estimates is clearly flawed in respect of self-employed persons and others with ariable income who find it extremely difficult to estimate their taxable income. The Tribunal expressed the opinion that the family payment system 'needs an overhaul and that such is long overdue'.

The Tribunal considered that waiver for administrative error (s.1237A) could not apply because the problems of 'guessing' the amount of income which will be earned, when that turns on factors which cannot be predicted, is a systemic problem not a departmental error. The Tribunal considered that special circumstances waiver (s.1237AAD) was not warranted given that Clark was not in any demonstrated financial hardship and it appeared feasible to repay the debt through deduction from her current family payment entitlement.

Formal decision

The AAT affirmed the deacons under review.

[S.L.]

[*Editor's note:* The Tribunal did not address the question of whether the Income and Assets form completed by Clark in August 1996 constituted a request in writing in accordance with a form approved by the Secretary (point 1069-H20). Compare the decision in *Stuart and Secretary to DSS* (1998) 3 *SSR* 42.]

Guardian allowance: whether payable when care of child shared equally between parents

ROGERS and SECRETARY, TO THE DFaCS and MEADE (No. 199900768)

Decided: 15 October 1999 by J. Dwyer.

Rogers sought review of a decision of the SSAT affirming a decision not to pay him guardian allowance in respect of his son, C. Guardian allowance in respect of C was being paid to his mother (Meade). As any decision to pay Rogers guardian allowance could affect her entitlement, she was joined as a party to his application.

The legislation

Section 1069, Module F of the *Social Security Act 1991* provides that guardian allowance is to be added to a person's standard family allowance rate. Point 1069-F6 says that where two people share in the daily care and legal responsibility of a child, guardian allowance is payable only to the person who has the greater share of the daily care of, and legal responsibility for the child.

The issue

It was agreed that Rogers and Meade share legal responsibility for C equally. Thus the issue was whether either parent had the greater share of the daily care of C.

The facts

Consent orders made by the Family Court of Australia on 17 December 1998 provided that Rogers and Meade each retain responsibility for C's long-term care, welfare and development and that each party was to be responsible for C's day to day care, welfare and development during their periods of residence. The orders provided that, generally, C was to live with his father (Rogers) from 9 am Sunday to 7 pm Wednesday and at all other times with his mother (Meade). Special provision was made for Rogers to spend time with C on the first Saturday in March, June, September and December, and on Christmas Day and on C's birthday. The orders stated that it was the intention of Rogers and Meade that C reside with each of them for an equal amount of time.

The law

TheTribunal observed that, given the stated intention of the parents as set out in the consent orders was to share daily care of and legal responsibility for C, it was unfortunate that the legislation did not permit them to share both family allowance and guardian allowance equally. It was noted that Rogers' intention was simply to obtain half of the guardian allowance for C and not to deprive Meade of the whole of that allowance. Although dividing the allowance equally appeared appropriate in the circumstances, the terms of Point 1069-F6 did not permit such a decision. Consequently, the parties were in the invidious position of each having to try to point out ways in which their share of the daily care of C was 'greater' than the daily care provided by the other party. This was particularly unfortunate where the parties had shown the good will and common sense necessary to negotiate a fair and equal agreement as to the child's daily care.

The Tribunal noted that a calculation of the precise hours of daily care provided by each parent, as undertaken by the SSAT, was one way of determining the issue. According to the terms of the Family Court's orders, on an annual basis, Meade had 16 hours more care of C than Rogers. The Tribunal then considered whether the additional contact hours Rogers was to have on Christmas day and C's birthday should be taken into account. The Tribunal noted that in *Elliot v Secretary, Department of Social Security* (1995) 134 ALR 439, the Federal Court suggested that periods of one or two hours of contact with a child on a day may not constitute a share of the daily care of the child.

Rogers submitted that weight should be given to the fact that he provided more 'daily care' rather than night-time care. The Tribunal considered it illogical to distinguish between daily and night-time care of a young child.

In *Elford and Secretary, Department of Social Security* (1995) 21 AAR 193, the Tribunal had concluded that where neither parent has a greater share of 'daily care' of a child, no guardian allowance is payable in respect of that child. The Tribunal agreed that where the legislation made no provision for equally dividing the allowance, it was not permissible to pretend that one parent had the greater share of daily care where that was not the case on the facts. The Tribunal noted on the facts of the present matter, there was much to be said for the view that the parties share the daily care of C equally, but it was unnecessary to decide that matter because such a decision would not mean that the decision under review would be set aside, nor would it conclusively decide the question of Meade's entitlement to guardian allowance.

The Tribunal noted that the Department's policy provides 'rules' for determining who is to receive guardian allowance if two qualifying parents share legal responsibility for a child. The Tribunal observed that the policy guidelines provide for a payment in circumstances where neither person has the greater share of the daily care of the child and concluded that such a payment is not authorised by the Act and is, in fact, inconsistent with the Act. Accordingly (following the High Court in *Green v Daniels* (1977) 13 ALR 1 at 9), the guidelines should not be applied by the Secretary or his delegates, or by the Tribunal.

The Tribunal exhorted Parliament to consider amending the Act to provide for equal division of guardian allowance where parents share the daily care of and legal responsibility for a child equally, noting that the administrative costs of dividing the payment should not be great, particularly where the parents were sharing standard family allowance. The Tribunal stated it would provide a copy of its reasons to the Chief Justice of the Family Court as he may also consider it desirable to amend the Act on this issue.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Parenting payment: 'carries on a business'

CANTLAY and SECRETARY TO THE DFaCS (No. 199900725)

Decided: 29 September 1999 by A.F. Cunningham.

Background

Since 1994 Cantlay had received sole parent pension. This pension was replaced by parenting payment and he continued to receive this until April 1998 when Centrelink cancelled his payment. As well, Centrelink raised a debt for overpayment of sole parent pension and parenting payment (single) for the period 30 May 1996 to 16 April 1998. Centrelink claimed that Cantlay had failed to disclose his income as an employee with Department of Premier and Cabinet during the period. Cantlay claimed he was an independent contractor, not an employee, and his business expenses should be allowable deductions from his gross salary in calculation of his rate of payment.

The issues

Whether Cantlay was 'carrying on a business' and entitled to reduce his ordinary income by the deduction of business related expenses?

The legislation

Section 1075(1) of the *Social Security Act 1991* states:

> (1) [Income reduced] Subject to subsection (2), if a person carries on a business, the person's ordinary income from the business is to be reduced by:
>
> (a) losses and outgoings that related to the business and are allowable deductions for the purposes of section 51 of the Income Tax Assessment Act 1936 or section 8-1 of the Income Tax Assessment Act 1997, as appropriate; and
>
> (b) depreciation that relates to the business and is an allowable deduction for the purposes of subsection 54(1) of the Income Tax Assessment Act 1936 or Division 42 of the Income Tax Assessment Act 1997; and
>
> (c) amounts that relate to the business and are allowable deductions under subsection 82AAC(1) of the Income Tax Assessment Act 1936.

The nature of the relationship

Cantlay worked for Foley, a member of Tasmanian Greens Political Party. This work began in 1995 and he was initially remunerated very little with Foley meeting his expenses. At the same time, Cantlay was re-establishing his business 'Sounding Board Management and Research Services'.

After the 1996 election, more moneys were available to the Tasmanian Greens for advisory support services. The government required Cantlay be appointed by Department of Premier and Cabinet as a temporary employee. This was agreed to by Cantlay. His hourly rate was stated as $13.96 per hour but Cantlay had negotiated with Foley an hourly rate of $30.00 (less than his normal rate).

Cantlay maintained that his working relationship with Foley was as a consultant not employee. The formal arrangement with the State government was merely a mechanism for payment. He worked for Foley as he had done prior to the formal arrangement. His hours were irregular and variable. He basically worked from home, used his own equipment which included computers, a photocopier, Internet access and printers. He engaged two other people to assist him with his work for Foley who also used his home office equipment. Cantlay selected the type of work he wished to do and if there were a task that he felt was outside his area of expertise, he would suggest to Foley that he engage someone else.

Foley confirmed this arrangement with the Tribunal. He engaged Cantlay as a consultant for the purpose of providing advice, undertaking reports and legislative amendments. Foley stated that whilst he and Cantlay consulted as to the type of work that would be undertaken, Cantlay exercised control at all times in relation to what was prepared and was responsible for the outcomes.

The Department submitted that the period prior to March 1996 was irrelevant. Foley had no power to employ Cantlay but was merely his supervisor. The relationship between Cantlay and the Department of Premier and Cabinet was one of employee and employer and the fact that another type of relationship was intended was not relevant.

The Tribunal concluded that there was no dispute that the Department of Premier and Cabinet employed Cartlay pursuant to an instrument of appointment during the relevant period. However this instrument of appointment and the relationship created did not of itself determine, for the purposes of the Act, whether or not Cantlay is entitled to have any business expenses deducted from his ordinary income. Pursuant to the provisions of s.1075 of the Act, Cantlay is entitled to reduce his ordinary income as defined in s.1072 by deductions allowable under the *Income Tax Assessment Act* if it is found that he is carrying on a business.

The Tribunal then considered a number of cases that looked at the definition of 'carrying on a business' — *Ekis and Secretary, Department of Social Security* (1998) 3 *SSR* 51 and *Evans v FCT* (1989) 98 ATC 4540. In *Blockley v Federal Commissioner of Taxation* (1923) 31 CLR 503 on the question of whether a person is carrying on a business, the High Court commented 'is one of fact, not of law, depending on a variety of circumstances ...'

The Tribunal also noted that the nature of an employer/employee/contractor relationship was recently examined by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. The Tribunal drew on these decisions to discuss the factual situation of Cantlay.

On balance the Tribunal found that the circumstances of Cantlay's employment relationship suggest one of a contract for services rather than a contract for service. It was task or result orientated rather than simply the provision of labour in return for a specified wage. There was sufficient evidence to persuade the Tribunal that Cantlay had established a business and was trading as Sounding Board Management and Research Service. He provided these services to Foley during the relevant period and was 'carrying on a business' within the meaning of s.1075(1) of the Act.

Formal decision

The decision under review was set aside and in substitution the Tribunal decided that the applicant's losses and outgoings, allowable under s.51(1) and s.54(1) of the *Income Tax Assessment Act 1936*, were to be deducted from his ordinary income in accordance with s.1075(1) of the *Social Security Act 1991*.

[M.A.N.]