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-

old. He owned 22 out of 32 shares in Fly Yourself Pty Ltd; the estate of his late mother and the estate of his late grandfather each owned five shares. The company's principal asset was Hanrick's home on the Gold Coast.

Hanrick was also a member of a partnership trading as W H Hanrick and Sons, which had been engaged in primary production prior to 2001. Notwithstanding that the other partners were Hanrick's late mother and his late grandfather, Hanrick maintained the partnership still existed. The partnership assets consisted of a bank deposit of $66,000 and a loan to Fly Yourself Pty Ltd of $200,220. The loan to the company had been intended to fund the purchase of Hanrick's home.

Centrelink decided that Hanrick's share of the partnership was 35/66, and the net assets needed to be attributed on that basis. It followed that $106,177 of the loan and $35,000 of the bank deposit were attributed to Hanrick as 'financial assets', which in turn attracted deemed income to Hanrick. Centrelink rejected Hanrick's claim on the grounds that his combined income precluded entitlement.

The issues

The Tribunal's principal task was to determine whether the loan by the partnership to the company was a 'financial asset'. If that question was answered in the affirmative, it would follow that deemed income thereon, in addition to Hanrick's other income, would put his combined income over the allowable threshold.

The law

Section 1077 of the *Social Security Act 1991* (the Act) requires deemed income from 'financial assets' to be assessed. The expression 'financial assets' is defined in s.9 to include 'financial investments', which includes money on deposit and the value of a loan that has not been repaid in full.

Discussion

Hanrick argued he should be treated as a home-owner. The loan moneys owed to the company should not have been taken into account because they related to the purchase of his home, which was exempted from the calculation.

The Tribunal turned its mind to the *Partnership Act* and concluded that the estates of Hanrick's mother and grandfather were not legal persons capable of entering into a partnership. The Tribunal observed that one effect of the *Succession Act 1981* was that the legal representatives of the estates could enter a partnership, but given Hanrick was sole executor of both estates, it was a legal impossibility for him to be in partnership with two other people, both of whom were himself. The Tribunal concluded he was really a sole trader and that the partnership property had vested in him. The Tribunal therefore considered that the shares attributed by Centrelink to Hanrick, being 35/66ths of the partnership property and 22/32nds of the company, understated his true entitlement to the financial assets of those entities.

The Tribunal observed that even if it was wrong in that respect, Hanrick's application would necessarily fail unless he could establish the loan moneys ought be disregarded because they were used to fund his principal home. The Tribunal stated:

> In *Repatriation Commission v Harrison* (1997) 46 ALD 193, the applicants controlled two companies. The sole assets of the companies were debts owed to them by the applicants ... The Tribunal held the value of the loans by the companies should be disregarded in assessing the value of the applicants' assets because in substance the applicants owed the money to themselves. Tamberlin J disagreed. The logic of the separate entity doctrine underlying corporate law prevented the decision-maker from having regard to the 'reality' of the situation. If the applicants were indebted to the companies, it was not open to the applicants to forgive the debt or ignore it. His Honour held that the value of the debt could be attributed to the applicants.
>
> I think the same logic applies here. The unpaid loan is a financial asset in the hands of the person or persons to whom it is owed. If the partnership has ceased to exist as I have found, the whole amount (less any amount that might be held for the benefit of others) is to be counted as part of the assets of the applicant. If the partnership remains on foot, the value of the loan is attributable to the partners according to the size of their shares ... The company's presence cannot be ignored, whatever the 'reality' of the situation. If one is to make use of complicated structures in the course of managing one's affairs in order to take advantage of the legal consequences of those structures, one cannot ignore the structure and its consequences when it suits one to do so.

(Reasons, paras 19, 20)

Formal decision

The Tribunal affirmed the decision under review.

[S.L.]

Disability support pension debt: special circumstances

SECRETARY TO THE DFaCS and BOYD
(No. 2003/541)

Decided: 11 June 2003 by S. Forgie.

The issue

The issue in this case was whether Boyd owed a debt of disability support pension (DSP) totalling $12,250 for the period July 1997 to January 2001, and whether any or all of the debt should be recovered. The SSAT had determined in July 2001 that no overpayment had occurred.

Background

There was no dispute that Boyd was during the period in question qualified to receive DSP, nor that on recalculation and taking into account her combined income her DSP payments should have been reduced to nil or a reduced amount in some fortnights during the period in question.

On 26 March 1997 a computer letter was generated from Centrelink to be sent to Boyd, which set out her combined annual income and required her to notify if her combined income was more than $82 per week, or if she or her husband commenced work. Although Boyd stated she did not receive this letter, she did in any case advise Centrelink on 26 March 1997 that her husband had begun work. There was no evidence that the letter had in fact been posted, and given this, the Tribunal concluded that Boyd was not given this notice (*Acts Interpretation Act 1901*, s.29). Boyd did not contact Centrelink again, nor was she contacted by Centrelink, until February 2001 when she was advised of the DSP debt. There was no dispute that after July 1997 Mr Boyd's employment income had increased above the amount noted in the Centrelink letter dated 26 March 1997.

The law

The *Social Security Act 1991* (the Act) at that time provided by s.1224 that an amount overpaid may be recovered where the amount was paid because of 'a false statement or false representation' or where a recipient 'failed or omitted to comply with a provision of this Act ...' (s.1224). Section 1223 then further provided that a debt was owed where '... the recipient was not qualified for the