

found no basis for applying this policy to cancel MW's FTB, given the provisions under s.23 of the Act which allowed for the continuation of payment in her circumstances. In addition Ms W's children were placed, as an interim measure, with her mother and not in an official foster care placement.

The Tribunal also referred to the *Children and Young Persons Act 1989*, for clarification on the status of the Interim

Accommodation Orders and various hearings referred to in these orders. The Tribunal noted that the Interim Accommodation Orders were limited to periods of 21 days and are applied during a process of determining a Protection Application. Whilst this process had yet to be finalised, the Tribunal placed weight on the fact that MW's children were only out of her care between July 2003 to

September 2003 and considered this absence to be temporary.

The Tribunal therefore concluded that MW remained entitled to FTB for the qualifying period, which in this case was from after the children were removed from her care until they were returned in September 2003.

[S.P.]

Federal Court Decision

Assets test: court-ordered trust

**SECRETARY TO THE DFaCS v
GEEVES**
(Federal Court of Australia)

Decided: 25 June 2004 by Keifel,
Weinberg and Stone JJ.

The Department of Family and Community Services (the Department) appealed against the decision of the primary judge that the contents of a trust fund created by the Court should not be included in the assets of Geeves, the carer of the beneficiary of the trust funds, Escott.

Escott sustained permanent brain damage as a result of a car accident and was awarded \$900,000 in damages. The award was paid to the Public Trustee Tasmania on trust for Escott. When Geeves' carer payment was cancelled the Public Trustee had \$630,000 in the trust account.

The law

Division 1 of Part 2.5 of the *Social Security Act 1991* ('the Act') deals with the payment of carer payment. To receive this payment the care receiver's assets must be less than a nominated amount. The value of a person's assets is to be worked out according to Part 3.12 of the Act. A new Part 3.18 was inserted into the Act, which allows private companies and private trusts to be included in a person's assets. Before a trust could be attributed as an asset of a person it must be a designated private trust, it must be a controlled private trust and the person must be an attributable stakeholder.

Section 1207P provides that the Secretary may declare some trusts to be excluded from the operation of the Act. Such a declaration is a disallowable instrument. The Secretary made such a

disallowable instrument, which provided that a court-ordered trust in relation to a personal injury matter for the benefit of the injured person was excluded. It was not disputed that Escott's trust was a court-ordered trust within the meaning of the declaration and was excluded.

The decisions

The Social Security Appeals Tribunal set aside the decision on the basis that the moneys held on trust were not an asset of Escott. The AAT decided Escott's beneficial interest in the trust was an asset but that it was excluded.

The Department argued that the trust was Escott's property and thus was an asset. This argument was rejected by the primary judge who stated that the trust was a discretionary one over which Escott had no control. He was in the same position as any beneficiary of a discretionary trust.

The trust

Keifel J was satisfied that the trust met the three requirements to be included in Escott's assets under the recent amendment. However, the Secretary in the declaration had specifically excluded this type of trust from being included in the person's assets.

The real issue of the appeal was whether Escott's interest in the trust fund was property and should be included with his assets. The trust was a private trust with a known beneficiary. This was a protective trust where Escott was unable to demand any part of the trust fund be paid to him. The fund was to be used for his care and maintenance.

As a beneficiary under a private trust Mr Escott has a proprietary interest in all the property which for the time being is subject to the trust ... It may be described as an equitable proprietary interest.

(Reasons, para. 20)

The beneficiary has rights against a third person in relation to the trust but has no ability to assign his interest in the trust.

Keifel J addressed the issue of whether such a proprietary interest could be considered *property* under the Act and concluded that it did not. The purpose of the Act was to provide financial assistance to persons whose means are limited. Persons with assets above a certain level should not receive benefits. According to Keifel J:

The evident focus of the Act, in my view, is upon assets which are available for a person's use. It does not seem to be consistent with the purpose of the Act to require that assets which are not able to be utilised by a person are to be taken into account in assessing whether they qualify for the benefit in question.

(Reasons, para. 23)

Because Escott did not have available to him the funds in the trust, his interest in the trust fund could not amount to property or assets under the Act.

Weinberg and Stone JJ essentially agreed with Keifel J's analysis and reasons.

The decision

The appeal was dismissed and the AAT's decision was slightly varied. Costs were awarded against the Department.

[C.H.]