

Court-ordered trusts and attributable assets

SECRETARY TO THE DFaCS and GEEVES
(No. 2003/593)

Decided: 25 June 2003 by Assoc Professor B.W. Davis.

Background

Escott was the beneficiary of a trust following a damages claim. An order dated 5 August 1998 was made by the Supreme Court of Queensland appointing the Public Trustee to hold damages awarded (approximately \$900,000) on his behalf.

Geeves cared for Escott for more than seven years and was receiving carer payment until it was cancelled by Centrelink in January 2002.

The trustee distributed approximately \$26,000 per year to Escott and paid for required expenses, for example \$7000 for a home gym.

The Centrelink decision was reviewed by the SSAT who decided that the money held in trust was not an asset of Escott and consequently carer payment should not have been cancelled. The SSAT found that the trust was a court-ordered trust and that Escott had no control over how the money was invested.

The issues

The Tribunal identified two issues. The first was whether Escott had a beneficial interest in the court-ordered private trust and whether this was an asset within the meaning of s.198D of the *Social Security Act 1991* (the Act).

The second issue was whether the Escott trust was an excluded trust within the meaning of s.198E of the Act.

Legislation

The Tribunal referred to s.11 which sets out definitions of 'asset', 'exempt asset' and 'value'.

Subsection 1118(1) deals with exempt assets. Section 1207P deals with designated private trusts with subsection (4) providing for the Secretary to declare a class of specified trusts for the purpose of this subsection by way of a disallowable instrument.

The relevant disallowable instrument is the Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2001, which states that court-ordered trusts are excluded

trusts and provides the definition of a court-ordered trust as follows:

6. Court-ordered trusts are excluded trusts

(1) Each trust that is a court-ordered trust is an excluded trust for section 1207P of the Act.

(2) A *court-ordered trust* is a trust created by an order of a court that:

- (a) relates to a personal injury matter; and
- (b) provides for some or all of the proceeds of the judgment of the court, or of a settlement between parties, to be held in trust for the benefit of the person in whose favour the judgment or settlement was made.

Submissions

The Department argued that the court-ordered trust was an asset of Escott under general principles of property law as it was intended for his sole beneficial interest. The fact that the court-ordered trust may be an excluded trust under s.1207P was not relevant in this case.

It was argued by the Department that the attribution rules did not apply in this case because court-ordered trusts are specifically excluded in the definition of 'designated trusts' by paragraph 6 of the disallowable instrument.

The Department argued that the new attribution legislation was intended to extend the operation of the pre-existing assets test, rather than having a result whereby what was being treated as an asset in the past would no longer be an asset under the new legislation.

On behalf of Geeves it was argued that s.1207P(4) clearly applied in this case and there was no basis for finding that the disallowable instrument made under this subsection should be disregarded, or that this subsection should be disregarded.

Findings

In considering the two issues raised, the Tribunal concluded that the sole beneficiary of the trust was Escott and therefore the trust was an asset within the meaning of s.11 and s.198D of the Act.

The Tribunal then considered how the asset should be treated in terms of the provisions relating to carer payment. The Tribunal found that prior to the introduction of attribution legislation Escott's assets would exceed the limits and Geeves would not have been qualified for carer payment.

The Tribunal referred to Centrelink's Guide which states at paragraph 4-12.3.80 that money held by the public trustee on behalf of an individual is considered the customer's asset. The Tribunal commented that these guidelines

should not be overturned 'unless there are compelling reasons to do so'. The Tribunal stated that it is 'required to treat statutes as they exist and where necessary given precedence over claimed intentions or operational practices'.

It was not contested that the Escott trust was a court-ordered trust and also an excluded trust.

The Tribunal concluded that the wording of the Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2001 was unambiguous and that under paragraph 6 it was clearly stated that a court-ordered trust is an excluded trust for the purpose of s.1207P. Consequently Geeves should be given the benefit conferred by this section and the trust should not be treated as an asset in assessing carer payment.

Formal decision

The AAT set aside the decision of the SSAT and substituted its own decision that:

- Escott's beneficial interest constituted an asset within the meaning of s.11 and s.198D.
- The Escott trust was an excluded trust within the meaning of the Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2001.
- Geeves was entitled to care of payment and reimbursement from the date of cancellation.

[R.P.]

Income and assets test: whether loan to company for principal home can be disregarded

HANRICK and SECRETARY TO THE DFaCS
(No. 2003/549)

Decided: 13 June 2003 by B.J. McCabe.

Background

Hanrick lodged a claim for age pension on 6 December 2001. He provided a letter from his accountant indicating his total combined income was \$47,029, an amount just below the income thresh-