

Federal Court decisions

Assets and income tests

MELBOURNE v SECRETARY TO DSS

Federal Court of Australia

Decided: 25 November 1988

by Northrop J.

This was an appeal, under s.44 of the *Social Security Act* against the decision of the AAT in *Melbourne* (1988) 42 SSR 536.

The AAT had decided that the rate of invalid pension payable to Christine Melbourne should be reduced on account of income credited to her account by the Senior Master of the Victorian Supreme Court. The Senior Master had invested \$1 million (a personal injury damages settlement) on Melbourne's behalf under the provisions of the *Supreme Court Act* 1986. According to the *Supreme Court Act*, the interest earned on that invested money was to be credited to Melbourne's account in a fund known as the Common Fund. The AAT had noted that, under the terms of the *Supreme Court Act*, Melbourne was beneficially entitled to the interest earned on the fund (in this case some \$130 000 a year) and that, accordingly, that interest fell within the definition of 'income' in s.3(1) [formerly s.6(1)] of the *Social Security Act*.

The Federal Court agreed with the approach taken by the AAT. In particular, Northrop J agreed that the decision of the Full Federal Court in *Flannery* (1987) 41 SSR 526 was directly applicable to the present case. That earlier decision had involved provisions in the *Public Trustee Act*, which were 'indistinguishable from those contained in . . . the *Supreme Court Act* (1986)'. Northrop J said:

'Applying that reasoning, in my opinion, the allocation, pursuant to s.133(14) of the 1986 Act of "interest" on the amount at credit in the Common Fund on account of the applicant constitutes a derivation of profits and for her own benefit in the sense contemplated by the definition of "income" for the purposes of the *Social Security Act*.'

(Reasons, p.20)

Assets Test

The Federal Court noted that, apart from the question whether the interest credited to Melbourne's account

constituted income, there was also the question whether the \$1 million held in the Common Fund could be described as her property, so as to affect the rate of her pension under the assets test. Northrop J said that it was not necessary to determine this question; but he clearly indicated that, in his opinion, that money would have to be taken into account for the purposes of the assets test.

Northrop J said that if the money had been given to trustees to hold on trust for Melbourne, there would be little doubt that it would be her property for the purposes of the *Social Security Act*. He continued:

'Although the moneys in a Common Fund are invested in the name of the Senior Master, he has no beneficial interest in the investments. No person other than the persons for whose benefit moneys were paid into Court, has any beneficial interest in the moneys invested in a common fund . . . On the death of a person on whose behalf the moneys have been invested, the amount standing to the credit of that person in the accounts of the common fund vest in the estate of that person and, together with any interest due, are to be paid to the personal representatives of that person.'

(Reasons, pp.16-17)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]



DINEEN and SECRETARY TO DSS

Federal Court of Australia

Decided: 6 December 1988

by Woodward J.

This was an appeal, under s.44 of the *AAT Act*, from the Tribunal's decision in *Dineen* (1987) 41 SSR 518.

Dineen was the legal owner of several pieces of rural land, which were being operated by his two sons. Dineen had decided to transfer these properties to his sons in 1980, but had proceeded with the transfer because of the costs involved. His will, made in 1980, left the properties to his two sons.

In 1985, following the introduction of the assets test, the DSS had decided that the three properties should be taken into account in calculating the rate of pension payable to Dineen. In June 1987, Dineen executed a declaration of

trust, acknowledging that the properties in question had been held by him in trust for his two sons since 1980.

The AAT decided that no trust, either express, constructive or implied, existed in relation to the three properties in favour of Dineen's sons. Dineen was, the AAT said, still the legal and equitable owner of the properties.

No express trust

The Federal Court agreed that no express trust had been created over the subject properties prior to June 1987. The Federal Court then considered the June 1987 declaration of trust:

'The purported declaration is a self-serving document, deliberately created eight years after the alleged event, to assist the applicant in his claim for a pension. For the reasons already given, it is not entirely consistent with the established facts. The Tribunal was entitled to disregard it and to find that no express trust was created in 1980 or at any other relevant time.'

(Reasons, p.14)

No constructive or implied trust

The Federal Court proceeded to the conclusion that the AAT had not made an error of law in finding that there was no constructive trust or implied trust over the subject properties in favour of Dineen's son.

The AAT had approached these questions in the correct fashion, finding that there had been no evidence of a common intention between Dineen and his sons that he held the property in trust for them (which would have established a constructive trust), and that a trust could be inferred from the Dineen's conduct (so as to establish an implied trust).

Deemed income

Finally, Woodward J held that the Tribunal had made no error of law in deciding that the value of the properties should be disregarded under the former s 6AD(1) [now s 7(1)] of the *Social Security Act* and that a deemed income of \$4740 should be taken into account pursuant to the former s 6AD(3) [now s 7(4)].

In particular, references made by the AAT to what might be reasonable from the community's point of view had not distracted the Tribunal from considering what it was required to consider - the 'relevant and reasonable considerations of personal and family circumstances.'

[P.H.]