Mrs El Bayeh until after 1 January 1993 and that I have interpreted clause 54 of Schedule 1A to indicate that there are no savings and transitional provisions available to Mrs El Bayeh for continued payment of AFP: thus sub-sections 831(3) of the Act would be relevant if not for the intent of the Minister's Second Reading Speech.'

(Reasons, para. 31)

Formal decision

The AAT (a) affirmed the decision to pay Mrs El Bayeh wife pension at a proportional rate based on her Australian working life residence; and (b) remitted the matter of payment of additional family payments to the DSS for reconsideration in accordance with the following directions: (i) the amount of additional family payment to be paid to the El Bayeh family from 1 January 1993 was to be based on Mr El Bayeh being the qualifying partner of the couple; and (ii) additional family payments due to the El Bayeh family were to be paid to Mrs El Bayeh.

[M.A.N.]

Family payment: 'income free area'

SECRETARY TO DSS and ALLEN (No. 10458)

Decided: 9 October 1995 by K.L. Beddoe.

Mrs Allen's claim for family payment on 16 August 1994 was rejected because the combined taxable income of $71,608 received by her and her husband for the financial year ending 30 June 1993 was above the taxable income ceiling from 1 January 1994 of $66,000 for 3 children. A request was made by Allen to change the appropriate tax year for the purposes of entitlement to family payment, on the basis that the combined taxable income would be reduced to $60,000 for the financial year ending 30 June 1995. This claim was also rejected. On review the SSAT substituted a new decision that Allen was qualified for family payment from 1 July 1994. The DSS requested review of this decision.

The legislation

Sections 1069-H11 and 1069-H12 of the *Social Security Act 1991* provide that the appropriate tax year for a family payment payday is ordinarily the tax year that ended on 30 June in the calendar year immediately preceding that in which the payday occurs. In Allen's case the appropriate tax year was the financial year ending 30 June 1993, as at the date of claim. However a claimant may make a request to change the appropriate tax year, in accordance with s.1069-H19 where their income for the tax year in which the request is made is likely to be not more than 75% of the person's income for the appropriate tax year at the time when the request is made, or less than the person's income free area. Once either condition is satisfied the Secretary must determine that the appropriate tax year is the tax year in which the request is made.

As the estimated taxable income for the year ending June 1995 was more than 75% for the 1993 financial year, the remaining issue was whether the estimated income was less than the income free area.

Income free area

Allen submitted that 'income free area' was defined by reference to a note to s.1069-H14 which deals with a change to the appropriate tax year because of an assumed notifiable event. That note reads 'for "income free area" see Table H'. By using Table H the relevant income ceiling in Allen's case would have been $66,000, and the estimated taxable income for the 1995 financial year would have been less than this amount.

The AAT noted that there was no assumed notifiable event and s.1069-H14 did not apply on the facts. The Tribunal regarded the note to s.1069-H14 as an unfortunate drafting error, and stated that there was nothing in the Act or any principle of statutory interpretation which required the note to be applied to the operation of s.1069-H19.

The relevant section to be applied in determining the meaning of 'income free area' under s.1069-H19 was s.1069-H31 which provides that a person's income free area is worked out in accordance with Table HA, giving an income free area of only $22,598 in Allen's case.

Formal decision

The AAT set aside the decision under review. As a result Mrs Allen was not qualified for family payment.

[A.T.]

Family payment: definition of dependent child

DRAKE and SECRETARY TO DSS (No. 10437)

Decided: 3 October 1995 by A.M. Blow, C.P. Webster, B. Davis.

Background

Drake's former wife had custody of the 3 children of their marriage under a court order. Drake had access for periods totalling 29% of the year. In December 1994, the wife took the children to Queensland and Drake had not seen them since.

Drake had been receiving family allowance at a percentage of the full rate until the DSS cancelled payment of family payment to Drake on 17 December 1992. Between December 1992 and December 1994, he had access for 14 days or more on four separate occasions. Those 14-day periods commenced on or about 31 December 1992, 29 January 1993, 31 December 1993 and 29 January 1994.

The issues

Was Drake entitled to family payment from 17 December 1992 until December 1994? Also, was Drake entitled to family payment after December 1994, even though he was not able to have access to the children because of his financial situation?

The legislation

Section 838(1) governs qualifications for family payment. Section 838(1)(a) says that 'a person is qualified for family payment . . . if the person has at least one FP child'. Section 831(1) says that 'each dependent child of a person is also an FP child of that person'.

'Dependent child' is defined in s.5(2) and s.5(2)(a) provides:

> '. . . a young person who has not turned 16 is a dependent child of another person (in this subsection called the "adult") if:
>
> (a) the adult has the right, whether alone or jointly with another person:
>
> (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;
>
> and the young person is in the adult's care and control.'

Access for 14 days or more

In interpreting s.5(2)(a), the AAT considered that it was bound by two Federal Court decisions: *Secretary, Department*

of Social Security v Field ((1989) 52 *SSR* 694 and *Secretary, Department of Social Security v Wetter* (1993) 73 *SSR* 1065.

The AAT interpreted the effect of these decisions to be that a person can only be entitled to family allowance or family payment if he is an access parent in respect of periods when he has access for 14 days or more at one time.

The AAT referred to a decision of the AAT in *Elliott & Secretary, Department of Social Security* (1994) 82 *SSR* 1184. In that case the AAT distinguished the case of *Field* on the basis that the pattern of intermittent access was different, and therefore the mother was entitled to a percentage of the family allowance.

The AAT did not consider that it could 'legitimately distinguish the pattern of access, while access existed, from the sort of pattern of access that the Full Court was considering in *Field*': Reasons, p.6. In relation to Drake's submissions that a decision adverse to him would be unjust, the AAT said:

> 'the policy of the legislation is for the money in question to be paid to individuals who have the children for significant periods of time, regardless of the justice or injustice of the situation that exists between separated parents in particular cases.'

(Reasons, para.6)

Formal decision

The AAT decided to set aside the decision under review and in substitution determined that the applicant be paid family payment in respect of the four 14-day periods commencing on 31 December 1992, 29 January 1993, 31 December 1 993 and 29 January 1994, but not otherwise.

[M.A.N.]

Aged pension: managed investment

MR AND MRS BOSMAN and SECRETARY TO DSS (No. 10272)

Decided: 6 July 1995 by G. Ettinger.

The DSS had rejected the Bosmans' claim for age pension on the basis that their assets exceeded the income test limit. The SSAT had agreed with the DSS decision but had found that certain expences should be allowed against the income from the asset.

The facts

The Bosmans had invested $50,000 with ASGARD Investment Service. It was argued that this was a managed investment pursuant to s.9(1) of the *Social Security Act 1991*. It was also argued by the Bosmans that the manager's fees charged by ASGARD should be allowed as a deduction from the income earned on the investment, and that the interest on the money they had borrowed to invest with ASGARD should also be a deduction. The amount borrowed by the Bosmans was $89,631. The Bosmans had other investments which were not the subject of dispute.

It was argued by ASGARD on behalf of the Bosmans that once the money was invested with ASGARD, it controlled how and when the money would be invested. It was conceded that the investor selects investments of their choice, and that ASGARD rarely disapproved of the investor's choice.

Managed investment

'Managed Investment' is defined in s.9(1A) and (1B) of the Act, and s.9(1C) sets out investments which are not managed investments. Section 9(1A) defines an investment as a managed investment if:

> '(a) the money or property invested is paid by the investor directly or indirectly to a body corporate or into a trust fund; and
>
> (b) the assets that represent the money or property invested (the "*invested assets*") are not held in the names of the investors; and
>
> (c) the investor does not have effective control over the management of the invested assets; and
>
> (d) the investor has a legally enforceable right to share in any distribution of income or profits derived from the invested assets.'

The DSS did not disagree with the Bosmans' submission that their investment satisfied s.9(1A)(a),(b) and (d). The DSS argued that the Bosmans retained effective control over their investment with ASGARD because they could nominate which investment they wanted their money to go into, and this could be done at any time. ASGARD argued that an investor might nominate a certain investment but it would depend on the manager when and how this investment was made.

The AAT noted that the issue of effective control had not been considered by the AAT before. In this case the Bosmans' control of their investment 'was simply one of selecting the mode of investment. There was no evidence before the Tribunal to indicate they were consulted about particular investments before these were made': Reasons, para. 29. Therefore the investment satisfied s.9(1A)(c) of the Act, and thus the investment was a managed investment.

Manager's fees

Section 1074F of the Act provides that the amount of income a person earns from an investment may be reduced by the reasonable costs incurred in the preceding 12 months in relation to the making, acquisition or disposal of the investment. Reasonable costs are those which must be paid as a condition of making, acquiring or disposing of the investment. The SSAT had found that the manager's fees were a reasonable cost.

The Bosmans told the AAT that the manager's fees were payable by ASGARD, and were an ongoing expense. The AAT found that, as the manager's fees were an ongoing expense, they could not be costs associated with the making, acquiring or disposing of the investment.

Interest on the loan

It was explained to the AAT that $89,631 was borrowed by ASGARD on behalf of the Bosmans, and $50,000 of this was invested. The legal responsibility for repaying the loan was with ASGARD. The interest cost associated with the loan is paid by taking income from the Bosnans' investment account.

The DSS submitted that 'welfare legislation did not contemplate persons becoming eligible for pension payments by borrowing money to negatively gear their investments'. The interest on the loan should not be deductible against the income earned on the investment. If there was a shortfall, the Bosnans would have to pay the difference. The AAT agreed with the DSS.

Formal decision

The AAT affirmed the decision under review.

[C.H.]