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SOCIAL SECURITY

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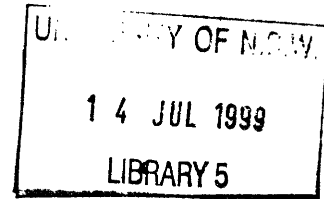

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...ding Student Assistance Decisions

Opinion

Restoring the status quo? An update on Lowe

On 28 May 1999 the Full Court of the Federal Court handed down its decision in the matter of *Secretary to the DSS v Lowe* (reported in this issue). The Court considered the meaning of the term 'dependent child' as defined in the *Social Security Act 1991* (the Act) as follows:

'**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.'

It also considered when it was appropriate to treat a child as a dependent child of two or more persons such that a decision maker determining entitlement to parenting payment (single) (formerly sole parent pension) must make a determination specifying which person is to receive that payment, as required under s.500E of the Act which 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 Full Court set aside the decision of the judge at first instance, and in doing so, removed many obstacles arising from that decision, whilst giving clear effect to the legislative intent and policy considerations underlying the legislative provisions.

At first instance Drummond J considered that the words 'at a time' in s.251 (the equivalent provision to s.500E, dealing with sole parent pension) required a child to be in a parent's care for a full fortnight, the period in respect of which pension is paid. Where parents shared care week about, as in Lowe's case, neither parent could be entitled to the sole parent pension. The Full Court rejected this approach as contrary to the purpose and context of the provisions set

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out in s.251. It considered that Drummond J had applied too narrow a construction of the term 'at a time'. It required a beneficial interpretation, which would not defeat the clear intent of the section. That intent was confirmed by reference to the wording of the equivalent section as it stood in the 1947 Act, where the section referred only to the requirement that a child be a qualifying child of 2 or more persons, before the discretion was enlivened. It concluded:

> 'Section 251, fairly understood, refers to a period during which particular arrangements with respect to the care of the child endure. The section looks at those arrangements and asks whether, during that period, more than one person would, but for the section, fulfil the statutory conditions for entitlement to the pension. It stands to reason the period in question must be long enough to make the enquiry meaningful – the period must be sufficient to be capable of entitling a person or persons to the pension.'

(Reasons, para. 7)

The Full Court also rejected the conclusion reached by Drummond J that the second limb of s.5(2)(a) could only be satisfied where a child was 'as a matter of fact, under the immediate care of the particular adult for any period of time other than a de minimus period'. The words 'and the young person is in the adult's immediate care' were not confined to the adult's immediate physical presence. The decisions of *Secretary to the DSS v Field* (1989) 52 *SSR* 694, *Secretary to the DSS v Wetter* (1993) 73 *SSR* 1065, *Edwards and Secretary to the DSS* (1994) 78 *SSR* 1134 *and Vidler v Secretary to the DSS* (1995) 2(2) *SSR* 26 were:

> 'united in suggesting that the whole of the arrangements for the care of a child should be considered when a determination is made as to whether the child is in a particular parent's care. It is not appropriate to dissect overall arrangements into discrete segments, unless those segments are sufficiently substantial to attract the principle discussed in Field, where it was suggested a period of a month during school holidays would, on the facts of that case, have required separate consideration. In the present case, if an overall approach is taken to the arrangements, it is clear that the care of Sarina is shared by her parents, and it is not appropriate to regard either of them as having that care in an exclusive sense each alternate week. Rather, their agreement necessarily involved, and was found to involve, joint participation in major decisions regarding the care of the child... although minor decisions requiring to be made immediately might be made by one parent with whom the child happened to be. Since even minor decisions were made pursuant to the mutual arrangements between the parties, they could not properly be seen as exercises of some exclusive capacity residing in each parent alternatively for a week. That would be quite unrealistic.'

(Reasons, para. 14)

The Full Court did not indicate what it considered would be an appropriate period of time over which to consider the care arrangements, as it was satisfied that in Lowe's case both parents exercised care and control over Sarina at all times.

Given the changes to the *Family Law Act 1975* effected by *the Family Law Reform (Consequential Amendments) Act 1995*, and the consequent amendments to the *Social Security Act 1991*, (effective 11 June 1996) it seems likely, adopting the reasoning of the Full Court in this case, that there will be many situations in which it can be said that parents will share care to the extent that they will both satisfy the requirement that the child is in their care within the meaning of s.5(2)(a). This is because of the emphasis on parental responsibility for children, effected by those amendments. Unless a Family Court order clearly modifies that responsibility, both parents may well continue to exercise the requisite degree of care, unless the period of time they are within the care of one parent, without access or with limited access by the other, is substantial, so that the child could no longer be said to be in their care.

The Full Court cites the example given in *Field's* case, where a child is with a parent for a month over a school holiday period. Significantly, such a situation would, in the past, have had the effect of enabling a 'non custodial parent' to potentially establish that they had a 'dependent child', certainly anything less than a 14-day period of care was said to be insufficient to satisfy the requirements of s.5(2) as it stood before the amendments. As a result of the amendments, the effect of the reasoning set out in *Field, Wetter* and *Vidler*, may be that a 14-day period of care by a parent is arguably the basis for deciding that the other parent, who nevertheless maintains legal parental responsibility, can not also satisfy the requirement that the child be in their care. Where the boundaries will be drawn however, remains unclear. This may well be a consequence of the need to maintain sufficient flexibility to enable a decision maker to be responsive to the individual circumstances of a variety of care arrangements.

[A.T.]

[**Note:** the 1999/2000 Budget proposes new income support arrangements for separated parents such that parenting payment will only be payable to new claimants if they have at least 60% care of a child. Existing parenting payment recipients who share care will retain their entitlements in certain limited circumstances.]

1999/2000 Budget

In brief those measures affecting social security and their proposed date of introduction are outlined below.

- Extended eligibility for Student Financial Supplement Loan (Jan 2000)
- A new Family Assistance Office (July 2000)
- New income support arrangements for separated parents sharing care (Jan 2001)
- Improved compliance measures (July 1999)
- Tightening of the gifting rules — deprivation provisions will affect entitlement for gifts over $5,000, reduced from $10,000 (July 1999)
- Expansion of Mutual Obligations for people aged 25-34 who have been unemployed for 12 months (July 1999)
- Simplification of debt recovery so that all overpayments will be recoverable debts, regardless of the reason for the debt (July 2000)
- Cessation of multiple claims for rent assistance for blended families in the one household (July 2000)
- Simplification of the isolated and secondary student boarder concession (Jan 2000)
- Simplification of family allowance and child care assistance (July 2000)
- Simplification of international payments (September 2000)

It is also proposed that the social security legislation be simplified. The Technical Rules Simplification Project is drafting legislation which will align all payment types, and reduce the volume of the current Act by some 500 pages. The package of legislation to bring these changes into effect will include the *Social Security (Administration) Bill 1999*, the *Social Security (International Agreements) Bill 1999* and the *Social Security (Consequential Amendment) Bill 1999*.