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12 SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

Can a child be a 'PP child' of 2 or more persons?

The *Social Security Act 1991* (the Act) contains provisions governing entitlement to parenting payment (single), (formerly sole parent pension). In order to be qualified for parenting payment a person must have a PP child, being a child who is their dependent child. A dependent child is defined in s.5(2) as:

> '5.(2) . . . 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 is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person:
>
> (i) is not a dependent child of someone else under paragraph (a); and
>
> (ii) is wholly or substantially in the adult's care.'

Section 500E provides:

> '500E.(1) A child can be a PP child of only one person at a time.
>
> 500E.(2) If the Secretary is satisfied that, but for this section, a child would be a PP child of 2 or more persons (***adults***), the Secretary must:
>
> (a) make a written determination specifying one of them as the person in relation to whom the child is to be a PP child; and
>
> (b) give each adult who has claimed parenting payment a copy of the determination.'
>
> 500E.(3) The Secretary may make the determination even if all the adults have not claimed parenting payment.'

The recent Federal Court decision in *Lowe v Secretary to the DSS* (reported in this issue) considered those circumstances in which the exercise of the discretion set out in the above legislative provisions would come into play. In the Court's view the definition of 'dependent child' set out in s.5(2) of the Act requires firstly, that the adult be legally responsible, either alone, or jointly with another 'for the day-to-day care, welfare and development of' a child and secondly, that the child be factually 'in the adult's care'. This second requirement could only be satisfied, according to Drummond J, whenever a child is, 'as a matter of fact, under the immediate care of the particular adult for any period of time other than a de minimus period'. This meant that, in Lowe's case, where the child was with the mother one week, and the father in the alternate week, the child could only be the dependent child of each parent during the week when she was in that parent's care. This would seem to be the precise situation in which s.500E would be called into play.

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In this Issue

Whilst Drummond J accepted that s.251(2) (the equivalent section of the Act to s.500E, dealing with entitlement to the former sole parent pension) assumed the possibility of a child being the dependent child of two adults, it was held that the words 'at a time' in s.250 meant 'at the one time'. Drummond J concluded:

> 'It follows that on the perhaps unusual facts of this case, s.251 has no impact on the entitlements of either Mr Lowe or Ms Schembri to a sole parent pension in respect of Sarina because the factual position is that Sarina is only a 'dependent child' of each and thus an SPP child of each, to the exclusion of the other, in alternate weeks. Here, there has been no period since the parents separated in 1991 when, but for s.251, Sarina would have been an SPP child of both at the same time. The circumstances of the case were therefore never such as to enliven the discretion conferred by s.251(2) . . .'

(Reasons, p.9)

However, it would not seem that the shared care situation of Sarina by Mr Lowe and Ms Schembri was particularly unusual. Further, one might question in what circumstances, a child could ever be a dependent child of two separated parents 'at the one time', except perhaps where parents are separated under the one roof and also share factual care and control of the child as a result of this living arrangement.

Drummond J went on to say:

> 'It also follows that the decision-maker has, by misinterpreting the relevant provisions of Part 2.6, wrongly caused Ms Schembri to be paid sole parent pension in respect of each week when the child was in her father's care and wrongly denied Mr Lowe the pension to which he, to the exclusion of the mother, is prima facie entitled in respect of each week since October 1996 when he has had Sarina in his care.'

(Reasons, p.9)

Arguably, however, the situation described by Drummond J above is exactly what s.251(2) (now s.500E(2)) is designed to avoid.

Further, the decision would seem to be at odds with the Federal Court decision in *Vidler v Secretary to the DSS* (1995) 2(2) *SSR* 26. O'Loughlin J in that case considered that, where the AAT had determined that the parents shared the legal right to daily care and control, and that actual care and control was shared in that there was 'a consistent pattern of care and control alternating every few days', it became necessary for the AAT to consider the application of s.251. A dissenting member of the AAT who refused to exercise the discretion had erred: 'Difficult though it may be, there was a statutory obligation to make a choice in favour of one of the competing parties to the entire exclusion of the other': Reasons, p.10-11.

O'Loughlin J also considered the AAT decision of *Edwards and Secretary to the DSS* (1994) 78 *SSR* 1134 in which the parents had custody of the child, and the child in their care, each alternate week, so that the factual situation was similar to that pertaining in *Lowe.* O'Loughlin J was of the view that the correct approach for the AAT to have taken in that case was to recognise that the parents had like legal rights 'and, if as a matter of fact . . . the Tribunal was of the opinion that the parents now shared equally the actual care and control of the child to call in aid s.251': Reasons, p.25.

Although Drummond J referred to *Vidler* in his judgment, he did not directly address O'Loughlin J's comments with respect to the application of s.251, confining himself to a discussion of the meaning of 'dependent child' as determined in the *Vidler* case.

Dependent child

One of the positive outcomes of *Lowe,* might be the Court's rejection of the concept that a child must be in an adult's care for a minimum 14-day period before the definition of 'dependent child' can be satisfied. Such a requirement had been said to be necessary to satisfy the requirements of s.5(2)(a) as it stood prior to amendments taking effect in 1996, and similar provisions in the *Social Security Act 1947*: see *Secretary to the DSS v Field* (1989) 52 *SSR* 694; *Secretary to the DSS v Wetter* (1993) 73 *SSR* 1065; *Elliot v Secretary to the DSS* (1995) 2(1) *SSR* 10; and *Vidler's* case. The effect of those cases was that a period of care of not less than 14 days was generally necessary before a non-custodial parent could be said to have 'the right to have, and make decisions concerning, the daily care and control of the child during that period'. This judicial gloss as to the meaning of 'dependent child', fixing as it did on a period of 'not less than 14 days' was arguably artificial and arbitrary in its application to the circumstances of many separated non-custodial parents, who were unlikely to be able to meet that requirement, due to the intermittent nature of their access arrangements.

From 11 June 1996, s.5(2) was amended by the *Family Law Reform (Consequential Amendments) Act 1995,* to reflect reforms to the *Family Law Act 1975* taking effect from the same date. As a result of those reforms concepts of guardianship, custody and access were replaced with the notion of parental responsibility which each parent has until modified by court order. Thus there has been a move away from parental rights as reflected in the previous definitions of 'dependent child' under the Act, to parental responsibility. Drummond J considered that *Field* and *Wetter* were 'of little relevance to the construction of the significantly different provisions governing who is a 'dependent child' that are of present concern': Reasons, p.6. Further, in discussing *Vidler*, Drummond J did not agree that any additional requirement could be imported into the current definition of 'dependent child', such that care for a 14-day minimum period was necessary before dependency could exist. This view, which seems consistent with a change in focus in the family law to shared parental responsibility for children, will have an impact on both qualification for parenting payment and the splitting of family payment between parents, as both rely on the claimant having a 'dependent child'. Nevertheless, the terms of any court order must necessarily be scrutinised in order to determine whether a parent retains or has been deprived of that parental responsibility.

Payability

The Court in *Lowe,* however, also took the view that, although both parents were qualified for sole parent pension, it was not payable to them, because the scheme of the Act was such that a person must be qualified for an entire pension period in order to be paid the pension. As neither parent had the child in their actual care for more than one week, and therefore, in the Court's view could not be qualified for the pension for longer than one week at a time, neither was entitled to pension. In a sense, this seems like a reintroduction of the minimum 14-day period of care requirement by the back door. Indeed, it goes further in imposing the requirement on both parents, rather than just the 'non-custodial' parent. Again it would seem that the majority of sole parents would have difficulty meeting this requirement. Fortunately, the impact of this aspect of the decision has probably been removed by the passage of the *Payment Processing Legislation Amendment (Social Security and Veteran's Entitlements) Act 1998* which will remove the concept of payday-based payments from the Act. All payments will become period-based payments from 1 July 1999.

[Note: the DFaCS has decided to appeal the *Lowe* decision to the Full Court of the Federal Court.]

New Department — a change of name

On 21 October 1998, the Department of Family and Community Services (abbreviated in the SSR as DFaCS) came into being. It incorporates the former Department of Social Security (DSS), as well as three areas formerly under the Department of Health and Family Services. The Department of Employment, Education, Training and Youth Affairs (DEETYA) has been renamed the Department of Education, Training and Youth Affairs (DETYA), and retains the task of administering the *Student Assistance Act 1973.*

[A.T.]