

Federal Court Decision

Carer payment: designated private trust; excluded trust

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

Decided: 16 December 2003 by
Heerey J.

The Secretary requested review by the Federal Court of a decision of the AAT that Geeves was entitled to carer payment.

The facts

Geeves had been caring for Escott for some years. Escott had sustained a permanent brain injury in an accident and had been receiving care since 1995. In August 1998 the Supreme Court of Queensland sanctioned a settlement of Escott's claim for damages of \$900,000 plus costs. A term of the settlement was that the money was to be paid to the Public Trustee of Tasmania in trust for the maintenance, education and other needs of Escott.

Centrelink cancelled Geeves' carer payment on 24 January 2002 on the basis that Escott's assets exceeded the disqualifying assets level. The amount in trust was \$774,174.

The law

Section 198D(1) of the *Social Security Act 1991* ('the Act') provided (at the

relevant time) that a care receiver's assets must be less than \$376,750. According to s.198E:

For the purposes of subsection 198D(1), (1A), (1C) or (1E), the of is to be worked out in accordance with:

- (a) Part 3.12, except Divisions 2, 3 and 4 of that Part; and
- (b) sections 198F to 198MA (inclusive); and
- (c) Part 3.18, except Division 9.

Paragraphs (a) and (b) did not apply in this case, but paragraph (c) was relevant. Part 3.18 contains the means test for private companies and private trusts.

The explanatory memorandum accompanying the amending legislation that inserted the means test for private companies and trusts, stated that the purpose of the amendment was to ensure that persons who held their assets in a private trust or company were treated in the same way as those who held their assets directly. Section 1207 provides that a trust must be a *designated private trust*. According to s.1207P(1) a trust is a designated private trust unless it is excluded. Subsection 1207P(4) provides:

The Secretary may, by writing, declare that each included in a specified class of is an excluded for the purposes of this section.

The Secretary has made such a declaration in the *Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2001*. Clause 6 states

- (1) Each trust that is a court-ordered trust is an excluded trust for s.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 judgement of the court, or of a settlement between the parties, to be held in trust for the benefit of the person in whose favour the judgement or settlement was made.

Excluded trust

The parties did not dispute that the trust created in favour of Escott by the Supreme Court of Queensland was a court-ordered trust within the meaning of the Declaration. Heerey J found that:

The clear words of the legislation lead unavoidably to the conclusion that the trust for Mr Escott is an 'excluded trust' and therefore not a 'designated private trust' for the purposes of Pt 3.18.

(Reasons, para 18)

The Court considered that the argument of the Secretary that this trust would have been caught by the ordinary rules regarding assets in the Act was doubtful. The trust was a discretionary trust over which Escott had no legal control.

The decision

The Federal Court decided to dismiss the Secretary's application with costs.

[C.H.]

AAT continued from p.7

Although not necessary to decide this, the AAT also commented that special circumstances existed such that any overpayment should be waived:

... where the payment was originally granted by the applicant department and then later over-ruled and given the severe disablement of the respondent and the good faith with which those acting for him acted, it would seem to me that ... special circumstances do exist ...

(Reasons, para. 4)

Formal decision

The matter was remitted to the Department with the direction that rent payable by Walters was \$278.25 per fortnight.

[H.M.]

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