

**Were there 'special circumstances'?**

The legislation is set out in *Vulich*, this issue. The question before the Tribunal was whether there were special circumstances in the present case such as would allow the backdating of the payment by three years.

The AAT referred to *Beadle* (1985) 26 SSR 321 and *Corbett* (1986) 31 SSR 387. The latter case was very similar to this case. Though the hospital staff encountered by the applicant did not advise her of the availability of the allowance it would not have been obvious from her son's condition that he was eligible. While the applicant's living conditions were disadvantaged she did not live in a remote area and had access to welfare agencies. Though shy, she was intelligent and articulate. She did not describe her financial circumstances as desperate. She was aware of the allowance but did not realise that she may be able to claim it in respect of her son.

Having regard to all these matters, the AAT could not find any 'special circumstances'.

**Formal decision**

The AAT affirmed the decision under review.

**BODNEY and SECRETARY TO DSS (No. W85/150)**

**Decided:** 19 August 1986 by R.D.Nicholson, J. G. Billings and N.Marinovich.

The Tribunal *affirmed* a DSS decision to reject the applicant's claim for handicapped child's allowance in respect of his asthmatic son. The Tribunal accepted that the son was a 'handicapped child' as required by s.105H(1)(b) of the Act in that he 'needed marginally less care and attention' than a severely handicapped child. But the Tribunal found that he did not need this care for an extended period: s.105H(1)(c). There was also no evidence of severe financial hardship under s.105JA.

**Backdating**

Nevertheless, the Tribunal considered whether, if the applicant had qualified, he would have been able to claim a backdated allowance under s.105R (that section applies s.102 which requires the existence of 'special circumstances').

The Tribunal looked to:

...the fact that the applicant is a male parent with sole responsibility for such care: the failure of agencies with which the Applicant was dealing to

inform him of his right to apply for a handicapped child's allowance and his prompt lodgment of an application following advice that such a course was possible; the fact that the Applicant is not in a strong position to deal with bureaucracy and in any event is not comfortable in appearing before welfare agencies; the lifestyle of the Applicant and his family as Aborigines in a near city environment; the financial circumstances of the Applicant; and the Applicant's intention given in evidence to use any backpayments to buy [his son] and his brother some decent clothes, to furnish the house a bit better and to buy [his son] a bike.

However, these circumstances and all the circumstances of this application must be viewed against the length of the period in question, namely 1980 to 1983. Seen in that light they are not, in the Tribunal's view, sufficiently weighty to warrant a finding that there exist special circumstances for allowing extension of the period for lodgment...

## Handicapped child's allowance: eligibility

**PIGOTT and SECRETARY TO DSS (No. V85/546)**

**Decided:** 17 October 1986 by R.Balmford, G.Brewer and D.Sutherland

The applicant asked the AAT to review a DSS decision to cancel payment of handicapped child's allowance in respect of her daughter.

**The facts**

The applicant's 16 year old daughter suffered from Sturge-Weber syndrome. In June 1984 she entered a boarding school where she stayed from Sunday evening to Friday afternoon of most weeks during term time. She remained at the school until April 1986.

While the daughter attended the school the applicant only received handicapped child's allowance during term holidays. It was that decision to cancel payment during term that she sought to have reviewed. It was not in issue that the child was 'severely handicapped'.

**The legislation**

Section 105K of the *Social Security Act* provides:

Handicapped child's allowance is not payable in respect of a

child for any period unless, in respect of that period, family allowance is ... payable under Part II in respect of the child to a person, other than an institution.

Section 95(1) states that family allowance is payable where:

...a person who has the custody, care and control of a child (not being a child who is an inmate of an institution) or an institution of which children are inmates...

**Was the applicant eligible to receive family allowance?**

The applicant was only eligible to receive handicapped child's allowance if she was entitled to receive family allowance for the time her daughter was in school. The school had been in receipt of family allowance during the term. Was this correct?

The question was whether the child was an 'inmate of an institution' during the school term. If she was then, under the terms of s.95(1) the applicant could not receive family allowance and would not therefore be able to claim the handicapped child's allowance. It was accepted that the Secretary had approved the school as

an institution for the purposes of the section.

The AAT said:

...the coupling of the terms 'inmate' and 'institution' would, prima facie, discount the [dictionary] definition which points to mere co-residency. In this context, it would seem that some formal admission and permanency in the residence at the institution is required. A temporary visit, say for one night, would not make a person an 'inmate'. In this instance, the word 'inmate' means a person admitted to, and residing in, a hospital, nursing home, charitable hostel, etc., for protracted periods even though those periods may be interspersed with time actually spent away from the institution. [The child] by staying at [the school] for numerous periods of five days and nights at a time, over almost two years, clearly falls within the term 'inmate'.

(Reasons, para. 20)

As family allowance was not payable to the applicant during term, then she

could not be eligible to receive handicapped child's allowance.

#### Section 105KA

The AAT also discussed the effect of s.105KA which for some of the period may have allowed the Secretary to pay the applicant the allowance even though she was not otherwise eligible. [This section was subsequently amended to remove this discretion in the Secretary. The Tribunal found that the new provision did not apply to alter the eligibility of the applicant.]

As the power no longer existed the Tribunal turned to the *Acts Interpretation Act 1901 (Cth)* which provided in section 8:

Where an Act repeals in whole or in part a former Act, then unless the contrary intention appears the repeal shall not -

...

(c) affect any right privilege obligation or liability acquired or incurred under any Act so repealed...

The AAT concluded that as there was only the possibility that the Secretary might have exercised the discretion favourably no right or privilege which could be preserved by virtue of the *Acts Interpretation Act* had accrued to the applicant under the old s.105KA. Thus the section could not be considered by the AAT as the repeal operated to remove it from consideration.

#### Formal decision

The decision under review was affirmed by the AAT.

## Assets test: method of valuation

REYNOLDS and SECRETARY TO DSS

(No.S85/199)

Decided: 14 October 1986 by R.A.Layton, J.A.Kiosoglous and D.B.Williams

The applicant had applied to the AAT for review of a DSS decision to reduce his age pension after the introduction of the assets test. This hearing was on the preliminary issue of whether or not the value of the residue of his property after deducting the value of his home and associated 2 hectare curtilage was properly included within the value of his property for the purposes of that test.

#### The legislation

Section 6AA of the *Social Security Act* provides:

(1) In calculating the value of the property of a person for the purposes of this Act -

(a) there shall be disregarded -

...

(ii) if the person is a married person - the value of any right or interest of the person in relation to one residence that is the principal home of the person, of the person's spouse or of both of them (not being a right or interest of the kind referred to in sub-paragraph (iv));...

Section 6AA(3) provides:

(3) A reference in this section to the principal home of a person shall be read as including a reference to -

(a) in the case of a dwelling-house - the private land adjacent to the dwelling-house to the extent that that private land, together with the area of the ground floor of the dwelling-house, does not exceed 2 hectares;...

#### The property

The applicant owned a block of land of approximately 4.5 hectares on which his residence was situated. After the house and its 2 hectare curtilage

was deducted, 2.5 hectares of land valued at \$20,000 remained.

#### Net market value

The applicant submitted that the 'net market value' of the property should be applied to property to be assessed under the assets test. He also submitted that the 2.5 hectares of land in the residue of his property had no market value as the local council prohibited the subdivision of property in the area under 30 hectares.

The AAT accepted that the value of assets to be taken into account for the purposes of the assets test is the net market value. But the Tribunal did not accept that the property did not have any market value as no one would wish to purchase the residue property.

#### The process of valuation

The AAT preferred to accept the DSS submission on the valuation of the assets. This process did not require a separate valuation to be undertaken for the residue property. The AAT said:

The starting point for calculating the value of that property is to assess the market value of the whole property which, but for the exemptions contained in s.6AA, would be the value of the property to be taken into account for the purpose of calculating the rate of pension. Section 6AA then operates to allow the value of certain property to be disregarded, in particular, the principal home (sub-s.6AA(1)(i)(a)) and the associated curtilage of 2 hectares (sub-s.6AA(3)). Section 6AA therefore requires that a market value be attributed to the principal home and the curtilage. The value of the property to be taken into account is the balance which remains after deducting the market value of the house and curtilage from the market value of the property as a whole. A separate valuation is not required in

relation to the residue of the property. The Act does not require such a valuation to be made, quite apart from the fact that it would be a valuation nightmare to try and assess the value of the residue of property which may be in more than one portion and of peculiar shape, use and quality.

(Reasons, para.16)

As to the prohibition on the subdivision of land in the area, the AAT said that the market value is a notional market value, determined by a hypothetical not unwilling seller and a hypothetical desirous purchaser. Where the land has restrictions on its subdivision (as in the present case) the property is to be regarded as capable of such division to enable its market value to be determined.

The Tribunal pointed out one consequence of not taking this approach in the present case: the applicant's house and curtilage, being below the limit for subdivision, would have no market value on the reasoning of the applicant. Thus their value could not be disregarded under s.6AA of the Act (their having no value to disregard) and the market value of the whole of his property would be taken into account in assessing the rate of his pension.

#### Summary

The AAT determined that the manner of assessing the value of the property of the applicant should be in the following way. First, the market value of the whole of the property is to be ascertained assuming a hypothetical not unwilling seller and a hypothetical desirous purchaser. Second, to obtain the market value of the principal home and curtilage assuming a like seller and purchaser as above, as if the property were capable of subdivision. Third, to disregard the value of the home and curtilage by deducting its market value from the market value of the whole. The difference then becomes the amount to be taken into account in assessing the applicant's rate of pension.