Child endowment: apportionment

DOWLING and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/33)

Decided: 10 May 1982 by W. Prentice.

In June 1980 the Director-General decided that the child endowment payable for the three children of Richard Dowling and Stephanie Claire, who had been divorced, should be apportioned (two-thirds to Dowling and one-third to Claire) under s.99A of the *Social Services Act*, which gives the Director-General the power to specify the share of endowment that each person (having the custody, care and control of a child) is to receive. Dowling appealed against this decision.

Facts

The parents had joint custody. The children spent Monday to Friday with Dowling and his *de facto* wife Bristow, and her two children, and week-ends (from Friday night to Monday morning) with Claire.

Prior to the Director-General's decision under review, Mr Dowling had applied for his child endowment to be assigned to Bristow, who was then paid benefits for five children at the five children rate. In June 1980, the five-child rate was $119.25. If the Bristow children and the Dowling/Claire children were treated as separate groups of children, they would have been paid $36.90 and $62.90 respectively — and these two rates, added together, would have been $19.45 below the five-child rate.

The rate of endowment.

Section 95(1) states that child endowment is to be paid to 'a person who has the custody, care and control of a child'.

The Tribunal decided that the inclusion of the word 'custody' in the section meant that a person who had only care and control of a child, but not custody, did not qualify for endowment. Therefore, Bristow was not eligible to receive payments with respect to Dowling and Claire's three children, and should receive payments at the two-child rate for her own two children. It followed that the endowment payments for the Dowling/Claire children should be at the three-child rate.

The share of endowment

Dowling argued that the allocation of two-thirds of the endowment money to him and one-third to Claire was incorrect, suggesting that the DSS had only considered the amounts of time the children spent with each parent, rather than the expenditure of each. He suggested Claire should receive some 10%.

The Tribunal held that 'having regard ... to the time, energies and monies spent on the Dowling children by their respective parents ... the decision under review should be confirmed'.

Formal Decision

The AAT affirmed the decision under review.

Procedure: suspension of DSS decision

DART and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V82/179)

Decided: 6 May 1982 by J.D. Davies, J.

Pamela Dart applied for an order suspending the decision to cancel her supporting parent's benefit until the substantive issue — whether she was living with a man as his wife on a *bona fide* domestic basis — could be determined by the AAT. Stay orders can be made under s.41(2) of the *Administrative Appeals Tribunal Act.*

Jurisdiction

The Tribunal adopted the earlier AAT view in *Gee* (1981) 2 *SSR 11 and RC* (1981) 4 *SSR* 36 that the AAT's jurisdiction included a power to review the original decision of the DSS to cancel a decision, not just the confirmation by the Director-General or his delegate.

The Tribunal also held that the staying of an order to cancel reinstated the determination that a benefit was payable, and the rate at which it was to be paid. And it would not be inconsistent with a stay order under s.41(2) of the *Administrative Appeals Tribunal Act* for the Director-General to adjust the rate of payment of the benefit.

Facts

The Tribunal found that Dart put forward facts which, if established at the hearing, would prove that she was not living with a man on a *bona fide* domestic basis, and she would succeed on the review.

Hardship and Convenience

The Tribunal found that Dart had no income other than the supporting parent's benefit and that she was supporting two children. They also noted that the applicant lived in Warrnambool, which was likely to delay a hearing and had no assets except $11 in the bank. The Tribunal noted that any payments made by the DSS pursuant to any stay order would not be recoverable if the applicant was unsuccessful in her substantive claim but concluded that a stay order was appropriate to secure an effective hearing — allowing time for the Director-General's statement of reasons for decision to be received and considered, a preliminary conference arranged and, if the conference was unsuccessful, to allow adequate preparation for a hearing.

Formal Decision

The AAT ordered that the decision cancelling Dart's supporting parent's benefit be stayed until the AAT completed its review of that decision or until further order.

Child endowment: residence in Australia

ALAM and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/100)

Decided: 12 May 1982 by W. Prentice.

In 1959, Loulou Alam migrated to Australia from Lebanon with her husband. Five children were born between 1962 and 1972. She applied for, and was paid, child endowment. In November 1974, the family travelled to Lebanon and stayed with the husband's parents.

Before leaving Australia, the Alams sold their house and furniture. They bought one-way tickets to Lebanon. They stayed in Lebanon until July 1979 when they returned to Australia. (At one stage during their stay in Lebanon, they allowed their Australian passports to lapse.)

Mrs Alam did not advise the DSS of her absence from Australia until her return in 1979. The DSS then claimed under s.140(1) of the *Social Services Act* an overpayment of $4859.60 — all the child endowment payments during Mrs Alam's absence from Australia.

'Residence' for income tax purposes

At the AAT review of this decision, the DSS relied on s.104(2) of the *Social Services Act*, which provided that child endowment should not be paid to a person unless that person was 'a resident of Australia as defined by the *Income Tax Assessment Act*'.

The definition of 'resident of Australia' in s.6 of the *Income Tax Assessment Act* 'includes a person ... whose domicile is in Australia unless the Commissioner [of Taxation] is satisfied that his permanent place of abode is outside Australia.'

The Taxation Office had twice written to the DSS, declaring that Mr and Mrs Alam 'were not considered residents of Australia within the meaning of thee *Income Tax Assessment Act* during their absence.'

These letters, the AAT said, did not show that the Commissioner had considered the questions (as to the 'domicile' and 'permanent place of abode') and, therefore, 'the Commissioner's opinion on the residential status of the applicant *in this case* is of no more relevance than that of any other citizen'. It was for the Director-General (and now for the AAT) to decide the question of Mrs Alam's residence.

'Residence' in and 'temporary absence' from Australia

The Tribunal referred to the 'puzzling' way in which the *Social Services Act* dealt with

residence and absence from Australia and said the intention of the Act was 'by no means clear'. But the AAT thought that Mrs Alam's entitlement to child endowment depended on s.103(1)(d) and s.104(1) and (2).

Section 103(1) (which is subject to s.104) provides that endowment ceases to be payable if

> (d) the endowee ceases to have his usual place of residence in Australia, unless his absence from Australia is temporary only ...

Section 104(1) provides that, where a woman, whose usual place of residence is in Australia, is temporarily absent from Australia, the child endowment provisions of the Act are to operate as if that woman was in Australia. However, according to s.104(2), endowment is not to be granted or paid by virtue of s.104(1) unless the woman is a resident of Australia as defined by the *Income Tax Assessment Act*.

The combined effect of these sections, according to the AAT, was that the Tribunal must decide whether:

(a) Mrs Alam remained a resident of Australia — s.104(2); and

(b) Mrs Alam was a person whose usual place of residence was in Australia who was temporarily absent from Australia — s.103(1)(d).

The Tribunal adopted the remarks in *Kyvelos*, (1981) 3 *SSR* 30, to the effect that 'residence' had a variety of meanings. It did

> not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country; that ownership or renting of property in Australia is not a necessary ingredient of being 'resident' here; that a person who normally lives in Australia would not cease to be 'resident in Australia' as that expression is ordinarily understood, during a period of temporary absence on vacation or on work ...

(Reasons for Decision, para 10)

The AAT's assessment

In this case, the Alams had lived in Lebanon for over four years. But they said that they had intended to stay for only six months and that they had stayed longer only because the civl war made travel within Lebanon dangerous and because of the illness of their parents. They explained the sale of their Australian house as necessary because they had outgrown it, and of their furniture as sensible because it was so old and dilapidated that it was not worth storage fees. The Alams also told the AAT that neither of them took paid work in Lebanon, nor did they rent accommodation. While away they voted in an Australian Federal election. Their children had minimal schooling in Lebanon.

All those facts were not disputed by the DSS; and, on their basis, the AAT said that the Alams did not have a settled or usual abode in Lebanon:

> [A]t no time did they, being naturalized citizens with Australian domicile, abandon the intention with which they arrived in Lebanon — namely to attend to their own and their children's future and education by returning to Sydney and buying there a new family home as soon as civil dissension and parental urging against their movement [were no longer obstacles] ... [I]t should not be found that they had ceased to be residents of Australia.

Mrs Alam was, therefore, a woman 'whose usual place of residence is in Australia', and whose absence from Australia remained only temporary: Reasons for Decision, para.17. She was, therefore, qualified to receive endowment throughout her absence.

Should endowment 'payment ... be made'?

The AAT then considered whether s.104(5) affected Mrs Alam's situation. This subsection says that endowment shall not be paid to a person temporarily absent from Australia, 'unless the Director-General is satisfied that the period of temporary absence is likely to exceed twelve months.'

The Tribunal pointed out that this provision merely suspended actual payment until the person returned to Australia, when payment could be reconsidered and made for the period of absence. Seeing that Mrs Alam had now returned to Australia, 'the force of s.104(5) is spent, and she would in any event be entitled to the endowment for the whole period of her absence': Reasons for Decision, para. 21.

Overpayment action: two options not available to DSS

The AAT also considered the hypothetical question of how the DSS might use s.140(1) or s.140(2) of the *Social Services Act* to recover any overpayment of child endowment. The Tribunal thought that Departmental practice and procedure made reliance on s.140(1) impossible: Reasons for Decision, para. 20. And recovery under s.140(2) was not available because that provision did not allow recovery from current child endowment payments: Reasons for Decision, para. 22.

Formal Decision

The AAT set aside the decision that there had been an overpayment and directed reinstatement of any endowment moneys which had been withheld from Mrs Alam.

Age Pension: portability

BURNET and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/102)

Decided: 19 February 1982 by E. Smith, L. G. Oxby and I. Prowse.

This case raised the question whether an age pension, granted to Burnet, was 'portable': could it be paid overseas?

Dorothy Burnet was born in Australia in 1913; and she resided continuously in Australia until 1956, when she and her husband moved to England.

In March 1979, Burnet came to Australia, leaving her husband, who had a chronic illness, in England. She had a return flight (to England) booked for 3 June 1979.

On 4 April 1979, Burnet applied to the DSS for an age pension. This was granted on 20 April. (The DSS apparently decided that Burnet met the age and residence requirements of s.21: as the AAT pointed out, Burnet might not have met the current residence requirement in s.21(1)(b); but the question of the validity of the pension grant was not raised in this review.)

According to Burnet, the DSS then informed her (by telephone) that this pension was portable: that is, she would continue to be paid if she returned to England. (The DSS denied giving Burnet this information.) Burnet then confirmed her return flight booking and returned to England on 3 June 1979.

The DSS then cancelled Burnet's age pension and, after an unsuccessful appeal to an SSAT, she asked the AAT to review this decision.

Portable pensions—the legislation

Section 83AB declares that a person's right to be paid a pension is not affected by her or his leaving Australia, 'except as provided by this Part'.

One of these exceptions is set out in s.83AD which states the general rule that a pension is not payable outside Australia to a former Australian resident who has returned to Australia, claimed a pension and left Australia less than 12 months after returning here: s.83AD(1).