[2012] AATA 537

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2011/5060 |
| Re | BCVP |
|  | APPLICANT |
| And | Secretary, Department of Families, Housing, Community Services and Indigenous Affairs |
|  | RESPONDENT |
| And | HTMD |
|  | OTHER PARTY |

# Decision

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| Tribunal | **Senior Member A K Britton** |
| Date | **16 August 2012** |
| Place | **Sydney** |

The decision made by the Social Security Appeals Tribunal on 9 November 2011 is set aside and in substitution it is decided that:

1. For the period, 23 November 2008 to 24 July 2009, the shared care percentage determined under s 59 of the A New Tax System (Family Assistance) Act 1999 (Cth) is:

• BCVP (applicant): 25%

• HTMD (other party): 75%

2. From 24 July 2009 each party’s shared care percentage is 50%.

3. The calculation of the amount of family payable benefit payable to BCVP and HTMD is remitted to the Secretary to be determined in accordance with the above.

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**Senior Member A K Britton**

# Catchwords

SOCIAL SECURITY - family tax benefit - shared care - percentage of care - pattern of care - decision under review set aside

# Legislation

A New Tax System (Family Assistance) Act 1999 (Cth) - 3, 22(7), 35B(1)(a), 35J(1), 58, 59, Pt 3 Div 1, Sch 1

Administrative Appeals Tribunal Act 1975 (Cth) - s 35

# REASONS FOR DECISION

**Senior Member A K Britton**

**16 August 2012**

1. The applicant challenges a decision made by the Social Security Appeals Tribunal that, for Family Tax Benefit (FTB) purposes, his former wife’s “percentage of care” of their two children was 100 per cent from 23 November 2008 and 50 per cent from 24 July 2009. FTB is payable where a person has the care of at least one “FTB child”. Where care of the child is shared by carers who are not members of the (same) couple, the amount (if any) of FTB payable to each carer is determined by, among other things, the proportion of time the child spends in the care of each carer. (See Part 3, Division 1 of the *A New Tax System (Family Assistance) Act 1999* (Cth) (the Family Assistance Act)).
2. The applicant claims that between 23 November 2008 and 24 July 2009, the children spent every alternate Friday to Tuesday night (inclusive) in his care. His former wife disagrees and claims that the children were only in his care on alternate weekends. The parties agree that, for FTB purposes, the children spent equal time in their care from 24 July 2009.
3. The issue to be determined is whether a pattern of care existed vis-à-vis the applicant and his children between 23 November 2008 and 24 July 2009 and, if so, the number of nights the children spent in his care.

# CONFIDENTIALITY ORDERS

1. Despite the presumption in favour of openness enshrined in s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth), I have decided to make orders restricting the publication of the names of parties in this case. This is because the publication of the names of the applicant and his former wife, the other party in these proceedings, would disclose the identity of their children. In my opinion, it would not be in their interests for the details of the dispute between their parents to be made public, nor is there any public interest in the disclosure of the facts underlying that dispute.
2. Accordingly, in these reasons for decision, the applicant will be referred to by the pseudonym “BCVP”, and, the other party, the applicant’s former wife as “HTMD”. The children will not be named.

# legislative framework

1. Where the care of an FTB child is shared and the persons who care for the child are not members of the (same) couple, and one of those individuals has made a claim for FTB, s 35B of the Family Assistance Act requires a determination to be made about the person’s percentage of care of the child:

**Determination of percentage of care - child is in the adult's care**

Initial determination

(1) If:

(a) the Secretary is satisfied that there has been, or will be, a pattern of care for a child over a period (the care period) such that, for the whole, or for parts (including different parts), of the care period, the child was or will be, under subsection 22(2), (3), (4) or (6), an FTB child of more than one individual; and

…

the Secretary must determine the adult's percentage of care for the child during the care period.

…

Percentage of care

(3) The percentage determined under subsection (1) or (2) must be a percentage that corresponds with the actual care of the child that the Secretary is satisfied that the adult has had, or will have, during the care period.

…

1. The actual care of a child an individual has had, or will have, is worked out based on the number of nights the child was, or will be, in the care of the individual during the “care period” (s 35J(1) of the Family Assistance Act). A “care period” is defined to mean a period where there has been, or will be, a pattern of care for the child (ss 3 and 35B(1)(a)).
2. FTB is only payable if the person’s “percentage of care” is at least 35 per cent (s 22(7) of Family Assistance Act). A person’s annual rate of FTB is calculated in accordance with the Rate Calculator in Schedule 1 of the Family Assistance Act (s 58). Central to this calculation is the person’s “shared care percentage” which is based on their “percentage of care (s 59 of the Family Assistance Act).

# Background

1. The applicant and his former wife have two young children. Throughout the disputed period the younger attended pre-school on Monday, Tuesday and Wednesday; the elder child attended school.
2. The applicant claims that from 23 November 2008, when the family home was sold, until 24 July 2009 (the disputed period), the children were in his care from Friday to Tuesday night (inclusive) each alternate week. He claims that this pattern remained unchanged until July 2009 except where the children were in his care on additional days.
3. The mother, on the other hand, is insistent that throughout the disputed period the applicant had the care of the children only on alternate weekends.
4. The applicant tendered a 2009 diary in these proceedings. It contained handwritten entries commencing on 15 May 2009 and ending 23 July 2009. He claimed that the entries were made by him contemporaneously and accurately reflect the times the children were in his care. He said he had decided to keep the diary on the advice of his father who urged him to do so if “things went bad” with his former wife. He explained that the reason the entries referred only to his children and his former wife was because it was kept for that very purpose. He claimed that throughout the corresponding period he also kept a separate work diary which has now been destroyed.
5. The entries cover 70 days within the disputed period and state that the children were in the applicant’s care for 32 of those days. The mother disputes five of the 32 claimed days, but concedes that she has no basis to dispute the balance because she did not keep a diary during that period.
6. The mother testified that around March 2009, in retaliation for her seeing someone else, the applicant stopped paying the $100 per fortnight he had been paying to her in lieu of child support. She said, as a result, she was forced to take on additional shifts and relinquish the children to his care on days additional to those agreed. She said it was for this reason the children spent more time in the applicant’s care from mid-2009, possibly earlier, but that the arrangement was at all times ad hoc and did not constitute a pattern of care.
7. The applicant tendered in these proceedings copies of the “sign in/sign out” records for the two pre-schools his son attended throughout the disputed period. The child attended one pre-school on Monday and Tuesday, and the other on Wednesday). He contends that the sign in/sign out records reveal that he delivered his son to and from pre-school every second Monday, Tuesday and Wednesday. The mother, who throughout the disputed period was a shift worker, claims that these records only reveal who picked up and dropped off the child and do not establish where they spent the night. She claims that when she found herself delayed at work, or required to work a morning or night shift, she sometimes called on the applicant to pick up and/or deliver the children to their respective schools. On her account, when this occurred, the applicant would care for the children in her home until it was time to leave for school or she arrived home from work.
8. The applicant’s manager testified that in November 2008, he negotiated an arrangement which allowed the applicant to work shorter hours on the days that he had care of the children and to make up lost hours the following week. While he could not be sure, the manager thought the applicant worked shorter hours on Monday to Wednesday.
9. In written statements prepared for these proceedings, the applicant’s parents corroborated his claim that the children were in his care Friday through to Wednesday on alternate weeks, and sometimes additional days, from November 2008.
10. The applicant claimed that, after leaving the family home in November 2008, he moved to private rental accommodation. He said that he moved in with his parents around April 2009 and remained there until the week on/week off arrangement commenced. When questioned, neither parent could recall the applicant returning to live with them during that period.

# Findings and Conclusions

1. There is no issue between the parties that a pattern of care vis-a-vis the applicant and the children existed throughout the disputed period. The only issue in dispute is the “actual care” the applicant had of the children throughout that period. The parties agree that the children spent each alternate Friday and Saturday night in the applicant’s care. The question to be determined is whether, in addition, they also spent each alternate Sunday, Monday and Tuesday night in his care.
2. The child care records reveal that, as claimed, the applicant delivered his son to and from pre-school each alternate Monday, Tuesday and Wednesday. They also reveal that on alternate weeks the child was either absent from, or taken to, pre-school by his mother. While not determinative of where the children spent the night, this evidence is nonetheless corroborative of the applicant’s claim. While plausible that from time to time the applicant stepped in and transported his son to pre-school on days when the child had been, or would be, in the care of his mother overnight, that does not explain the regularity in the pattern revealed by the attendance records.
3. There are a number of inconsistencies in the applicant’s evidence. In addition his failure to offer a satisfactory explanation for his delay in making a claim for FTB is troubling. Nonetheless, the weight of evidence suggests that, as claimed, the children spent five nights each fortnight in his care. While, as agreed by the parties, by mid-2009 the children were spending more time with the applicant, that arrangement was ad hoc and in my opinion could not be said to constitute a pattern of care. Therefore a further determination under s 35B of the Family Assistance Act cannot be made.
4. I find that the children spent five nights of each fortnight in the care of their father, and the balance of each fortnight with their mother. Accordingly the parties’ percentage of care is:

* BCVP (applicant): 35%
* HTMD (other party): 65%

This converts to “shared care” percentages of (s 35B of the Family Assistance Act):

* BCVP (applicant): 25%
* HTMD (other party): 75%

As agreed each party’s “shared care” was 50% from 24 July 2009.

1. I have decided to remit to the Secretary the task of calculating the amount of FTB payable to the parties in accordance with the above. Until that exercise is undertaken, it is not possible to determine whether either party received an overpayment of FTB and, if so, by what amount. Nor is it possible to determine whether any ensuing debt can or should be waived or written off. It is appropriate that that decision be made by the Secretary.

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| I certify that the preceding 23 (twenty -three) paragraphs are a true copy of the reasons for the decision herein of Senior Member A K Britton |

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Associate to Senior Member A K Britton

Dated 16 August 2012

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| Date(s) of hearing | **6 August 2012** |
| Date final submissions received | **9 August 2012** |
| Applicant | **In person** |
| Solicitors for the Respondent | **Ms S Mantaring, Centrelink Program Litigation and Review Branch** |
| Other Party | **In person** |