Administrative Appeals Tribunal Decisions

Assets test: valuation of shares

WYNDHAM and SECRETARY TO THE DFaCS (No. 19990728)

Decided: 29 September 1999 by W.G. McLean.

Claims in October 1996 by Wyndham and his wife for newstart allowance and additional parenting allowance were rejected as their combined assets exceeded the $176,000 limit for a homeowner couple. The value of their combined assets was $170,218 plus $295,500 for Wyndham's shareholding in the Wyndham Pastoral Co Pty Ltd (WPC). The SSAT set aside the rejections and directed a professional valuation of the shares be obtained, but Wyndham applied to the AAT.

Background

The WPC had been formed in 1961 by Wyndham's parents to own the family home in Armidale and a nearby farming property and plant. The parents had each received a controlling management share in WPC for the remainder of their lives, and Wyndham and his brother Edmund had both received 13,900 shares. All had been appointed directors. At about the same time Wyndham, his brother Edmund and their parents had formed a partnership that rented the property and plant from WPC for a peppercorn rate and operated a farming business.

Edmund bought out the other partners in 1989, paying $50,000 to Wyndham that represented 25% of the partnership's net assets at that time. In 1990 Edmund had also purchased 4438 shares in WPC from Wyndham whose shareholding fell to 34%. The price of $47.32 per share was based on WPC's estimated net assets at that time. The valuation method and the price were accepted by all the directors when approving the transfer as required by WPC's Articles of Association.

Since then Wyndham had received no dividends from WPC or income from the farming operation. Edmund had suffered brain damage in 1992, and the Office of the Protective Commissioner (OPC) had been appointed to manage his affairs. His wife had been largely managing the farming operations but profits were lower. Wyndham's parents had passed away. The Armidale house had been sold to Wyndham's mother in 1996 by way of a $106,000 loan from the WPC, and that amount was still a liability of her estate.

Based on an estimated value for the farming property and improvements of $728,400, an accountant had estimated Wyndham's remaining 9462 shares in WPC to be worth $295,500 in 1996. Wyndham accepted the 1996 estimate represented a fair and reasonable assessment. He intended to negotiate the sale of his remaining shares to Edmund for a price based on the underlying net asset value.

Shares valuation

Mr Wyndham argued that as a minority shareholder he had no control over the operations of the WPC, and the OPC for Edmund could continue to fix a nominal rental for the use of the farm and plant. Furthermore, the farming operation was not profitable enough to pay any more rent and this position was unlikely to change in the foreseeable future. This lack of dividends adversely affected the value of his WPC shareholding to a material degree.

The AAT considered it appropriate to accept the 1996 estimate of Wyndham's shares in WPC. That was probably a conservative figure as the property valuation on which it was based was less than valuations done in 1990 and 1997. That estimate was accepted by Wyndham, and had been used by the Secretary to assess Mr and Mrs Wyndham's assets in rejecting their claims. The AAT noted that in the past the directors of WPC had agreed to the transfer of shares based on the underlying net asset value of WPC, and the same approach was adopted when Edmund had bought Wyndham's interest in the partnership.

The AAT also considered it would not be appropriate to apply a discount to the 1996 estimate until Wyndham had concluded negotiations to sell his remaining shares to Edmund, and/or Wyndham had obtained legal advice concerning his rights and obligations as a director of WPC.

It followed that the total value of Mr and Mrs Wyndham's assets was $465,718.

Formal decision

The AAT set aside the SSAT's decision and substituted decisions to affirm the rejection of the claims for newstart allowance and additional parenting allowance.

[K.deH.]

Age pension: deprivation of assets

KOSCHITZKE and SECRETARY TO THE DFaCS (No. 19990835)

Decided: 8 November 1999 by J. Handley.

Background

Koschitzke's claim for age pension was rejected by Centrelink on the basis that her assets exceeded the asset limit. In June 1996, her husband transferred his interest in two properties to his sons. The total value of the properties was assessed at $1,069,920, the consideration received by Mr Koschitzke was $808,039. The assessed deprivation was $251,881.

On appeal, the Social Security Appeals Tribunal set aside this decision and found that Koschitzke's assets did not exceed the limit. The SSAT found that there had not been a deprivation of assets for the purposes of s.1123(1) of the *Social Security Act 1991* (the Act).

The issue and legislation

The issue in this appeal was whether there was a deprivation of assets for the purposes of s.1123(1) which states:

> **1123.(1)** For the purposes of this Act, a person disposes of assets of the person if:
>
> (a) the person engages in a course of conduct that directly or indirectly:
>
> (i) destroys all or some of the person's assets; or
>
> (ii) disposes of all or some of the person's assets; or
>
> (iii) diminishes the value of all or some of the person's assets; and
>
> (b) one of the following subparagraphs is satisfied:
>
> (i) the person receives no consideration in money or money's worth for the destruction, disposal or diminution;
>
> (ii) the person receives inadequate consideration in money or money's worth for the destruction, disposal or diminution;
>
> (iii) the Secretary is satisfied that the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.

The legal submissions

Two main submissions were presented for Koschitzke. First, it was contended that s.1125A(1) of the Act related only to disposal of assets by the person who applies for the pension. In this case

Koschitzke applied for the pension and her husband disposed of the assets.

The second submission was that there was adequate consideration for the transfer of the properties since Mr and Mrs Koschitzke's sons (Richard and Steven) had worked on the property for minimal wages for 26 and 16 years respectively. Evidence was provided that there was an agreement (albeit not in writing) that the sons would perform the work at less than award wages with the expectation that the properties would ultimately be transferred to them.

The DFaCS argued firstly that s.1225A(1) is not limited to disposals only of assets of the person claiming a pension.

In relation to the 'agreement' between Mr Koschitzke and his sons, the DfaCS argued that:

> ...Richard and Steven were given no more than a 'hope' or an expectation 'in the nature of a loose family arrangement' that one day they might ultimately receive a transfer of the properties from their father.

(Reasons, para. 74)

As there was no agreement, then the sons' foregone wages could not be regarded as consideration for the transfer of the properties.

Findings

The Tribunal found firstly that s.1225A was not limited in the way suggested by Koschitzke's legal representative. The intention was clear, especially when read in conjunction with s.1223 and s.1064-G2.

In relation to the issues of adequate consideration, the Tribunal agreed with the DFaCS that there was no 'certain agreement' between Mr Koschitzke and his sons about the ultimate transfer of the properties, however, based especially on the evidence of Mr Koschitzke, the Tribunal was satisfied that there was an oral agreement to transfer the properties in consideration of foregone wages and that the sons acquired an equity sufficient to permit them to take legal action on the basis of that agreement if necessary.

Consequently the Tribunal found that a constructive trust existed between Mr Koschitzke and his sons and the transfer of properties was in accordance with an undertaking to transfer in exchange for foregone wages. Reliance was placed on the decision of *Kidner v Secretary Department of Social Security* (1994) 77 *SSR* 1132. The Tribunal considered and distinguished the case of *Secretary, Department of Social Security and May* (1998) 3(2) *SSR* 15, concluding that this case, although similar in that property was transferred in lieu of wages, was not relevant as the persons transferring and receiving the property were partners under a partnership agreement and there was no legal obligation to pay the foregone wages. Also in May there was no agreement that wages would be paid.

The Tribunal concluded that Mr Koschitzke disposed of some assets (ie, the properties). However he received adequate consideration for this in that the foregone wages of his sons for 26 and 16 years were in excess of $251,881.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

DSP: assets test; constructive trust or beneficial interest

SADTO AND SECRETARY TO THE DFaCS (No. 19990855)

Decided: 15 November 1999 by E.A. Shanahan.

Background

Sadto had received disability support pension (DSP) since 1979. In 1984 properties in Frankston (Queen Street) were registered in the name of Sadto and his mother and father. In 1993, following the death of Sadto's father, these properties were transferred to Sadto and his mother. Other properties in Frankston (David Street) and Rye were registered in 1990 and 1992 respectively in the names Sadto and his mother and father. In 1993 these properties were also transferred to Sadto and his mother.

Evidence given by Sadto's mother was that her son had not contributed to any of the properties, nor did he derive income from them. Sadto's evidence was that although he signed transfer documents, he was unaware that he had an interest in any of the properties

In 1997, Sadto's real estate assets were valued at $317,000 and his rate of DSP was reduced accordingly.

This decision was appealed to the Social Security Appeals Tribunal which on the basis of a re-evaluation in 1997, decided that the value of the assets was $222,333.31.

The issue

The issue in this appeal was whether Sadto had a beneficial interest in the properties or whether his role was one of trustee.

The law

It was argued for Sadto that his lack of knowledge about the property dealings, the fact that he did not contribute to the purchase or the decision to purchase the properties led to the conclusion that he had no beneficial interest in these properties. Despite an existing legal interest it was submitted that, instead, he held the properties as trustee for his mother.

It was proposed that the trust was created without a common intention. Cases referred to as authority were *Gissing v Gissing* (1971) AC 886, *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137. All three cases relate to constructive trusts.

The DFaCS conceded that Sadto did not contribute to the purchase or development of any of the properties, but his parents clearly intended that he would benefit by making him a co-owner.

Halsbury's Laws of Australia was referred to in relation to resulting trusts:

> The presumption of a resulting trust applies when one person pays for, or contributes to the payment for, property which is transferred to, or owned in shares with, another person, and the share of the transferee is greater than his or her contribution to the purchase price. In these circumstances the law presumes that the parties intend to own the property in shares in proportion to their contributions. The presumption of a resulting trust may be rebutted if ... the transferee proves that the transferor intended to confer beneficial ownership in the property.

(Reasons, para. 33)

In relation to constructive trusts, the DFaCS again referred to Halsbury:

> A constructive trust will be imposed where the sole owner's of properties refusal to recognise the existence of an equitable interest in another person amounts to unconscionable conduct.

(Reasons, para. 36)

The DFaCS concluded that there was clear intention of a gift that would benefit Sadto and in these circumstances neither a resulting or constructive trust could arise.

Findings

The Tribunal found that there was no evidence of a constructive trust or a resulting trust. Sadto's legal interest equated with a beneficial interest and as such the value of the properties was to be considered in the application of the assets test.