

- (iii) because the parent or parents are unable to provide the person with a suitable home owing to a lack of stable accommodation; and
- (b) the person is not receiving continuous support, whether directly or indirectly and whether financial or otherwise, from a parent of the person or from another person who is acting as the person's guardian on a long-term basis; and
- (c) the person is not receiving, on a continuous basis, any payments in the nature of income support (other than a social security benefit) from the Commonwealth, a State or a Territory.

In this matter it was not disputed that Semmens met the requirements of s.1067A(9)(a) and (c), but the question was whether he met the remaining criterion — whether he was being supported by a 'person who is acting as the person's guardian on a long-term basis'.

Discussion

The AAT considered that, as the Andersons had provided care for Semmens for more than 12 years, a close and long-term relationship could be said to exist. In the absence of a definition in the Act of the term 'guardian' the Tribunal considered the dictionary definition of this term which referred to questions of the degree of independence and ability to manage one's own affairs.

The Tribunal, noting the purpose of YA was to provide assistance for children with little support and Semmens' living arrangements, concluded that the Andersons had to be regarded as Semmens' guardians. Hence the claim for YA to be paid at the independent rate could not succeed.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Family tax benefit: reasonable action to obtain maintenance

THOMAS and SECRETARY TO THE DFaCS
(No. 2004/221)

Decided: 3 March 2004 by S. Webb.

The issue

In this matter the question at issue was whether 'reasonable maintenance action' had been taken by Roslyn Thomas, which in turn affected the rate of family tax benefit ('FTB') to be paid to her for the period 14 June 2000 to 18 October 2001. In this period FTB had been paid at the base rate, and she contended that a higher rate should have been paid to her.

Background

Thomas had two children, her son Dean having been born in April 1998. Thomas made an informal verbal arrangement for the payment of weekly maintenance with Dean's father, but did not seek an administrative assessment of maintenance under the *Child Support Act*, nor did she seek acceptance under that Act of the informal maintenance arrangement which she had made. She in fact received an average of \$50 per fortnight from Dean's father, but this amount was not assessed under the *Child Support Act* or against any impartial measure.

She lodged a claim for FTB in May 1998 in which she advised Centrelink that she did not have a maintenance agreement with Dean's father, and that she did not receive maintenance payments in respect of her children. Despite this information, she was paid the maximum rate of FTB in respect of Dean until June 2000 (an error of coding acknowledged by Centrelink), and then at the base rate until October 2001. The payment error was discovered in about May 2000 during a review, following which Thomas was sent letters in May and June 2000 regarding the rate of FTB being paid to her, and advising her that a higher FTB rate may be payable should she take reasonable action to seek maintenance in respect of Dean. Thomas claimed that she received neither letter, although the Tribunal accepted that the second had in fact been sent. On 18 October 2001 Thomas lodged a completed Child Support Assessment Form, following which her FTB payments were increased as it was accepted that she had undertaken reasonable maintenance action at that time. Thomas contended that

at no stage was she informed that her informal arrangement with Dean's father was not 'reasonable maintenance action'.

The law

The rate of FTB is calculated in accordance with the Rate Calculator at Schedule 1 of the *Family Assistance Act 1999* (s.58). Under Clause 10 of that calculator, FTB is payable at the base rate unless the parent concerned takes action that is considered to be reasonable to obtain maintenance. Clause 10 provides:

10. The FTB child rate for an FTB child of an individual is the base FTB child rate (see clause 8) if:
 - (a) the individual or the individual's partner is entitled to claim or apply for maintenance for the child; and
 - (b) the Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and
 - (c) the individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

Discussion

The Tribunal noted that the *Social Security Family Assistance Guide* establishes policy guidelines regarding maintenance action. Those guidelines provide that reasonable action will be considered to have been taken if, inter alia, a parent completes an assessment form and has payments collected by the Child Support Agency, or lodges a Child Support Agreement. Noting that the Tribunal is not bound to follow such policy Guidelines (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60), the Tribunal determined that the question of 'reasonableness' required attention to be paid to both the reasonableness of the amount of maintenance paid and also to the reasonableness of the action taken to obtain that maintenance.

In considering the question of 'reasonableness', the Tribunal determined that three steps were necessary — (1) determination of the identity of the person with maintenance liability for the child; (2) assessment of the appropriate level of maintenance that is payable in the particular situation; and (3) action to arrange for payment of maintenance at the appropriate level. In Thomas' situation, although it was accepted that an informal maintenance arrangement had been made, there was no evidence that an impartial assessment of liability had been made, and therefore there was no way of determining whether the amount being paid by Dean's father was a reasonable amount in the circumstances. As such '... Ms Thomas' action to obtain

maintenance, while well motivated, was not sufficient to be reasonable for the purposes of calculating the rate of FTB ...' (Reasons, para. 38).

The Tribunal concluded that Thomas did not fully undertake reasonable action to obtain maintenance until the level of maintenance payable had been

properly assessed, that is, until October 2001. In passing the Tribunal noted the obligation on Centrelink to ensure that FTB claimants are properly informed of their rights and obligations, and of the administrative options that arise from those obligations.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

SSAT Decision

Carer allowance and family tax benefit: temporary cessation of care; reasonable steps to have children returned

MW and SECRETARY TO THE DFACS

Decided: 24 October 2003

Carer allowance and family tax benefit ('FTB') in respect of children A and C were cancelled in July 2003 on the basis that the children were not living with MW or in her legal care, due to Interim Accommodation Orders made in July 2003.

Centrelink argued that under s.21 of the *Family Assistance (Administration) Act 1999* ('FAA') an adult must have at least one 'FTB child' to be eligible for (FTB). Under s.22 of the FAA, an FTB child must be in the adult's care for that adult to receive FTB. Under s.22(4) of the FAA the FTB child must not be in the care of another person who has legal responsibility for the day-to-day care, welfare and development of the child.

Centrelink further argued that under Centrelink Policy, the Family Assistance Guide 2.1.1.85, where a child has been removed from the original carer's care for an unknown duration, and this is supported by legal documentation, the person providing the actual daily care should be paid FTB. As MW no longer had legal responsibility for the day-to-day care, welfare and development of A and C and they were in the legal care of the person stipulated in the Interim Accommodation Order, the decision to cancel FTB was correct.

Centrelink also argued that under s.953 of the *Social Security Act 1991* ('the Act') the carer must be living with the children in order to remain eligible for carer allowance. As an Interim

Accommodation Order stated that A and C were not to reside with MW, pending another court hearing in August 2003, she could not be paid carer allowance.

There was no dispute that Interim Accommodation Orders were made in July 2003 for MW's children to be placed in another person's care. That person was MW's mother. The Tribunal accepted that MW and her partner contested the Protection Application made by the Department of Human Services (DHS) and had the children returned to their care in September 2003. While further Interim Accommodation Orders were made in September 2003, the children remained in their care subject to various conditions, such as acceptance of assessments and support services.

Cancellation of carer allowance

Qualification for carer allowance for children with disabilities, is set out in s.953 of the Act. Section 953(2) refers to 'dependent child' and 'care and attention on a daily basis', in a private home that is the residence of the person ...'. However s.957 provides for continuation of payment when there is a temporary cessation of care and s.953(3) allows a total of 63 days in any calendar year or 'another period that the Secretary, for any special reason in the particular case, decides to be appropriate'.

The Tribunal also examined Centrelink's *Guide to Social Security Law Policy Instructions* 1.1.T.60 and 3.6.4.40 regarding temporary cessation of care and the application of s.957. While the examples provided refer to cessation of care due to periods of respite care, illness or vacation, Centrelink's policy does not put forward any restrictions as to the reasons for the temporary cessation of care. The Tribunal noted the Act does not include any definition of 'temporary cessation of care' or restrict the situations in which s.957 can be applied.

The Tribunal concluded that s.957 applied in MW's case and that she remained qualified for carer allowance for 63 days from the time her children temporarily left her care.

Cancellation of FTB

Section 22 of the *Family Assistance Act 1999* ('the FA Act') sets out the criteria for a child to be an FTB child of an individual. Section 23 of the FA Act allows for the continuation of payment of FTB for a 'qualifying period' if there has been a change in care without consent and the person takes reasonable steps to have the child again in their care.

Centrelink's *Family Assistance Guide* defines 'reasonable steps' as including action such as an application to the Family Court. The Tribunal took the view that contesting a Protection Application in the Children's Court was similar in nature and comes within the meaning of 'reasonable steps'.

MW and her partner contested the Protection Application made by DHS. At the time of MW's FTB being cancelled, an Interim Accommodation Order was in effect for her children to be placed with her mother in July 2003 until a further hearing in August 2003. The children were returned to her care in September 2003, a period longer than four weeks. The Tribunal accepted that MW and her partner contested the Protection Application in the Children's Court, and Tribunal concluded that they took 'reasonable steps' to have the children returned to their care, as required under s.23 to allow continuation of payment of FTB.

The Tribunal noted that Centrelink had relied on Policy Instruction 2.1.1.85 which deals with disputed care arrangements where a child is placed in foster care, and instructs that the foster carer should be paid FTB where the care is longer than four weeks or of an unknown duration and is 'fully supported by legal documentation'. The Tribunal