

Certainly, it is easy to envisage situations in which a person manipulates circumstances to deny another person contact to his or her child. In those circumstances, my interpretation of s 22(3) and, indeed, the other provisions of s 22, would mean that he or she would manipulate circumstances to deny a person of his or her entitlement to FTB. The FA Act, however, is not the arbiter of who should and who should not have contact with their children and nor is it a vehicle for ensuring compliance with Family Court orders. It was intended to improve the assistance that families can get through the tax and social security systems (Second Reading Speech by the Treasurer, 31 March, 1999, House of Representatives, page 4889).

(Reasons, para. 34)

1 July to 18 October 2001

In relation to the first period, the Tribunal concluded that Horne had contact with the two children and that a Family Court order was in place; consequently they were his FTB children for this period. At the same time they were FTB children of May which raised the issue of assessing the percentage of FTB payable during this period.

The AAT referred to s.22(7) and the Family Assistance Guide. The Tribunal also found that while the Family Court order is relevant in determining a pattern of care, it is only part of the consideration. The Tribunal referred to the case of *Nowicz and Secretary, Department of Family and Community Services* (2001) 65 ALD 314 quoting the Senior Member at p. 318 as follows:

... sub-section 22(7) equally does not limit the Secretary's discretion to only consider care arrangements as stipulated in a Court order or parenting plan. A common sense approach necessarily means that the Secretary, and therefore this Tribunal, considers the relevant documentation, and the evidence of both parties as to what has been happening in the past, and what is intended to happen in the future, if such differs from the documentary evidence. Based upon such consideration, the Secretary is then in a position to determine what pattern of care has existed, or will exist in relation to the relevant FTB child.

16. Once established, it is appropriate that variation only occur where there is to be a significant departure in an established pattern of care. This may occur, for example, when contact weekends are changed from fortnightly to monthly. It would not occur when the odd weekend contact visit was missed, or a child stayed for one particular weekend in addition to the contact weekend in a given fortnight during a particular assessment period. The Tribunal would also note that the legislation is clearly not concerned with patterns of expenditure on the children, and is based purely on the time spent in each of the carers' care.

The AAT found that on the basis of the Family Court order, the two children

were in Horne's care for approximately 14% of the period; however in reality, contact was less than this and the Tribunal found 10% was a more accurate assessment.

Consequently under s.59(1) Horne's entitlement percentage for FTB was 10% and May's was 90% which was the assessment made by Centrelink and the SSAT.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that May was eligible for FTB at the rate of 100% for the period from 19 October 2001 to 13 December 2001, but not in relation to the earlier period.

[R.P.]

Family tax benefit debt: special circumstances waiver; 'knowingly'

QX03/5 and SECRETARY TO THE DFaCS
(No. 2003/1254)

Decided: 12 December 2003 by
Dr E. Christie.

The issue

The issue in this matter was whether the applicant's daughter, Pamela, was an FTB child during the periods in dispute, in particular whether she remained in her father's care and whether he remained responsible for her day-to-day care, welfare and development, even though she was residing away from him.

Centrelink sought to recover amounts of family tax benefit (FTB) paid to the applicant for the period January 2000 to June 2001 in respect of changes in the applicant's income, and from January to June 2000 and from July 2001 to October 2002 because Pamela was not in his care in these periods. The SSAT in April 2002 affirmed the decision to recover these amounts. The applicant contended that although Pamela was not residing at his home at the time he completed the Centrelink form in October 2002, he had neither stated or implied that she had left 'his care'.

Background

The applicant was, from August 1999, in receipt of FTB in respect of his daughter Pamela. The Family Court had in June 1999 issued an order that Pamela live with her father and that he had responsibility for her day-to-day care and welfare. However, after a holiday with her mother at the end of 1999 Pamela had refused to return to her father's care, although he reached an understanding with her mother that this would not be taken to affect his custody or guardianship responsibilities for his daughter.

Despite this living arrangement, the applicant stated he continued to use the FTB payments to meet Pamela's needs, and that he could produce evidence to support his disbursement of the FTB moneys for Pamela's benefit. He argued that, because of her health conditions and the time she spent overseas, her mother in fact had little to do with Pamela's day-to-day care, and that he had not notified Centrelink of the changed arrangements regarding Pamela because of the complexity of the situation and because he was unsure how to do so effectively. In October 2002 the applicant did advise Centrelink that Pamela had left his care at the end of 1999 to live with her mother. The Tribunal also received evidence from the applicant's treating psychiatrist regarding the applicant's history of depression and other psychiatric conditions, his early retirement from teaching through his depression, and several periods of hospitalisation which resulted.

The law

The qualifications for FTB are contained in s.22 of *A New Tax System (Family Assistance) Act 1999* ('the FA Act') which provides:

22. When an individual is an FTB child of another individual

- (1) An individual is an FTB child of another individual (the adult) in any of the cases set out in this section.
- (2) The individual is an FTB child of the adult if:
 - (a) the individual is aged under 18; and
 - (b) the adult is legally responsible (whether alone or jointly with someone else) for the day to day care, welfare and development of the individual; and
 - (c) the individual is in the adult's care; and
 - (d) the individual is an Australian resident or is living with the adult.

In relation to the question of waiver of a debt, the FA Act by s.101 provides:

101. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or a false representation; or
 - (ii) failing or omitting to comply with a provision of the family assistance law; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.

Thus for waiver to occur under this provision, there must be 'special circumstances' and, in addition, an applicant must not have 'knowingly' made a false statement or representation.

Discussion

The Tribunal considered the meaning of the terms 'day-to-day care' and 'care' in ss.22(2)(b) and (c), having regard to Pamela's situation. The Tribunal noted the decision in *Secretary, Department of Social Security v Field* (1989) 25 FCR 425 and concluded that Pamela ceased being in her father's day-to-day care whilst she lived with her mother, and that, therefore, her father was not entitled to receive FTB for her.

The Tribunal then considered whether the FTB overpayments paid to the applicant should be waived in whole or part. The Tribunal referred to the decision in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that to amount to 'special circumstances' a situation must be unusual, uncommon or exceptional. The Tribunal noted the psychiatric evidence that Pamela's father was 'consumed with his daughter's welfare' and so unable to make a rational, logical or cogent decision regarding his response to Centrelink. Further, having regard to the applicant's overall psychiatric conditions, and notwithstanding his steady improvement over time, his conditions and their implications could not be confined to the particular periods when he was in hospital or undergoing consultations with his psychiatrist — rather they applied throughout the period in question.

The Tribunal concluded that, given his psychiatric condition and its impact upon him, that applicant could not be said to have had actual knowledge of his failure to comply with his notification obligations (*Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435 applied), and that his circumstances were unusual and uncommon sufficient to meet the *Beadle* requirements, and that therefore waiver of the overpayment was appropriate.

Given the applicant's argument that he had in fact expended the FTB moneys on Pamela, the Tribunal directed that the overpayment be waived to the extent that the applicant was able to provide corroborating evidence that the payments were disbursed for Pamela's benefit.

In passing, the Tribunal noted the suggestion that the Department review its protocols for dealing with clients with known psychiatric conditions so as to avoid situations which might aggravate a pre-existing condition.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Family tax benefit debt: waiver, severe financial hardship; administrative error; special circumstances

WHITE and SECRETARY TO THE DFaCS (No. 2004/13)

Decided: 9 January 2004 by M. Sassella.

The issue

In this matter the issue was whether an overpayment of Family Tax Benefit ('FTB') should be waived due to administrative error by Centrelink or through special circumstances. Both White and her husband were receiving Centrelink benefits, some of which were not being counted as income for FTB purposes when they should have been.

Background

White was in receipt of FTB from July 2000, and was paid fortnightly on the basis of her estimated income. In the financial year 2001/02 Centrelink determined that an overpayment of FTB totalling \$1919 had occurred. In that year White was in receipt of disability support pension, whilst her husband received newstart allowance.

In April 2001 White advised Centrelink that the family's estimated income for 2001/02 was \$12,000, but in

fact her own and her husband's respective Centrelink payments in that year totalled \$18,486. At the time of advising Centrelink of the estimate (\$12,000), White told Centrelink that she was in receipt of disability support pension, but was told 'not to worry about the DSP as it is not taxable' (Reasons, para. 12), even though such payments are taken into account as income for FTB purposes. In June 2001 Centrelink wrote to White outlining her ongoing payments, which letter included the advice that income for the 'secondary earner' was shown as nil and which advised her of the need to inform Centrelink should the combined income fall outside certain specified limits.

The Tribunal determined that an overpayment of FTB totalling \$1919 had occurred in the relevant year. The issue for consideration was whether any of that overpayment should be waived and, if so, on what basis.

The law

The requirements for waiver of debts to be considered are contained in ss.97 and 101 of the *Family Assistance (Administration) Act 1999* ('the Act'). This Act by s.97 provides for waiver where the debt has arisen solely through administrative error and where the relevant payments were received in good faith —

97(1) The Secretary must waive the right to recover the proportion (the *administrative error proportion*) of a debt that is attributable solely to an administrative error made by the Commonwealth if subsection (2) or (3) applies to that proportion of the debt.

97(2) The Secretary must waive the administrative error proportion of a debt if:

- (a) the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt; and
- (b) the person would suffer severe financial hardship if it were not waived.

A further waiver ground, where special circumstances can be said to exist, is provided by s.101 of the Act —

101. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or a false representation; or
 - (ii) failing or omitting to comply with a provision of the family assistance law; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and