

SENATE QUESTION

Senate Community Affairs References Committee

Written questions on notice from Senator Deborah O'Neill

On 17 August 2020, Senator Murray Watt asked a question on notice (Senate Question Number 1828) relating to decisions by Social Services and Child Support Division of the Administrative Appeals Tribunal citing the Federal Court decision *McDonald v Director-General of Social Security* [1984] FCA 59. The response from the Minister is attached for reference.

In relation to that response, please provide a copy of each of the 73 decisions by the Administrative Appeals Tribunal referred to in the Minister's response to Question Number 1828, with any necessary redactions in relation to personal information.

RESPONSE

Of the 73 decisions of the Administrative Appeals Tribunal (AAT) referred to in the response to Question Number 1828, the first 5 decisions in the following table were provided to the Senate Standing Committee on Legal and Constitutional Affairs in response to Question on Notice LCC-SBE19-21. The sixth decision (attached) is a decision related to a review of a decision made under the child support legislation which was published by the AAT on the Australasian Legal Information Institute website in accordance with our publication of decisions policy.

Decision Date	Review number	Member
8/03/2017	2016/S104681	Member Professor Terry Carney AO
20/04/2017	2016/S104394	Member Professor Terry Carney AO
25/08/2017	2017/M113469	Member Professor Terry Carney AO
7/09/2017	2017/ M112147; 2017/M112302	Member Professor Terry Carney AO
7/09/2017	2017/S112884	Member Professor Terry Carney AO
18/06/2018	2018/MC013815	Member Michelle Baulch

The AAT considers that providing copies of the other 67 decisions would involve an unreasonable diversion of resources. Information in each decision must be redacted to ensure it is not possible to identify any non-government party, witness or other individual mentioned in the decision. This involves removing all particulars that may be sufficient to identify a person, including names, the address of any premises at which the person resides or works or the locality in which any such premises are situated. The AAT estimates this task would take 1 hour to complete for each decision. The AAT has calculated that 1 staff member would have needed to be diverted to work full time for approximately 9 working days on this task.



**Yeaxley and Child Support Registrar (Child support) [2018] AATA
3064 (18 June 2018)**

DIVISION: Social Services & Child Support Division

REVIEW NUMBER: 2018/MC013815

APPLICANT: Ms Yeaxley

OTHER PARTIES: Child Support Registrar

TRIBUNAL: Member M Baulch

DECISION DATE: 18 June 2018

DECISION:

The decision under review is affirmed.

CATCHWORDS

Child support - Percentage of care - No change to the likely pattern of care - Refusal to revoke the existing care percentage determination - Decision under review affirmed

Names used in all published decisions are pseudonyms. Any references appearing in square brackets indicate that information has been removed from this decision and replaced with generic information so as not to identify involved individuals as required by subsections 16(2AB)-16(2AC) of the *Child Support (Registration and Collection) Act 1988*.

REASONS FOR DECISION

BACKGROUND

1. This application for review is about the child support assessment applying in respect of [Child 1].
2. The *Child Support (Assessment) Act 1989* (the Act) provides for an administrative assessment of the child support payable by one separated parent to the other. It uses a statutory formula which contains variables such as the parents' adjusted taxable incomes, the number and ages of children and the percentages of care.
3. Ms Yeaxley and [Mr A] are the separated parents of [Child 1]. Since 14 November 2010 the Department of Human Services – Child Support (the Department) has made assessments under which Ms Yeaxley is liable to pay child support to [Mr A] in respect of [Child 1]. Since 11 April 2016 the Department has determined that liability on the basis that [Mr A] had 100% care of [Child 1] and Ms Yeaxley had 0% care of [Child 1].
4. On 23 October 2017 Ms Yeaxley advised the Department that there had been a change in the care arrangements for [Child 1], such that [Child 1] would be in her care 100% of the time from that day.
5. On 1 December 2017, the matter was considered by a Departmental employee, who decided that there should be no changes to the care percentages applying to the child support assessment (the decision under review).
6. Ms Yeaxley objected to that decision and, on 8 March 2018, that objection was disallowed. Ms Yeaxley has now applied to this tribunal for an independent review of the Department's decision.
7. A hearing into the application for review was held by the tribunal on 18 June 2018. Ms Yeaxley discussed the application for review with the tribunal by telephone and gave sworn evidence during the hearing. A representative of the Child Support Registrar (the Registrar) did not participate in the hearing.
8. The tribunal had before it relevant documents provided to it by the Department pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975* which were labelled folios 1 to 96, a copy of which Ms Yeaxley confirmed she had received prior to the tribunal hearing.

ISSUES

9. The statutory provisions relevant to this review application are found within the Act.
10. The issue which arises in this case is what should be the care percentages applying to the child support assessment in respect of [Child 1]?

CONSIDERATION

11. Part 5 of the Act provides that the Registrar must make an administrative assessment of child support in accordance with the statutory formula set out in that Part. The statutory formula requires that there be a determination as to the percentage of care given by each parent in respect of each child to whom the child support assessment relates.
12. Sections 49 and 50 of the Act require the Registrar, or this tribunal, to determine the likely pattern of care for a child during a period that is considered appropriate (a care period).
13. Section 54F of the Act provides that an existing care percentage determination must be revoked if the Department is notified, or otherwise becomes aware, that the care that is taking place does not correspond with the existing percentages of care recorded and that change would alter the cost percentage used for the parent in the administrative assessment. Section 55C of the Act explains how to determine a parent's cost percentage based upon their percentage of care for their children.
14. Unless a care arrangement applies and that care arrangement is not being complied with, the Registrar will determine the pattern of care based upon the extent of the actual care that a parent has of their child. A care arrangement is a formal arrangement about the care of a child and includes a written agreement, court order or parenting plan.¹
15. In this case, the evidence was that there is no written agreement, court order or parenting plan in place that pertains to the care arrangements for [Child 1]. Therefore, care is determined by having regard to the actual care each parent is likely to have. Pursuant to section 54A of the Act the actual care a parent has of a child may be worked out on the number of nights that a child is likely to be in that person's care in a care period. This does not prevent other measures being used to determine a parent's actual care of their child.
16. I noted that since at least 11 April 2016 the Department has determined the child support liability on the basis that Ms Yeaxley had 0% care of [Child 1] and [Mr A] had 100% care of [Child 1]. On 23 October 2017 Ms Yeaxley advised the Department she would have 100% care of [Child 1] from that day. [Mr A] advised the Department on 2 November 2017 that [Child 1] still lived at his address.
17. Ms Yeaxley's evidence at hearing was that after [Child 1] finished a period of time in juvenile detention, he was set against living with his father because his father did not like [Child 1]'s girlfriend. Instead of living with Ms Yeaxley 100% of the time, [Child 1] spent time staying at his girlfriend's aunt's or mother's home, and occasionally with Ms Yeaxley. Ms Yeaxley's evidence was that [Child 1] did not go back to his father's home.
18. Ms Yeaxley's evidence was that during this period of time she was providing [Child 1] with money; one time she gave him \$120, sometimes it was \$20 and another time was \$50. Her evidence was that there might have been one occasion when, according to [Child 1], [Mr A] gave [Child 1] \$50 and [Mr A] recently purchased [Child 1] a phone.

¹ See section 5 of the Act and section 3 of the *A New Tax System (Family Assistance) Act 1999*.

19. Ms Yeaxley did not dispute that [Child 1] did not ultimately end up staying with her 100% of the time. She stated that he would come and go as he pleased and no one could exercise any control over him. Ms Yeaxley stated that there was no pattern or regularity to the times when [Child 1] would stay with her.
20. Ms Yeaxley has provided the Department with a statutory declaration from [Ms B]. She advised me that [Ms B] is the aunt of [Child 1]'s girlfriend. That statutory declaration states that [Child 1] lives with his mother and sister, and he might stay at [Ms B]'s house one night a week, but not often.
21. I found the statutory declaration made by [Ms B] to be unconvincing. [Ms B] states that [Child 1] lived with Ms Yeaxley, but this is totally at odds with Ms Yeaxley's own evidence that [Child 1] usually stayed elsewhere; either with [Ms B] or at his girlfriend's mother's home. I placed no weight on the statutory declaration of [Ms B] when making my decision.
22. Ms Yeaxley advised the Department she would have 100% care of [Child 1] from 23 October 2017, however her evidence at hearing indicated that [Child 1]'s care did not proceed in accordance with the expectation she held at 23 October 2017. On the evidence available, it is not clear to me exactly where [Child 1] stayed in the period after 23 October 2017, other than there was no regular pattern of care of [Child 1] staying with his mother.
23. In this case, Ms Yeaxley submitted that [Child 1] does not live with his father. Evidence in the bundle of documents indicates that [Mr A] disputed this. There is no onus of proof applicable in tribunal proceedings. However, the person making a particular proposition carries an evidentiary burden to satisfy the decision-maker, on the balance of probabilities, that their proposition should be preferred: see *Mcdonald v Director-General of Social Security* [1984] FCA 57. In this instance, Ms Yeaxley has not satisfied that burden and there is no cogent evidence to suggest that there has been a change to the care arrangements that applied for [Child 1].
24. Having found that there is no change in care arrangements for [Child 1] that constitutes a new pattern of care, I was not satisfied that the existing care determinations should be revoked.
25. Having arrived at the same decision as that of the Department, I therefore affirmed the decision under review.

DECISION

The decision under review is affirmed.