

ent child of another person if that person has the right '(i) to have the daily care and control of the young person; and (ii) to make decisions about the daily care and control of the young person'.

Daily care and control

The AAT followed the Federal Court decisions of *Secretary, DSS v Field* (1989) 18 ALD 5 and *Secretary, DSS v Wetter* (1993) 112 ALR 151. It was noted that in *Field*, the Full Court stated that a Family Court order for access could give a person a right to make decisions about the daily care and control of a child even though he or she had not been awarded legal custody. In that case the father had access periods from Thursday morning to Sunday night one week, followed by access from Friday afternoon to Monday morning alternate weeks, and parts of the school holidays. While the Federal Court regarded this as involving a right to have and make decisions concerning the child's 'care and control', the intermittency of access days meant that there was no right to have the 'daily care and control' of the child.

The AAT considered that the pattern of access in the case before it was indistinguishable from that considered by the Federal Court in *Field*. The AAT pointed out that the amount of money spent by each parent in caring for Jantaara was not relevant to the issue of 'daily care and control'. It pointed to relevant factors which confirmed that McDonald was the parent who had the right to 'daily care and control', namely the fact that she organised and made decisions about Jantaara's activities such as pre-school, swimming and the like, provided for her every day needs, and made decisions about her medical treatment as demonstrated by the Family Court Consent Orders. The fact that those orders gave Shorter the right to attend pre-school concerts, sports and other school functions was seen by the AAT as emphasising the intermittent pattern of the access exercised by him.

As Shorter did not have the 'daily care and control' of Jantaara, she was not his 'dependent child' pursuant to s.5(2) of the Act and therefore Shorter was not qualified for family payment.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Assurance of support benefit: waiver; special circumstances

STOJANOVIC and SECRETARY TO DSS
(No. 11216)

Decided: 2 September 1996 by D. Chappell, I. Way and S. Bullock.

Background

Stojanovic sought review of the decision of the SSAT affirming a debt raised against him amounting to \$7933.40, and owed under an assurance of support entered into by him in respect of his sister, Milenkovic, nephew and niece. The primary issue before the Tribunal was whether there were any grounds to waive the debt under s. 1237AAD of the *Social Security Act 1991*, which provides:

'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 false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; 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 write off the debt or part of the debt.'

The facts

Following the Milenkovic family's arrival in Australia on 1 January 1993, they resided with Stojanovic and his family until 12 August 1993. On 30 July 1993 Milenkovic made a claim for job search allowance, which was granted on 17 August 1993, after investigation by the DSS of her circumstances, and an interview with Stojanovic as assurator. Stojanovic, at that interview, indicated that his family was moving to Oakdale, away from relevant services and schools to which his sister and children required access. He also stated that his business had suffered as a result of his inability to work for a time through injury, the family was in debt and no longer able to support his sister's family. It was apparently also agreed by Stojanovic and Milenkovic at this interview, that a \$3500 bond lodged with the Department of Immigration, Local Government and Ethnic Affairs at the time the assurance of support was entered into, would be used to enable Milenkovic to stay in town, but after this

amount was expended, Milenkovic would return to live with her brother.

Following this, Stojanovic was contacted by the DSS after allegations were made by Milenkovic that she had been forced from his home. He denied that this was the case. However, following a number of interviews by a DSS social worker with Milenkovic, it was recommended that job search allowance should continue to be paid to her, as it would be intolerable for her to return to live with her brother.

The evidence

There was conflicting evidence before the AAT as to the circumstances surrounding Milenkovic's departure from Stojanovic's home. Stojanovic gave evidence to the effect that his sister had concocted the story that she had been forced from his home, in order to gain Ministry of Housing accommodation, and a benefit from the DSS. Milenkovic gave evidence that she and her children had been affected by Stojanovic's heavy drinking, moodiness, and aggressiveness, and that, on the night of 12 August 1993, her brother told her to leave his home after a major argument.

Conclusions

The AAT made an assessment of the credibility of the principal witnesses and preferred the evidence of Stojanovic. Having accepted Stojanovic's version of the events, by implication it rejected the veracity of the evidence given by Milenkovic on behalf of the DSS. It was a condition precedent to waiver under s. 1237AAD that 'the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or representation'. Therefore, it was an ironic consequence that waiver could not apply because of Milenkovic's knowing involvement in the making of a false statement or false representation to the DSS, this having led to the payment of job search allowance to her and the raising of the debt.

Formal decision

The AAT affirmed the decision under review and determined that Stojanovic was liable to repay the debt of \$7933.40 under an assurance of support.

[A.T.]