

and there [was] no reason why at some time in the future her finances may not improve sufficiently to repay the

amount at some appropriate rate':  
Reasons, para.40.

#### Formal decision

The AAT affirmed the decision under review.

## Family allowance: 'custody, care and control'

SCHNEIDER and SECRETARY TO DSS

(No.T85/10)

Decided: 5 March 1986 by R.C. Jennings.

Emilie Schneider had married an Australian and migrated to Australia from the Philippines in June 1981, leaving her 3 young children in the care of her sister.

Some time after her arrival in Australia, Schneider obtained visas for her children to enter Australia but, because she lacked the necessary money to pay their fares, their departure from the Philippines was delayed until February 1985, when they travelled to Australia and joined their mother. Over the intervening period, Schneider and her sister maintained regular contact by telephone and mail and Schneider settled all the important questions as to the care and control of the children.

In February 1984 (that is, a year before the children arrived in Australia) Schneider claimed family allowance for the 3 children. When the DSS rejected this claim, she asked the AAT to review the decision.

#### The legislation

At the time of the decision under review, s.95(1) of the *Social Security Act* provided that a person who had 'the custody, care and control of a child' was qualified to receive family allowance for that child.

Section 96(1)(d) prevented the grant of a family allowance for a child if that child was not living in Australia. However, s 96(5) said that s.96(1)(d)

was not to apply where the child in question was living outside Australia, the claimant was living in Australia and the Director-General was satisfied that the claimant intended to bring the child to live in Australia as soon as it was reasonably practicable to do so.

#### 'Custody, care and control'

The AAT said that there was no dispute that Schneider had always intended to bring her children to Australia as soon as reasonably practicable. Therefore, the fact that the children were outside Australia would not have prevented the grant of a family allowance for those children.

The central question, the AAT said, was whether Schneider had the 'custody, care and control' of her 3 children while those children were living with her sister in the Philippines.

The AAT noted that, in *Hung Manh Ta* (1984) 22 SSR 247, the Tribunal had said that 'custody, care and control' referred 'to the responsibility for the actual day to day maintenance, training and advancement of the child'; but that this responsibility might be delegated to another person.

The AAT also referred to the decision in *Al Halidi* (1985) 25 SSR 303, where it had been suggested that a parent who was separated from her children would be more likely to get family allowance for the children, 'where they are living with grandparents or other relatives who are in a sense only minding them', than if the children were living with their other parent.

The AAT said that the evidence in the present case established that Schneider had retained substantial control over her sister's care of her children. That is, she had kept the ultimate responsibility for the day to day maintenance, training and advancement of her children even though she had arranged for her sister to carry out that responsibility. The AAT concluded:

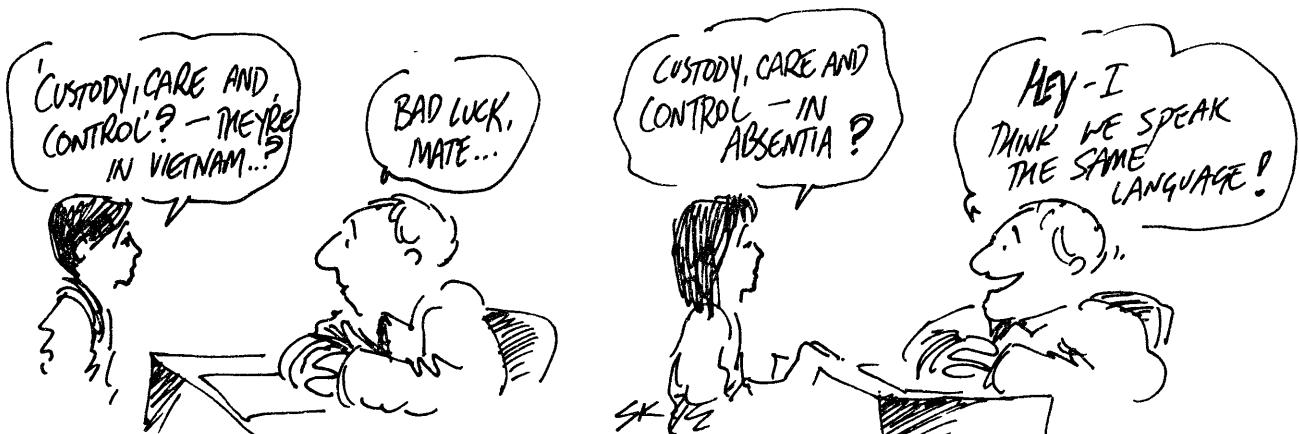
'I accept the interpretation of the relevant provisions of the Act adopted by the Tribunal in *Hung Manh Ta* and *Al Halidi*. I agree that claims for family allowance can be successful in respect of children under 16 living outside Australia by persons who can demonstrate that they have retained sufficient degree of "custody, care and control" to qualify.

The present case falls within that degree because the applicant achieved a firm and successful arrangement with a close and trusted relative which enabled her to exercise as much care and control as was reasonably possible and necessary in order to discharge through her agent full responsibility for the day to day maintenance, training and advancement of her children.'

(Reasons, para.11)

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the respondent with a direction that Schneider be paid the appropriate family allowance from the date of her application.



## Assets test: imperfect gift

BALL and SECRETARY TO DSS

(No.W85/122)

Decided: 24 January 1986 by G.D. Clarkson.

Raymond Ball was an age pensioner. In December 1982, Ball informed his 3

sons that he intended to transfer to them a piece of real property located in South Australia. In July 1983, he prepared a draft memorandum of transfer but delayed further action until the effect of the proposed assets test on age pensions was known.

In March 1984, Ball handed the certificate of title of the property to his youngest son, saying - 'You might as well keep these now; the house is yours; hang on to them.' In April 1984, the son returned the certificate of title to Ball so that he could execute