hearing on the definition of "reside". In the Dictionary of Canadian Law (third edition, 2004) the term "reside" is defined as 1. To be physically present someplace. 2. To have a home that is a permanent place of abode to which, whenever a person is absent, that person intends to return.

The Court Order which set out that the children shall be in the care of one parent for one week commencing at 9:00am on Sunday and then be in the care of the other parent for the following week, on a rotating basis. With

the exception of irregular and unpredictable hospital stays, the children are sleeping with the parents on a 50% weekly rotational basis. Based on the written and oral testimony, on those days that the children sleep at the other parent's home and the appellant takes either one or both of the children to various appointments, the children are under the care of the other parent for the balance of the day. The children are returning to the home they are residing in at the time. The panel cannot reasonably conclude that they are residing with the appellant when they are picked up from and returned to the home of the other parent to attend medical or other appointments. In the construction of the definition of "dependent child", the two-part test is not written as meeting one "or" the other, it is "and"; both parts of the definition must be met before a child can be considered a dependent child. While it has been argued and the panel is inclined to accept that the second part of the test is met by the appellant, it is not enough to meet the definition of "dependent child".

Further, the matter of a child residing 50% of the time with another parent has been addressed in the *Employment and Assistance Regulation*:

***Employment and Assistance Regulation***

**PART 1 – INTERPRETATION**

**(B) Definitions**

**1** (1) In this regulation:

***"Act"*** means the *Employment and Assistance Act*

(2) For the purposes of the Act and this regulation, if a child resides with each parent for 50% of each month under

(a) an order of a court in British Columbia,

(b) an order that is recognized by and deemed to be an order of a court in British Columbia, or

(c) an agreement filed in a court in British Columbia,

the child is a dependent child of the parent who is designated in writing by both parents.

The language is clear, in the case of shared custody arrangements a child may be designated as a "dependent child" by being designated as such by both of the parents in writing as addressed through the *Regulation.* There is no evidence before the panel to show that either child has been so designated.

As a result, in applying the legislation to the facts of the case, the panel finds that the ministry's decision was reasonably supported by the evidence and confirms the ministry's decision.