Federal Court

Sole parent pension: dependent child

VIDLER v SECRETARY TO DSS (Federal Court of Australia)

Decided: 21 December 1995 by O'Loughlin J.

Vidler appealed against the AAT decision that Ashford, his former wife, was entitled to be paid the sole parent pension in respect of their only child Julie. The AAT had affirmed the SSAT decision. The DSS had rejected Vidler's claim for sole parent pension, and granted him a 49% share of the family payment. The DSS authorised review officer had reversed that decision, granting sole parent pension to Vidler with 51% of family payment. The SSAT varied the family payment decision to 50% each, and paid sole parent pension to Ashford (by majority).

Background

Vidler and Ashford separated 12 months after Julie was born. Ashford lodged a claim with the DSS for family payment and the sole parent pension, which were subsequently paid to her. In September 1992 the Magistrates Court ordered that Vidler was to have sole custody of Julie, and Ashford liberal access. These orders were discharged by consent by the Family Court in December 1992. Orders were made that the parents have joint guardianship and custody of Julie; Ashford was to care for Julie while Vidler was working and he would have Julie on his days off; Vidler's period of care of Julie should not be increased without the consent of both parties; and Vidler was to pay Ashford $50 a week maintenance. At this time Vidler was in full-time employment. He became unemployed in June 1993, and claimed the sole parent pension and family payment.

The SSAT decision

Ashford appealed to the SSAT and Vidler was joined as a third party. The SSAT concluded that the actual care of Julie had been shared by her parents on an equal basis since Vidler ceased working. Therefore family payment should be divided equally between the parents. The majority of the SSAT thought that there was no sufficient reason to cancel Ashford's pension, whilst the dissenting member decided that neither parent should be paid the pension.

Vidler applied for the review of the SSAT decision, and Ashford applied to be joined as a third party. When Vidler appealed to the Federal Court it was drawn to the Court's attention that Ashford had not been named as a respondent. The Court joined Ashford as a third party to the proceedings, but Ashford did not appear at the hearing. The appeal proceeded in her absence.

The legislation

Section 249, as qualified by ss.259 and 251 of the *Social Security Act 1991*, sets out the requirements which must be satisfied to be paid the sole parent pension. The relevant requirement in this matter is that the claimant must have at least one SPP child. Section 250 defines an 'SPP child'.

> 'A young person is an SPP child of another person (an adult) if:
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> (a) the young person is dependent child of the adult; and
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> (b) the young person has not turned 16; and
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> (c) the young person is a natural child of the adult.'

(Reasons, p.6)

For Julie to be the SPP child of Vidler she must also be his 'dependent child'. 'Dependent child is defined in s.5(2) of the Act. If the child has not turned 16 years, the child is a dependent child of the adult if the adult has the right (whether jointly or alone):

> '(i) to have the daily care and control of the young person; and
>
> (ii) to make decisions about the daily care and control of the young person;
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> and the young person is in the adult's care and control. . . '

Section 251 of the Act provides that a young person can be the SPP child of only one person, and if the young person would be the SPP child of more than one person, the DSS is to make a written determination specifying whose SPP child the young person is. The SSAT and the AAT decided that it was necessary in this case to make such a determination. They followed *Secretary to DSS v Wetter* (1993) 40 FCR 22 where the Court stated that the AAT must proceed to make such a determination where a young person would be the SPP child of more than one person.

O'Loughlin J summarised the relevant legislation as:

> 'Is there an adult who has the right to have the daily care and control of Julie together with the right to make decisions about the daily care and control of Julie and is Julie in the adult's care and control? The first two tests refer to legal rights whilst the last test deals with the factual circumstances.'

(Reasons, p.8)

Dependent child

Vidler and Ashford were granted joint custody and joint guardianship of Julie. Section 63E(1) and (2) of the *Family Law Act 1975* provide that the person who has custody of the child has the right to have daily care and control of the child, and the right to make decisions about the daily care and control of the child.

According to O'Loughlin J:

> 'The similarity in language of subs63E(2) of the *Family Law Act*, dealing with the right to "daily care and control" and the right to make decisions on that subject, with the language in the definition of "dependent child" in subs5(2) of the Act is material.'

(Reasons, p.9)

Therefore the AAT correctly concluded that both Vidler and Ashford were adults having the right jointly to have the daily care and control of Julie as well as the joint right to make decisions about her. These rights had been given to them by the Family Court Order. Based on the evidence which showed regular sharing of the child by her parents, the AAT also correctly concluded that Julie's parents shared between them her care and control. This meant that the AAT must make a determination pursuant to s.251(2).

Section 251(2) determination

O'Loughlin J found that the AAT had a statutory obligation to choose either Ashford or Vidler as the adult whose SPP child Julie is to be. The AAT relied heavily on the Family Court Order when making this determination. In his submission to the AAT, Vidler had relied upon calculations he had made which showed that he cared for Julie 51.2% of the time in 1993 and 55.8% of the time in 1994. The AAT found that these figures were not conclusive, and that the figures reflected the fact that Julie's parents shared her care. The Court agreed with that conclusion. It also agreed with the finding that having regard to the mere hours when Julie was in Vidler's care was not sufficient, especially if those hours did not accord with a Family Court Order. Otherwise, this would mean that the AAT

was countenancing a breach of a Family Court Order.

The AAT interpreted the Family Court Order to mean that Ashford was to have the greater care of Julie. O'Loughlin J agreed with that interpretation, because the words of the Order stated: 'The mother is to care for the child during those periods when the father is engaged in employment'. This meant that Ashford was to care for Julie at all times except on those occasions when Vidler was not working — on average Ashford would have Julie for 5 days out of 7. This was reinforced by that part of the Order requiring Vidler to pay Ashford maintenance.

O'Loughlin J noted that there were no decisions of the Federal Court under the 1991 Act dealing with s.249, but there were several decisions under the 1947 Act which had dealt with the concept of 'dependent child'. In *Secretary to DSS v Field* (1989) 25 FCR 425 the Full Court decided that a child cannot be a dependent child of a person merely because the person has factual control of child. The person must have the legal right to have, and make decisions about the child. O'Loughlin J found that:

> 'the decision in Field's case is still relevant . . . I see no reason to interpret the concept of custody care and control differently.'

(Reasons, p.19)

Field's case was followed in *Wetter's case* where it was found that the Court Order determined the legal right to daily care and control of the child. Therefore, when Julie was in the care of one of her parents, she could be considered the dependent child of that parent, and that parent might then qualify for sole parent pension. However, the Court concluded:

> 'I do not consider that the identity of the parent who had actual care and control of a child on a particular pension day was the correct approach. The better approach would have been to recognise that the parents now had like legal rights and, if as a matter of fact (as seems to be the case because of the Tribunal's reference to s.251) the Tribunal was of the opinion that the parents shared equally the actual care and control of the child to call in aid s.251.'

(Reasons, p.25)

This was the situation here. Both parents had like legal rights and shared equally the actual care an control of Julie. Therefore it was appropriate to apply s.251.

Formal decision

The appeal was dismissed with costs.

[C.H.]

SSAT decisions

Compensation: special circumstances

GD and SECRETARY TO DSS

Decided: 21 November 1995.

GD appealed against a DSS decision to recover compensation-affected social security payments amounting to $19,000 for the period 21 March 1993 to 29 April 1995. GD had received a lump sum compensation payment from the Transport Accident Corporation (TAC) as a result of an accident in March 1993. The TAC had retained the $19,000 to pay directly to the DSS.

GD argued that the sum represented by the social security payments paid to him in the first 18 months after the accident should not be recovered by the DSS because special circumstances applied. The *Transport Accident Act* (Vic.) provided that no damages for pecuniary loss are to be paid for the first 18 months after the accident, if the person was unemployed at the date of the accident. GD was unemployed at the date of the accident, and he submitted that he should not have to refund the payments for that period because he had not been compensated for that period. There was no 'double dipping' in this case.

Section 1184 of the *Social Security Act 1991* provides that all or part of a compensation payment may be regarded as not having been paid in the special circumstances of the case. The SSAT decided that special circumstances did not apply in this case, because the result was the intention of the Act. Section 1184 is not to be invoked because a less beneficial set of circumstances applied to GD. The Act covers all compensation schemes throughout Australia.

Family payment debt

HT and DEPARTMENT OF SOCIAL SECURITY

Decided: 24 July 1995.

The DSS raised and sought recovery of a debt of $576.30, being family payments paid to HT between February 1994 and February 1995. HT received basic family payments for one child in 1994 based on her combined income for 1992-93. In January 1994 HT's husband changed his job, and received an increased income. HT's combined income now exceeded the maximum allowable limit. HT did not tell the DSS that her husband had changed his job even though she had received a notice requiring her to tell the DSS if certain events occurred.

The SSAT decided that there was no debt. The DSS notice required HT to notify if she or her partner started or recommenced work, changed jobs, started self-employment or if their combined taxable income was likely to be more than a certain amount. Section 886 of the *Social Security Act 1991* provides that if a notifiable event occurs, and the person fails to notify of that event (see s.872), and if the person's income exceeds 125% of their base year income and their income free area, then their family payment entitlement is to be recalculated. The recalculation is on the basis that the appropriate income year is the tax year in which the notifiable event occurred. Section 872 of the Act allows the Secretary to give a notice requiring a person to notify the DSS if a specified event occurs, providing that event affects the payment of family payment.

Because HT's husband changed his job there was a notifiable event. At some stage it would have become apparent that HT's combined income was likely to exceed her income free area. Therefore HT's entitlement to family payments would have to be recalculated using her combined income for the 1993-94 tax year. The date of effect of the decision to recalculate HT's entitlement under s.886 is established by reference to s.876 and s.877. These sections operate when the occurrence of the event causes HT not to be qualified for family payments. The events in this case are HT's husband changing his job, and the likelihood of an increase in income. Neither of these events would effect HT's qualification for family payment, whether family payment were payable, or the appropriate rate. A change of job without an increase of income would not effect the qualification for family payment, while an increase in income rather than a likelihood of an increase would effect the rate of payment.