Centrelink levied family tax benefit (FTB) and parenting payment (PP) debts against Greene for the period 18 September 2000 to 13 March 2001 on the grounds that he did not have the legal responsibility for the 'day-to-day care, welfare and development' of Matthew. The SSAT set aside the decision, being satisfied that notwithstanding the physical separation, Greene had not relinquished the responsibility for day-to-day care.

The issue

The issue for the Tribunal was whether Greene retained the legal responsibility for the 'day-to-day care, welfare and development' of Matthew after he moved away.

The legislation

Section 22(4) of the *Family Assistance Act 1999* sets out qualification for FTB and provides, amongst other things, that a child must not be in the care of anyone else with the legal responsibility for the 'day-to-day care, welfare and development' of the child. For PP purposes, s.5(2) of the *Social Security Act 1991* defines 'dependent child' and requires that the adult be 'legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person'.

The evidence

Matthew gave evidence that other than a power bill and some school fees, his father did not contribute much financially. Phone calls from his father were rare and he wanted to stay in Redpa for stability. He saw his grandparents daily and sometimes dined with them. As far as he knew, his grandparents paid most bills. He sometimes received $50 per fortnight from Greene, with assistance from time to time from his grandparents.

Greene's evidence was that he wanted Matthew to reside with him at the end of the 2000 school year. He conceded he failed to inform Centrelink when he moved and accepted his assistance to Matthew was intermittent and limited. He said he phoned Matthew from time to time and had contributed to some school fees. He had not discussed food and keep with the grandparents as he knew he could rely upon them to do their best for Matthew.

Submissions

The Department contended that although Greene had legal responsibility for Matthew, there was little evidence of day-to-day care, indeed it was not a case of delegation but abrogation. Greene had received substantial Commonwealth assistance of which little found its way to Matthew. Abandonment occurred from September 2000 as there was no substantial agreement with the grandparents but merely an assumption they would provide care. Whilst accepting physical presence was not essential, there had been little or no contact, no formal delegation to the grandparents and little oversight or guidance.

Greene submitted that Centrelink's assessment was a harsh and incorrect one in difficult circumstances. He had demonstrated care and concern for Matthew and had attempted an accommodation arrangement with the grandparents which was, at least in outline, an agreed delegation. The Tribunal's attention was drawn to the case law favouring Greene's case.

The findings

The Tribunal observed the different inferences drawn by counsel from cited cases and since individual cases varied, suggested they offered only limited guidance. The Tribunal accepted Matthew's evidence but found Greene to be an unimpressive witness. Greene had failed to produce any material evidence of claimed expenditures and admitted his contributions were piecemeal and intermittent. The Tribunal stated:

> The Respondent and the SSAT relied upon *Juren v SDSS* (1993), involving a father who made no financial contribution but constantly urged his son to join him; the Tribunal does not find this persuasive in the Greene situation where contact between the parties virtually ended. In *Parks v SDSS* (1984) it was held the parent must retain a considerable degree of oversight and control, which is hardly the situation here.
>
> There are other case determinations which appear more relevant in the Greene case. In *Mohamad v SDSS* (1989) the Tribunal held that care and control were lost once an agreed period of absence ended and new circumstances prevailed ...

(Reasons, paras 40, 41)

The Tribunal was satisfied no formal delegation to the grandparents existed and the most that could be claimed was that an arrangement appeared to exist that Matthew would remain in Redpa until the end of the school year. From December 2000, however, that no longer applied. Whilst not satisfied Matthew was entirely abandoned, the Tribunal was satisfied that day-to-day care fell to the grandparents by default.

Formal decision

The Tribunal set aside the decision and found that on balance, Matthew remained a FTB and PP child of Greene for the period 18 September 2000 to 31 December 2000, and thereafter the situation changed such that Matthew ceased being a qualifying child.

[S.L.]

Family tax benefit overpayment: whether amount paid for student exchange program was direct child maintenance

IORIO and SECRETARY TO THE DFaCS
(No. 2003/266)

Decided: 23 March 2003 by G.D.Friedman.

Background

From 1 July 2000 Iorio was receiving family tax benefit (which replaced family allowance) in respect of his daughter. The daughter was accepted into a student exchange program involving a 12-month stay in Italy in 2001. Iorio and his former wife (the mother) signed an agreement in 13 December 2000 to share the cost of the trip. The agreement provided that the mother would pay for travel, school expenses and other expenses to the value of $7200 and Iorio would provide money to the value of $6350. The parents also agreed that the payment of $7200 would count as child support while the daughter was studying overseas.

A copy of the agreement was forwarded to the Child Support Agency. On 14 December 2000 a non-agency payment of $7200 was credited to the mother's Child Support Agency account following her payment directly to the cost of the program. On 23 January 2001 the Child Support Agency sent a letter to Iorio confirming that $7200 had been credited to the mother's account.

On 25 January 2002 Centrelink informed Iorio that he had been paid $2785.65 in family tax benefit in excess of his entitlement during the period 1 July 2000 to 23 February 2001, based on the amount of child maintenance received. Centrelink waived $1000, leaving a debt of $1785.65.

The issue

Was the amount paid by the mother for the daughter's student exchange program direct child maintenance?

Legislation

Section 3 of *A New Tax System (Family Assistance) Act 1999* (the Act) provides:

> **maintenance income,** in relation to an individual, means:
>
> (a) child maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the maintenance of an FTB child of the individual and is received from:
>
> (i) a parent of the child; or
>
> (ii) the partner or former partner of a parent of the child; or
>
> (b) partner maintenance — that is, the amount of a payment or the value of a benefit that is received by the individual for the individual's own maintenance and is received from the individual's partner or former partner; or
>
> (c) direct child maintenance — that is, the amount of a payment or the value of a benefit that is received by an FTB child of the individual for the child's own maintenance and is received from:
>
> (i) a parent of the child; or
>
> (ii) the partner or former partner of a parent of the child;
>
> but does not include disability expenses maintenance.

Whether payment 'direct child maintenance'?

The Department submitted that the mother's payment of $7200 fell within the definition of direct child maintenance under s.3(c) because the daughter received the value of the benefit of the payment by the mother for the program. The Tribunal should use the ordinary meaning of 'own' to refer to a particular benefit for the daughter's maintenance and for no other child's maintenance. The Department referred to *Secretary, Department of Social Security and Rosendorf* (1990) 20 ALD 270 in which the Tribunal stated:

> One has to distinguish a benefit from an advantage ... and The Macquarie Dictionary defines the word 'benefit' to mean 'anything that is for the good of a person or thing'. It is in this sense that the word is used in the Social Security Act.

The Department also submitted that the decision to credit the mother's Child Support Agency account with a non-agency payment of $7200 was correct because both parents had signed the agreement, which specified that the payment was to count for child support. She stated that the calculation of family tax benefit by Centrelink was correct and took into account all relevant factors.

Iorio submitted that his daughter and mother pressured him late at night into signing the agreement the day before the deadline for payment. He maintained that he was unaware of the details of the program. He disagreed strongly that the $7200 was for travel, school expenses and other expenses, and stated that the mother's contribution covered only airfares and supervision of the daughter during the program. It was not for her own maintenance as specified in the legislation, because it was not provided for her personal maintenance.

Iorio stated he was misled about the nature of the program, and discovered after his daughter's departure that there was no school component, and that she proposed to spend the year staying with relatives and travelling in Europe. He then organised distance education for her, and incurred the cost (between $9000 to $10,000) of providing books, internet access, telephone and other materials that enabled her to study a Victorian Year 11 course while she was overseas.

In relation to the crediting of the $7200 to the mother's account with the Child Support Agency, Iorio submitted that at no time did he receive the mother's payment, so he should not have incurred a family tax benefit debt as a result. He stated further that the amount was actually a debt incurred by him because he was required to waive child maintenance from 30 January 2001 to 31 December 2001.

The Tribunal accepted Iorio's evidence that pressure had been exerted on him to sign the agreement shortly before the deadline for payment. However, it noted as the custodial parent, he should have been aware of details of the proposed trip and discussed the issues with his daughter before committing himself to the expenditure and before consenting to her participation. The agreement signed by Iorio and the mother states clearly that the mother's payment is to be counted as child support during the program.

The Tribunal was satisfied that the statement in the agreement that the mother was to pay for the daughter's travel, school expenses and other expenses to the value of $7200 was correct, even though Iorio also contributed a considerable sum towards her education and other expenses.

The Tribunal found that the daughter received the value of the benefit of the payment by the mother of $7200, and that this benefit was received for her own maintenance and for no other person's, from a parent. The payment fell within paragraph (c) of the definition of maintenance income received by Iorio and had to be taken into account in the calculation of family tax benefit.

In determining whether Iorio incurred a debt the Tribunal was satisfied that Centrelink took into account the correct factors when calculating family tax benefit payable to him based on the amount of child maintenance received during the period 1 July 2000 to 23 February 2001. The Tribunal found that, under s.71(2) of the Act, Iorio incurred a debt of $1785.65 to the Commonwealth.

The Tribunal noted that under s.95 of *A New Tax System (Family Assistance (Administration)) Act 1999* (the FAA Act) the Secretary may decide to write off the debt in certain circumstances. The Tribunal found there were no grounds to write off the debt. Section 97 of the FAA Act provides for waiver of a debt arising from administrative error made by the Commonwealth. The Tribunal found that there was no administrative error by Centrelink. Section 101 of the FAA Act provides for waiver of recovery of a debt where there are special circumstances (other than financial hardship alone). In this case the Tribunal found that Iorio's circumstances did not constitute special circumstances (other than financial circumstances alone), and waiver of the debt under s.101 of the FAA Act was not appropriate.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Parenting payment debt: administrative error; special circumstances; waiver

SECRETARY TO THE DFaCS and MCKENZIE
(No. 2003/267)

Decided: 21 March 2003 by S. Bullock.

Material facts

McKenzie had been paid parenting payment in 1999 based on a declared figure of $349.20 per week for her husband's casual earnings. During May 2000, McKenzie had completed a family assistance office form and had declared her husband's annual income to be $24,876. About a month after McKenzie had completed the form there was a change in her husband's employment. She gave evidence at the hearing