Administrative Appeals Tribunal decisions

Sole parent pension: whose SPP child?

VIDLER and SECRETARY TO DSS and ASHFORD (joined party)
(No. 9708)

Decided: 25 August 1994 by S.A. Forgie.

The applicant Vidler was the father of Ashford's child, Jullie, born 4 June 1991. He applied for review of a decision of the SSAT to set aside a decision to cancel Ashford's sole parent pension (SPP) and to reinstate payments to her. Since SPP can only be paid to one of two parents in respect of the one child, the effect of the SSAT's decision was to deny payment of SPP to him. On application by Ashford, the AAT joined her as a party to Vidler's application.

The legislation

As part of the qualifications for SPP under s.249 of the *Social Security Act* 1991, an applicant must have an 'SPP child'. Under s.250 an 'SPP child' is either a 'dependent child' or a 'maintained child' of the applicant. A child cannot be a 'maintained child' (defined in s.5(2)) if he or she is a 'dependent child' as defined in s.5(9A). A young person is a 'dependent child' of an adult if the adult has the sole or shared right to have and to make decisions about the daily care and control of the young person, and the young person is in the adult's care and control.

Sub-section 251(1) provides that a young person can be an SPP child of only one person at a time. If a young person would otherwise be an SPP child of more than one person the Secretary is required by s.251(2) to make a written determination specifying whose SPP child the young person is to be.

Dependent child

By an order of the Family Court made on 11 December 1992, Ashford and Vidler had joint guardianship and custody of Jullie. Paragraphs 7 and 8 of the order provided that the mother was to care for the child during periods when the father was engaged in employment, and he was to care for the child during his rostered days off. Vidler was to pay $50 per week maintenance to Ashford for Jullie.

The Full Court of the Federal Court in *Secretary, DSS* v *Field* (1989) 52 *SSR* 694 said that once a court has made custody and access orders, the terms of the orders determine whether a person thereafter has a 'right' to have, and to make decisions concerning, the daily care and control of the child.

Having regard to the definitions of guardianship and custody in s.63E(1) and (2) of the *Family Law Act 1975* the AAT said that the order of the Family Court gave to Vidler and Ashford jointly the right to have, and to make decisions about, the daily care and control of Jullie. Paragraphs 7 and 8 were not intended to alter the effect of the joint custody order but merely to establish who would have her actual care at particular times.

So Ashford and Vidler jointly had the right to daily care and control and to make decisions about those matters. But the further criterion for the definition of 'dependent child' was having actual care and control. Each parent had actual care and control when Jullie was in his or her care. On one view of the legislation, Jullie was a 'dependent child' of each parent on an alternating basis and could not therefore be an SPP child of both of them at the same time (see *Edwards* (1994) 78 *SSR* 1134).

The AAT doubted the correctness of that view. It was implicit in s.251(1) that an application of the definition of SPP child could lead to a young person's being the SPP child of more than one person at a time. This could be so if 'a more global view' was taken of the care arrangements. Such an approach to apportionment of family payments had by implication been adopted in cases such as *Minassian* (1990) 55 *SSR* 734 and in *Fischer* (unreported 9 December 1993, Decision No. 9169). In those cases a child was held to be a dependent child of more than one person where both parents had joint custody and the actual care of the child alternated between them.

Noting that the scheme of SPP payments was not concerned with variations in day to day actual care, the AAT concluded:

> This structure, together with the provisions relating to family allowance, which shares many features in common with the scheme relating to sole parent pension, leads me to conclude that the time to which I am having regard in determining whether Jullie is the dependent child, and so an SPP child, is not day by day but over a period. What is the appropriate length of period over which to consider that issue I do not need to consider in this case.

(Reasons, para. 64)

In the instant case there was a consistent overall pattern of care and control alternating every few days, allowing the AAT to find that Jullie was the dependent child of both of them for the whole of the relevant period. It was therefore necessary to make a determination in accordance with s.251(2) as to whose SPP child Jullie was to be.

The AAT noted that s.251 did not allow for the SPP to be apportioned. Nor did it allow the AAT to determine that Jullie was the SPP child of neither of them, although that would have been the fairest result 'for neither can be said to be a sole parent if that term is understood to mean the parent who carries the major responsibility for rearing the child': Reasons, para 66.

Criteria for making a determination under s.251(2)

Since qualification for SPP depends on a parent's having the care of the child or wholly or substantially maintaining the child, the first consideration is which parent has the greater care and control of Jullie. In this case actual care and control was shared roughly equally.

The Act also focussed on who has the legal rights in respect of a child's care and control. So the second factor to take into account was who had those rights under the Family Court order. Paras 7 and 8 of the order indicated that Ashford was to have the greater care of Jullie. The order for Vidler to pay maintenance was consistent with that interpretation. The order provided that the parties could alter the care arrangements. Although there had been some ad hoc agreements, the AAT found that there had been no agreement to vary the broad framework of the care arrangements in the order.

Vidler claimed to be a better parent than Ashford, but the AAT refused to

take this factor into account. That was a matter for the Family Court, not for those administering the SPP scheme.

As an SPP child may be a maintained child as well as a dependent child, it was relevant to consider the extent to which each parent was maintaining Jullie. The AAT first considered what items of expense were to be taken into account. The Family Court in *Coon v Cox* (1994) FLC 92-464 discussed two scales measuring the costs of maintaining children, and preferred the Lee Scale which took account of additional expenses not included in the Lovering Scale, such as housing, transport and medical expenses.

The AAT found that both parents paid for the maintenance items when Jullie was in their care and control. As their periods of care were roughly equal, so too were their expenses. Vidler's $50 maintenance payments 'did not significantly alter the balance in his favour'. The AAT said that in this context it was not relevant to consider which of them had the greater earning power as 'a sole parent pension is not concerned with broader philosophical issues of who, if either, should be foregoing employment in order to care for Jullie': Reasons, para 77.

The AAT concluded that it should make a s.251(2) declaration in favour of Ashford since the Family Court order gave her greater periods of care of the child than it gave Vidler, and the terms had not been varied by order or by agreement between them.

Formal decision

The AAT affirmed the decision under review.

[P. O'C.]

Overpayment: departure certificate

SECRETARY TO DSS and APOSTOLOS AND HELEN THANASOUDAS

(No. 9713)

Decided: 2 September 1994 by G.L. McDonald.

The DSS decided to cancel payment of pharmaceutical allowance (PA) from 25 March 1993, to cancel payment of disability support pension (DSP) and age pension (AP) from 23 September 1993, and to recover an overpayment of PA, DSP and AP of $839.50 paid to the Thanasoudases from 25 March and 23 September to 21 October 1993. The SSAT set aside this decision deciding that there was no overpayment of DSP and AP because these pensions were to be cancelled when the Thanasoudases returned to Australia. The DSS requested review of the SSAT decision by the AAT.

The facts

The facts were not in dispute. Mrs Thanasoudas was paid AP, Mr Thanasoudas was paid DSP, and they both were paid PA. On the 13 January 1993 they were sent separate letters in similar terms advising them that they must tell the DSS within 14 days if they decide to leave Australia. Because the Thanasoudases do not speak English they did not understand the contents of the letters. On 13 March 1993 the Thanasoudases left Australia for Greece without notifying the DSS. They returned to Australia on 6 November 1993.

The law

With respect to the payment of AP, s.68 of the *Social Security Act 1991* authorises the DSS to give a notice requiring the person to notify the DSS if certain specified events occurred. According to s.71 a determination that a pension is payable continues in effect until it ceases to be payable because of certain sections of the *Social Security Act*. Section 73 provides that if the person does not notify the DSS of the specified event, and because of the event the person is no longer entitled to a pension, the pension ceases to be payable. Similar provisions apply to payment of DSP. Section 1064-C1 stipulates that a person must be in Australia to be paid the PA.

The section which authorised the DSS to cancel the Thanasoudases pensions is s.1218, which states that if a person leaves Australia without a departure certificate and remains absent for more than 6 months, the person ceases to be qualified for the pension at the end of the 6 months. Section 1219 sets out the procedure to be followed in order to obtain a departure certificate. The person must notify the DSS as required by the recipient notification notice of the proposed departure, and then a departure certificate may be issued. Finally, a debt is due to the Commonwealth if an amount has been paid to a person because that person failed or omitted to comply with a provision of the *Social Security Act* (s.1224).

Recipient notification notice

The AAT was satisfied that the letter of 13 January 1993 was a recipient notification notice as defined in s.68. It was noted that the letter did not specify that it was a 'recipient notification notice' as required. The AAT followed the decision of *Gellin* (1993) 76 *SSR* 1101 which decided that the inclusion of the section number authorising the issuing of the notice, was sufficient to validate the notice. The finding in *Moe* (1994) 80 *SSR* 1165 that the notice was not valid because it did not state the consequences of not notifying the DSS, was not followed by the AAT. The AAT decided that there was no a statutory requirement that the consequences of failing to notify be included in the notice. Section 62(2) provided that an event was not to be included in the notice unless it affected the payment of the pension, and therefore the letters to the Thanasoudases contained sufficient information. Similar reasoning applied to the notice issued in relation to payment of DSP to Mr Thanasoudas.

In passing, the AAT noted the amendment to s.68 which purported to validate all notices issued under the SSA from 1 July 1991.

> 'The application of such retrospectively acting provisions would indeed be extraordinary if the Tribunal had found that the notices . . . had been defective.'

(Reasons, para. 10)

The cancellation

The AAT followed previous AAT decisions of *Gellin* and *Moe*, and decided that s.1218 operated independently from the provisions of s.1219. Therefore the validity of the recipient notification notice did not affect the decision to cancel the pensions. The Thanasoudases' pensions were correctly cancelled after they had been absent from Australia for 6 months. As a basic requirement for payment of PA was that the person be in Australia, payment of PA was correctly cancelled from the date the Thanasoudases left Australia.

An amount of $873.30 was overpaid to the Thanasoudases because they omitted to notify the DSS when they left Australia. An administrative charge