December 29, 1964

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1964—NO. 8

Dear Mr. Kervick:

You have requested our opinion as to whether a child, who is the legal ward of her grandmother, a State employee, is encompassed within the statutorily defined coverage of the State Employees Health Benefit Act, L. 1961, c. 49; N.J.S.A. 52:14-17.25 *et seq.* You have posed the following factual situation. The child's parents were divorced and the court granted custody of said child to the father. The mother's whereabouts are and have been unknown since 1955. In 1958, because of personal reasons, the father placed the child with the grandmother under a temporary custody agreement. Upon the death of the father in 1960, the grandmother was appointed legal guardian of the child by the Hudson County Court. The grandmother, a State employee, assumes full responsibility for the support and care of the child and has claimed this child as a dependent under the Health Insurance Policy in question. It is also noted that the child receives a modest income from the Veterans' Administration and the Social Security Administration. The specific issue is whether the ward in question is a "dependent" as defined by N.J.S.A. 52:14-17.26(d) which is here set forth:

> "The term 'dependents' means an employee's spouse and the employee's unmarried children under the age of 19 years who live with the employee in a regular parent-child relationship. 'Children' shall include stepchildren, legally adopted children and foster children provided they are reported for coverage and are wholly dependent upon the employee for support and maintenance. A spouse or child enlisting or inducted into military service shall not be considered a dependent during such military service."

It is our opinion that this child is a dependent within the terms of the Health Benefits Act.

The Hospital Service Plan of New Jersey has apparently denied the employee benefits under the Act on the grounds that the child is not and never has been a "foster child." This assumption is correct if the reference was solely to the statutory definition of "foster child." There is a generic concept of foster child which would include any child receiving nurture and parental care from one not standing in a consanguineous or legal relationship. *E.g., Cicchino v. Biarsky,* 26 N.J. Misc. 300 (Cty. Dist. Ct. 1948); *In re Norman's Estate,* 295 N.W. 63 (Minn. Sup. Ct. 1940). In order that a statutory foster child-foster parent relationship may exist, the child must have been at the time of placement a ward of the State and under the guardianship of the State Board of Child Welfare. N.J.S.A. 30:4C-26 *et seq.* The child in question was voluntarily placed with the employee by her father and the relationship subsequently created is that of guardian and ward. This fact does not exclude the child from coverage.

It is evident that the word "dependent" means something more than a natural

child. The term "natural child" does not appear in the law. Moreover, the definition recites that "children" shall include stepchildren, legally adopted children, and foster children. The critical question is whether the word "include" was intended by the Legislature to mean that the enumerated persons which follow are the only persons to be regarded as "dependents" or that such enumerated persons are merely exemplary and constitute only some of the kinds of persons intended to be covered by the statute as "dependents." Stated differently, was the word "include" intended by the Legislature to be self-limiting and restrictive or expansive in meaning?

The New Jersey Supreme Court has recently made the following observation in *Cuna v. Bd. of Fire Com'rs, Avenel,* 42 N.J. 292, 304-305 (1964):

> "Moreover, we feel that the Legislature did not intend to limit the activities from which compensation might arise to those expressly stated in *N.J.S.A.* 34:15-43. When the Legislature stated 'As used in this section, the terms "doing public fire duty", as applied to active volunteer firemen, * * * *shall be deemed to include* participation * * *,' (emphasis added) it did not intend to limit the activities to those thereafter enumerated but intended, as the words plainly indicate to make sure that they would be held to include what was there expressed. It was not intended that 'shall' * * * include should exclude other activities. 'Include' is susceptible to two shades of meaning: (1) that the thing which is stated is the only thing intended; or (2) that the thing which is stated constitutes only one of the things intended. *Schluckbier v. Arlington Mutual Fire Ins. Co.,* 8 Wis. 2d 480, 99 N.W. 2d 705, 707 (Sup. Ct. 1959). Ordinarily the term 'include' is a word of enlargement and not of limitation. *Gray v. Powell,* 314 U.S. 402, 62 S. Ct. 326, 86 L. Ed. 301 (1941); *People v. Western Air Lines, Inc.,* 42 Cal. 2d 621, 268, P. 2d 723 (Sup. Ct. 1954). For example, referring to a statute allowing a city to answer calls for assistance from nearby towns, a New York court stated that 'a call for assistance' includes any call for aid resulting from the operation of a recognized plan for furnishing of mutual aid in case of fire or other public emergency and that the word 'include' was used as 'a word of enlargement or as indicating the reverse of a restrictive intention, *specifying a particular case inserted out of abundant caution.' City of Watertown v. Town of Watertown,* 207 Misc. 433, 139 N.Y.S. 2d 198, 206 (Sup. Ct. 1952). (Emphasis added).
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> "The Legislature enumerated certain activities in order to make crystal clear to any court that, as to such enumerated activities, there should be no doubt that injuries incurred in performing any such activity would be compensable. But the Legislature did not thereby preclude recovery as to other activities which have been held within the ambit of compensability with respect to injuries sustained by paid employees."

The words "shall include" in the subject statute indicate a legislative intent that the class of children encompassed by the statutory definition is not exhausted by those types of relationships expressly set forth. The Legislature, in effect, wanted to make certain that unmarried minor children under the age of 19 years living in a regular or continuous parental relationship, such as stepchildren, adopted children, and foster children, who are specifically enumerated, would be deemed dependent "children." But this specific list of children was not intended to exclude other chil-

dren with similar characteristics. This interpretation is supported by the fact that the only specific exclusion from the statutory definition of "children" involves a child in the military service.

It is also important to note that among the types or categories of children who may constitute "dependents" are foster children. The statutory relationship of foster child-foster parent is not as binding or strong as the relationship of legal guardian-ward. In 1962, the Legislature created the Bureau of Children's Services which was a continuation of the former State Board of Children's Guardians or the State Board of Child Welfare. L. 1962, c. 197; N.J.S.A. 30:4C-1 *et seq*. It is contemplated under the operative statutes that the control and guardianship of children is retained by the Bureau of Children's Services with only a delegation of the right to control and custody and maintenance to "foster parents" for "temporary or long-term care." N.J. S.A. 30:4C-2(h). An order placing a child under the guardianship of the State vests in the State, not the natural or foster parents, the power to consent to the adoption of the child. Atty. Gen. *Formal Opinion* 1959, No. 12; *Lavigne v. Family and Children's Society, Elizabeth,* 18 N.J. Super. 559, 571 (App. Div. 1952). The guardianship of the Bureau of Children's Services encompasses the power to control the property of wards, to prosecute and defend suits on behalf of wards and to demand, receive, hold and administer the real and personal property of wards (N.J.S.A. 30:4C-22) as well as the authority to expend sums for the medical, dental, psychological and general maintenance and care on behalf of wards (N.J.S.A. 30:4C-27). "Foster parents" under the operative statutes exercise only the delegated responsibilities of the State which has over-riding jurisdiction of wards.

In contrast, the legal guardian of a child has direct and nondelegable responsibilities with respect to his care. The relationship of guardian-ward may arise "when the parents of any minor child are dead or cannot be found, and there is no other person, legal guardian or agency exercising authority over such child." N.J.S.A. 9:2-9. The "care and custody" is transferred to an appropriate person as determined by the court. N.J.S.A. 9:2-10. A legal guardian's responsibilities include "far greater duties than the mere receipt of income, investment of corpus and the disbursement of said income. He [the guardian] is charged not only with the payment of the costs, but as well the selection of proper schools, custodians, housing, clothing, maintenance and general welfare of his wards." *Strawbridge v. Strawbridge,* 35 N.J. Super. 125, 131 (Ch. Div. 1955).

It appears forcibly from the foregoing that the relationship of guardian-ward within the structure of applicable statutory and decisional law is continuing, strong, and binding. In many respects it entails greater legal responsibilities toward the child than flow from the relationship of foster parent to foster child. Since the word "children" in the State Employees Health Benefit Act shall include, but not be limited to, foster children, as well as stepchildren and legally adopted children, considerations of policy and sound rules of statutory construction dictate that the child who is a legal ward comes within the ambit of the legislative definition of "children."

The only remaining question is the interpretation of the qualifying phrase "wholly dependent upon the employee for support and maintenance." A review of the history of this legislation indicates that these statutory qualifications apply to all "children" in determining whether they are eligible "dependents." The present Act was passed in 1961 but similar bills had been introduced in the Legislature during the previous ten years. Sections 17 and 18 of A-309 (1955) which dealt with such health insurance for State employees, spoke broadly in terms of "dependents" and "dependent children." The same language was used in A-464 (1955) and A-201 (1956), while

Section 1 of A-467 (1957) and A-167 (1957) dealing with similar insurance for county and municipal employees used such terms as "for themselves and their families." Section 3 of A-404 (1957) and Sections 17 and 18 of A-70, A-471 and A-203 (1958) used the same terms as the initial bills. However, A-203 (1958) was amended so that "families" were changed to read "husbands or wives and dependent children under 19 years of age." The words "dependents", "dependent children" and "for their families" were again used in A-244, A-459 (1959), A-178, A-288 and A-433 (1960). Section 4 of A-621 (1960) again referred to "husbands or wives and dependent children under the age of 19 years" as did Section 4 of A-622, A-623, A-670, S-188, S-190 (1960) and A-322, A-333 and A-336 (1961). Finally, in A-620 (May 1, 1961), the definitions similar to those in the present act were placed together in Section 1. Section 1(d) used the present wording of the bill in reference to dependent children under 19 years and also added the following clarification: " 'Children' shall include adopted children and stepchildren." On May 15, 1961, A-620 was amended to read as it does at present. It deleted the terms "adopted children and stepchildren" and substituted therefor "stepchildren, legally adopted children, and foster children, provided that they are reported for coverage and are wholly dependent upon the employee for support and maintenance." Thus all "children" in the enumerated list, adopted children, stepchildren, foster children, as well as all other children falling sensibly within the legislative classification may be considered as eligible "dependents" provided they are reported for coverage and they are "wholly dependent" upon the employee for support and maintenance.

The phrase "wholly dependent" must be construed in accordance with the objectives and policy of the basic statute. *E.g., Cammarata v. Essex County Park Commission,* 46 N.J. Super. 262, 270 (App. Div. 1957), *aff'd* 26 N.J. 404 (1958); *Laboda v. Clark Twp.*, 40 N.J. 424 (1963); *Safeway Trails, Inc. v. Furman,* 41 N.J. 467 (1964). Remedial statutes such as the subject legislation designed to provide benefits for the public welfare must be accorded a liberal and flexible interpretation consistent with their social purposes. *Cf. Alexander v. New Jersey Power and Light Co.*, 21 N.J. 373 (1956); 3 *Sutherland, Statutory Construction* (1943) Sec. 5505, p. 41.

These principles of statutory construction support the conclusion that the phrase "wholly dependent" was intended to express a standard of substantial, and actual dependence. With respect to other remedial and social welfare legislation in which "dependency" is a criterion, courts have found the essential test to be substantial or actual dependency. *E.g., Ricciardi v. Damar Products Co.*, 82 N.J. Super. 222, 226-227 (App. Div. 1964) (Under the Workmen's Compensation Act, "[a] showing of actual dependency does not require proof that, without decedent's contributions, claimant would have lacked the necessaries of life. The test is whether his contributions were relied upon by the claimant to maintain the claimant's accustomed mode of living."); *Carianni v. Schwenker,* 38 N.J. Super. 350, 361-362 (App. Div. 1955); *Jackson v. Erie R.R. Co.*, 86 N.J.L. 550, 551 (Sup. Ct. 1914) ("[D]ependents * * * mean dependent for the ordinary necessaries of life, one who looks to another for support or help * * *.").

We have also noted that in a rider to the policy contract of the Major Medical Plan under the State Employees Health Benefit Act it is provided that:

> "An employee's children shall include any stepchildren, legally adopted children, and foster children, provided such children are dependent upon

the employee for support and maintenance and have been reported to the policy holder for the insurance."

This contract evinces an understanding on the part of the persons charged with the implementation and administration of the statute that the dependency requirement with respect to "children" covered by the act encompasses the generally accepted meaning of this term as involving actual or substantial dependence. The administrative interpretation and application of a statute, when consistent with the overall objectives of the legislation, are persuasive of the true meaning of the statute and the intent of the Legislature. *Lane v. Holderman,* 23 N.J. 304 (1957): *Walsh v. Dept. of Civil Service,* 32 N.J. Super. 39, 48 (App. Div. 1954), *certif. granted* 17 N.J. 182 (1955); *Swede v. City of Clifton,* 39 N.J. Super. 366, 377 (App. Div. 1956), *aff'd* 22 N.J. 303 (1956). Moreover, we are satisfied from the facts which you have furnished that the child in question is actually dependent upon her legal guardian for the necessities of life and is thus "wholly dependent" upon her guardian within the meaning and intendment of the Act, notwithstanding the nominal receipts of income which she receives from the Social Security and Veterans' Administrations.

In sum, it is our opinion that an unmarried child under the age of 19 years residing with an employee who is the legally appointed guardian of the child in a regular parent-child relationship and who is substantially and actually dependent on the employee for basic support and maintenance is a dependent within the meaning of N.J.S.A. 52:14-17.26(d).

Very truly yours,
ARTHUR J. SILLS
Attorney General
By: ALAN B. HANDLER
First Assistant Attorney General

December 29, 1964

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1964—NO. 9

Dear Mr. Kervick:

You have asked for our opinion concerning the effect to be given to an application for accidental disability pension, in the case where the application is denied but an affirmative finding of permanent disability is made by the Pension Board involved.

It is our opinion, for the reasons stated herein, that an application for accidental disability which is denied but with respect to which there has been an affirmative