

income nor a deduction, as it was passed on to the Commonwealth government.

The Tribunal concluded that only two items claimed by Klewer (uniform laundry, and mobile phone costs) might be allowable deductions, but then only if she could be said to be operating a business and only if these expenses related to that business.

The Tribunal noted that the general test of whether a business is being conducted '... is determined by the degree of autonomy the person has in the way in which they derive their income. The greater the control which someone else has over their income earning capacities, the less likely they are carrying on a business' (Reasons, para. 9). The Tribunal concluded here that Klewer's terms of agreement with the company which owned the taxi cab gave her very little scope for autonomy and that, indeed, '... the cab company has obviously sought to have control over every foreseeable event in the operation of a cab'.

The Tribunal concluded that Klewer was not carrying on a business, and therefore could not reduce her amount of income by the deductions she had claimed.

#### Formal decision

The Tribunal affirmed the decision under review, other than in relation to the amount of GST collected by Klewer in the period in question.

[P.A.S.]

## Age pension: deprivation of assets; death benefit

**GARBUTT and SECRETARY TO  
THE DFACS**  
(No. 2001/566)

**Decided:** 21 June 2001 by  
Dr J. D. Campbell.

#### Background

Garbutt lived with her son Wayne who died in November 1997. Wayne was an employee of Australia Post and a member of the Australia Post Superannuation Scheme.

In August 1990, Wayne nominated the beneficiaries of his superannuation to be 'next of kin as per will'. After his death, no will could be located. The trust provided that the trustee was not obliged to pay the death benefit to the people

nominated, but rather to people who were financially dependent on Wayne.

A dispute eventuated in relation to a de facto relationship between Wayne and a third party, Ms Wild. Ultimately the trustees of the superannuation fund decided that 60% of the death benefit would be paid to Garbutt and 40% would be paid to Ms Wild.

In December 1998 the trustees paid Garbutt approximately \$165,100. This amount was deposited into Garbutt's bank account and then withdrawn and distributed to the surviving siblings because Garbutt understood that this was her late son's wish.

Centrelink assessed Garbutt's pension on the basis that she had deprived herself of assets of \$155,000 on 23 December 1998.

Garbutt appealed this decision which was affirmed by the SSAT.

#### 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 evidence

The evidence of Garbutt was that she distributed the money because she wanted to carry out the wishes of her late son. She told the Tribunal that although she did not have particular discussions with her son in relation to superannuation, she understood his intention was to share his estate with the surviving children.

The evidence of Garbutt was corroborated by Wayne's sister, who indicated

that Wayne told her that the superannuation would be part of his estate.

#### Legal submissions

Two main submissions were presented for Garbutt. First, it was contended that the money was paid to Garbutt in her position as legal personal representative and that she had a duty to properly administer the estate. She therefore held the money in trust for herself. The moneys were then distributed to her as the first surviving beneficiary under intestacy.

The second submission was that there was a secret trust between Garbutt, her son and the surviving siblings and that Garbutt acknowledged to her son that she would carry out his wishes. Because of the secret trust she was bound not to distribute the money to herself as beneficiary, but rather to distribute it to the surviving siblings.

The Department argued that the trust deed was clear and that the moneys were distributed in accordance with this deed. The moneys were paid to Garbutt as a dependent, and not as a legal personal representative of the estate, therefore the payment was not a payment to the estate. The Department also disputed that a secret trust existed. It was the trustees who had the power to distribute the death benefit and not Garbutt.

#### Findings

The Tribunal found that the amount paid to Garbutt was paid on the basis that she was financially dependent on her late son prior to his death. Payment was a personal benefit arising from the trustees' decision that she was financially dependent. The amount paid was not paid to Garbutt as the personal legal representative of her son.

The Tribunal found no evidence of a secret trust. It also concluded that since the trustees held the power of disposition in relation to the death benefit, then no trust could arise from discussions between Wayne and Garbutt during his lifetime. Garbutt could only assign a death benefit when he became absolutely entitled to it, which did not occur while he was alive.

#### Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]