(i) in gaol; or

(ii) undergoing psychiatric confinement because the person has been charged with committing an offence.

Section 23(5) states that a person is in gaol if the person is in one of the circumstances set out in the sub-section. Relevant to Franks' case was s.23(8), which provides that 'psychiatric confinement' in relation to a person includes confinement in:

(a) a psychiatric section of a hospital; and

(b) any other place where persons with psychiatric disabilities are, from time to time, confined.

Sub-section 23(8) is subject to s.23(9), which reads as follows:

> The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be 'psychiatric confinement'.

Course of rehabilitation

The Tribunal referred to two previous decisions *Secretary to the DFaCS and Fairbrother* (1999) 30 AAR 93, contra *Pardo and Secretary to the DFaCS* (2000) 32 AAR 381; 4(7) *SSR* 84. Franks submitted that *Pardo* should be preferred because it accorded with the beneficial intent of the legislation and the decisions of *Bulsey and DSS* (1993) 31 ALD 621 and (on appeal) *Blunn v Bulsey* (1993) 53 FCR 572.

The Tribunal noted that s.23(9) clearly differentiates between confinement in a psychiatric institution per se and confinement in a psychiatric institution in order to undertake a course of rehabilitation and that the sub-section only operates in the latter circumstance.

The Tribunal referred to s.34 of the *Mental Health Act 1974* (Qld) which sets out the procedure on a finding that a person is unfit for trial. The person is detained as a restricted patient in a hospital, with a clear inference that the person is to receive appropriate treatment and rehabilitation with a view to the Patient's Review Tribunal and the Mental Health Tribunal eventually determining fitness for trial after treatment and rehabilitation.

There was no dispute that Franks was undergoing rehabilitation while detained under s.34. The Tribunal addressed the question whether there was a distinction to be drawn between a course of rehabilitation of indefinite duration as contemplated by s.34 of the *Mental Health Act 1974* (Qld) and a course of rehabilitation of a finite duration, for example, 12 months.

The Tribunal referred to *Fairbrother* (1999) 30 AAR 93 which decided that s.23(9) referred to a course of rehabilitation of finite duration. In contrast *Pardo and DFCS* (2000) 32 AAR 381 at 393-4 found that the words *'a period'* as used in s.23(9) should be interpreted as meaning the duration within which a person undertakes a course of rehabilitation. It may be flexible and may be reviewed from time to time.

The Tribunal found that the 'words "during a period" are to be construed so as to require a temporal connection from time to time between the confinement in a psychiatric institution and the undertaking of a course of rehabilitation' (Reasons, para. 27).

> Provided the confinement and the undertaking of the course of rehabilitation are contemporaneous the sub-section will operate to exclude the person from the operation of s.23(8) unless it can be said that rehabilitation which is determined on a flexible basis such as day to day or week to week is not a course of rehabilitation. I do not think that is an appropriate interpretation of the words. Rehabilitation of persons with psychiatric disabilities could not, in my view, be laid out as a week by week program as might be appropriate for a person with physical disabilities. It cannot be the intention of beneficial legislation to provide for the exclusion from the operation of s.1158 on a basis that would have little regard to the real life circumstances likely to occur from day to day. As Senior Member Handley said in *Re Pardo* (at 394) the restoration of a person's potential will vary from person to person. It must be added that this is even more so in relation to psychiatric illness.

(Reasons, para. 28)

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Parenting payment rate: whether carrying on a business; allowable deductions

KLEWER and SECRETARY TO THE DFaCS (No. 2001/729)

Decided: 22 August 2001 by D. Muller.

The issue

The critical issue in this matter was whether the applicant was carrying on a business and, in turn, whether business deductions could be taken into account in determining her income for parenting payment purposes.

Background

Klewer was a sole parent raising four children, and during the period in question was in receipt of parenting payment. In September 2000 she returned a Parenting Payment Review form in which she declared that she was operating a business as a taxi driver. She provided Centrelink with a profit and loss statement, which included details of deductions against her earnings for GST paid, uniform laundry, fuel used in commuting to and from work, mobile phone costs, non-payment of full fares by passengers, loss of income due to vehicle breakdown, loss of income due to family commitments, and baby sitting costs.

The law

'Income' is defined in s.8(1) of the *Social Security Act 1991* (the Act) to include amounts 'earned, derived or received ... for the person's own use or benefit'. Where, however, a person is conducting a business s.1075 of the Act allows for 'losses and outgoings that ... are allowable deductions for the purposes of ... the *Income Tax Assessment Act 1936* ...' to be deducted against the amount of income.

Discussion

The Tribunal noted that some of the items claimed by Klewer as business deductions (the costs of fuel used in commuting to work, non-payment of full fares by passengers, loss of work due to cab breakdown, loss of work due to family issues, and baby-sitting costs) were not in fact allowable under the *Income Tax Assessment Act 1936* — and these items could not be claimed even if she was carrying on a business. The amount of GST collected by Klewer was not for her own use or benefit and was neither

income nor a deduction, as it was passed on to the Commonwealth government.

The Tribunal concluded that only two items claimed by Klewer (uniform laundry, and mobile phone costs) might be allowable deductions, but then only if she could be said to be operating a business and only if these expenses related to that business.

The Tribunal noted that the general test of whether a business is being conducted '... is determined by the degree of autonomy the person has in the way in which they derive their income. The greater the control which someone else has over their income earning capacities, the less likely they are carrying on a business' (Reasons, para. 9). The Tribunal concluded here that Klewer's terms of agreement with the company which owned the taxi cab gave her very little scope for autonomy and that, indeed, '... the cab company has obviously sought to have control over every foreseeable event in the operation of a cab'.

The Tribunal concluded that Klewer was not carrying on a business, and therefore could not reduce her amount of income by the deductions she had claimed.

Formal decision

The Tribunal affirmed the decision under review, other than in relation to the amount of GST collected by Klewer in the period in question.

[P.A.S.]

Age pension: deprivation of assets; death benefit

GARBUTT and SECRETARY TO THE DFaCS (No. 2001/566)

Decided: 21 June 2001 by Dr J. D. Campbell.

Background

Garbutt lived with her son Wayne who died in November 1997. Wayne was an employee of Australia Post and a member of the Australia Post Superannuation Scheme.

In August 1990, Wayne nominated the beneficiaries of his superannuation to be 'next of kin as per will'. After his death, no will could be located. The trust provided that the trustee was not obliged to pay the death benefit to the people nominated, but rather to people who were financially dependent on Wayne.

A dispute eventuated in relation to a de facto relationship between Wayne and a third party, Ms Wild. Ultimately the trustees of the superannuation fund decided that 60% of the death benefit would be paid to Garbutt and 40% would be paid to Ms Wild.

In December 1998 the trustees paid Garbutt approximately $165,100. This amount was deposited into Garbutt's bank account and then withdrawn and distributed to the surviving siblings because Garbutt understood that this was her late son's wish.

Centrelink assessed Garbutt's pension on the basis that she had deprived herself of assets of $155,000 on 23 December 1998.

Garbutt appealed this decision which was affirmed by the SSAT.

The issue and legislation

The issue in this appeal was whether there was a deprivation of assets for the purposes of s.1123(1) which states:

> **1123(1)** For the purposes of this Act, a person disposes of assets of the person if:
>
> (a) the person engages in a course of conduct that directly or indirectly:
>
> (i) destroys all or some of the person's assets; or
>
> (ii) disposes of all or some of the person's assets; or
>
> (iii) diminishes the value of all or some of the person's assets; and
>
> (b) one of the following subparagraphs is satisfied:
>
> (i) the person receives no consideration in money or money's worth for the destruction, disposal or diminution;
>
> (ii) the person receives inadequate consideration in money or money's worth for the destruction, disposal or diminution;
>
> (iii) the Secretary is satisfied that the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.

The evidence

The evidence of Garbutt was that she distributed the money because she wanted to carry out the wishes of her late son. She told the Tribunal that although she did not have particular discussions with her son in relation to superannuation, she understood his intention was to share his estate with the surviving children.

The evidence of Garbutt was corroborated by Wayne's sister, who indicated that Wayne told her that the superannuation would be part of his estate.

Legal submissions

Two main submissions were presented for Garbutt. First, it was contended that the money was paid to Garbutt in her position as legal personal representative and that she had a duty to properly administer the estate. She therefore held the money in trust for herself. The moneys were then distributed to her as the first surviving beneficiary under intestacy.

The second submission was that there was a secret trust between Garbutt, her son and the surviving siblings and that Garbutt acknowledged to her son that she would carry out his wishes. Because of the secret trust she was bound not to distribute the money to herself as beneficiary, but rather to distribute it to the surviving siblings.

The Department argued that the trust deed was clear and that the moneys were distributed in accordance with this deed. The moneys were paid to Garbutt as a dependent, and not as a legal personal representative of the estate, therefore the payment was not a payment to the estate. The Department also disputed that a secret trust existed. It was the trustees who had the power to distribute the death benefit and not Garbutt.

Findings

The Tribunal found that the amount paid to Garbutt was paid on the basis that she was financially dependent on her late son prior to his death. Payment was a personal benefit arising from the trustees' decision that she was financially dependent. The amount paid was not paid to Garbutt as the personal legal representative of her son.

The Tribunal found no evidence of a secret trust. It also concluded that since the trustees held the power of disposition in relation to the death benefit, then no trust could arise from discussions between Wayne and Garbutt during his lifetime. Garbutt could only assign a death benefit when he became absolutely entitled to it, which did not occur while he was alive.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]