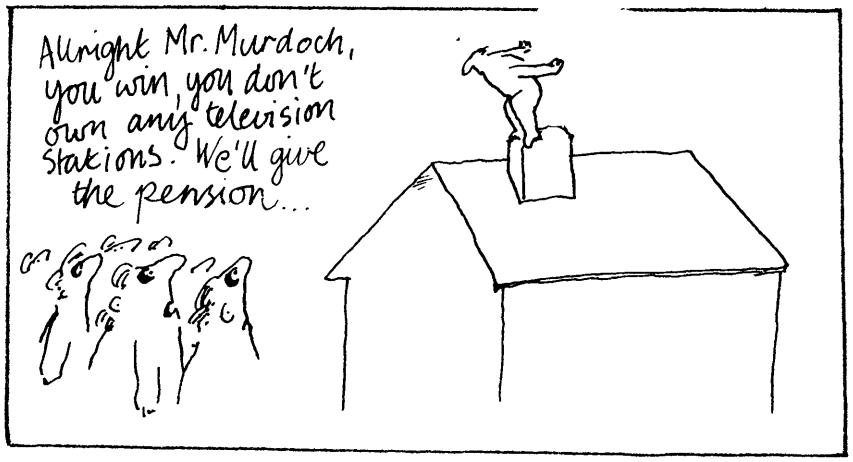

wished to give the taxi to his son for him to operate. The transfer fees payable to pass registration to his son were high and it seemed that this was an important reason why the father kept the registration in his name.

Did ownership change?

The Tribunal examined the issue as to whether ownership of the taxi plates had passed to the son. The AAT asked whether the applicant was estopped by acquiescence from asserting his title. The actions of the applicant and his son were not clear - they were consistent with the son being given the right to operate the taxi in his father's name. Thus the equitable doctrine would not apply.

Can the DSS consider equitable doctrines when applying the assets test?

There was nothing in the *Social Security Act* which gave the DSS power to decide equitable rights.

> It is the Tribunal's opinion that section 6AC confers no such power and that the Secretary and therefore this Tribunal are concerned with positive dispositive actions when making decisions under section 6AC. The proper course for persons asserting a right to equitable relief depending on equitable estoppel is to seek to have the right determined in a court exercising equitable jurisdiction but not to expect such right to be determined by a purely statutory Tribunal. It would take clear words, in the Tribunal's opinion, to confer such jurisdiction upon it or upon the Secretary.

(Reasons, p. 8)

Some positive disposition of the property was therefore required.

The Tribunal also considered whether there had been an assignment of the public vehicle licence or the applicant's interest in the taxi co-operative of which he was a member. The Tribunal concluded that the applicant had both legal and beneficial ownership of the public vehicle licence and the shares in the co-operative as he had done no acts indicating the relinquishment of ownership. The lease was evidence of his continuing ownership.

Formal decision

The Tribunal affirmed the decision under review.

Dependent child

SCHARRER and SECRETARY TO DSS
(No. V86/221)
Decided: 3 December 1986 by H. E. Hallowes, G.F.Brewer and D. M. Sutherland

Denise Scharrer had been refused supporting parent's benefit by the DSS in December 1984. She had been caring for the son of a neighbour after the neighbour had entered hospital in August 1984 with a totally incapacitating disease. A supervision order was made by the Melbourne Children's Court in September 1984 in respect of the son. He was placed in the care of the applicant as a result of that supervision order.

The legislation

There were a number of amendments to the legislation during the relevant time. When the applicant first made her claim and prior to 5 September 1985, the relevant part of the *Social Security Act* read:

> s.83AAA(1)...'supporting parent' means an unmarried person who has the custody, care and control of a child...

On 5 September 1985, s.83AAA(1) was amended to read (so far as is relevant):

> 'supporting parent' means an unmarried person who has a dependent child...

Section 6(1) defined 'dependent child' to include 'a child under the age of 16 years who is in the custody, care and control of the person'.

On 1 July 1986 s. 83AAC(2) was amended to read:

> (2)...a child shall not be taken to be a dependent child of a person unless -
> (a) the person is a natural or adoptive parent of the child, or has the legal custody of the child;...

Did the applicant have 'custody, care and control'?

Concentrating on the period between the initial claim and 5 September 1985 when the Act was first amended, the AAT ascertained whether the applicant had custody, care and control of the child and so qualified for the benefit.

The Tribunal referred to earlier decisions which looked to the actual situation in terms of maintenance rather than legal rights.(*Hung Manh Ta* (1984) 22 *SSR* 247)

> To require '*legal* custody' and '*physical* care and control' of a child introduced a gloss on the words of the Act drawn from a different legislative context which could not be justified within the context of the *Social Security Act*...Mrs Scharrer is clearly responsible for the actual day to day maintenance, training and advancement of M. [His mother] will be unable to step back into that responsibility ... While maintenance alone will not justify the conclusion that an applicant has custody, care and control...it is a factor to be taken into account.

(Reasons, para.5)

Her commitment to the child and the lack of any limitation in time or scope on her care compelled the AAT to conclude that the applicant had custody, care and control at this time and so qualified for supporting parent's benefit at this time.

The period between 5 September 1985 and 1 July 1986

The practical change for this period was the inclusion of s.6(1A) which limited the definition of 'dependent child' by providing that:

> ...a person shall not be taken to have the custody of a child unless the person, whether alone or jointly with another person, has the right to have, and to make decisions concerning, the daily care and control of the child.

This presented no difficulty for the applicant. She was responsible for the child and had the right to make decisions concerning his daily care and control.

There was no conflict between the 'rights' referred to in s.6(1A) and the 'rights' retained by the mother as a parent:

> All rights of parents or custodians to make decisions concerning children may be brought to an end by an order emanating from a Court having jurisdiction so to do. Sub-section 6(1A) does not refer to 'rights' generally but rather to rights as to 'the daily care and control of the child'.

(Reasons, para.9)

The period from 1 July 1986

The amendment on 1 July 1986 altered the situation. The requirement that the dependent child be in the 'legal custody' of the person defeated the applicant's claim from this date according to the AAT.

Section 61(1) of the *Family Law Act* provides:

> Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child.

As there was no 'order of a court to the contrary' legal custody of the child remained with her mother. While the custody of the applicant may be 'lawful' the *Social Security Act* now required an order of a court that she has custody to be eligible for the benefit.

As the applicant had no such order, whether from the Family Court or a State court she was therefore not eligible.

Formal decision

The AAT decided that the appplicant should be granted supporting parent's benefit from the first pension pay day after her intial claim until 1 July 1986.

[**Comment:** It is questionable whether there is a clear distinction between 'legal custody' and 'lawful custody' as the AAT appears to suggest.

The section cited from the *Family Law Act* does not use the phrase legal custody but 'custody'. There are clearly other contexts where the phrase 'legal custody' is used without any intention to take away the rights of parents. For example, s.95 *Community Welfare Services Act* 1970 (Vic) deems every person detained in a remand centre or youth training centre to be in the legal custody of the Director-General of Community Services. Yet an order to be so detained does not require the transfer of guardianship rights to the Director-General: see *Childrens Court Act* 1973 (Vic), s.26(1)(f)(ii). Thus a 16 year old detained in a youth training centre is in the legal custody of the Director-General, but by virtue of s.61(1) of the *Family Law Act* the parents remain guardians.

Of course, the parents may have lost custody in such a case. But the AAT appears to require that an order be sought that takes away such rights in a much more permanent or far reaching sense. It is as if the concept of legal custody is akin to guardianship. It is clear that the law recognises shifts in legal custody of a temporary nature from the example given from the Victorian legislation. To require an order from the Family Court or a State court specifically related to that issue seems unnecessarily severe.

The question becomes one of whether the principles that govern custody of children in family law where the rights of the parents to look after the child are mainly in issue have application in the welfare area where the parental support has for one reason or another broken down.

If the child had been made a ward of the state and then passed to the care of the applicant then perhaps it could have more easily been argued, on the AAT's reasoning, that she was the legal custodian. Yet the fact that only a supervision order was made, which is a clear alternative to wardship under the legislation, made such an argument impossible.

In principle, if a court orders that a child reside with a particular person and abide by that person's directions as to daily routine, it is arguable that the person has been given custody of the child. That the custody is legal or lawful would flow from the origin of the order. Such a power resides with the Children's Court when making supervision orders: see *Childrens Court Act*, s.41. B.S.]

HUYNH and SECRETARY TO DSS (No. N86/324)
Decided: 11 November 1986 by G.P.Nicholls

The applicant asked the AAT to review a DSS decision to cancel family allowance paid in respect of his three children resident in Vietnam. He had been sending money and goods to his wife and three children in Vietnam. Although he had lodged sponsorship forms with the Australian authorities no exit visas had been issued by the Vietnamese Government for his three children. The evidence suggested that these would not be issued in the foreseeable future.

The legislation

Section 95 provides that family allowance is payable to a person who has a 'dependent child'. Section 6(1) defines 'dependent child' to include a child under the age of 16 years who is in the 'custody, care and control of the person'.

Was there 'custody, care and control'?

The threshold question was whether the applicant had the custody, care and control of his three children in Vietnam. This, said the AAT, was factual 'custody, care and control'. This may be qualified by delegation to others at times of the care of the child, but presupposes the ongoing possibility of direct custody, care and control by the parent.

This factual custody, care and control did not exist in this case sid the AAT:

> This is most easily tested by reference to the most critical decision the applicant can take, namely a decision to bring his wife and the three children to Australia. Whilst ever the Government of the DRVN has not issued exit visas, the applicant is unable to factually resume the 'custody, care and control' he so earnestly wants .... I readily accept that the applicant contributes significantly to the maintenance of the children, seeks to exercise some controls over them and is doing his very best to reunite the family. These factors go some way towards establishing factual 'custody, care and control' but in the absence of any real control over their movement to Australia, they are insufficient in my view to establish the reality of that 'custody, care and control'.

(Reasons, para.25)

Once the exit visas were issued such 'custody, care and control' would exist.

Formal decision

The AAT affirmed the decision under review.

NGUYEN and SECRETARY TO DSS (No. V85/454)
Decided: 11 December 1986 by H.E.Hallowes

Mrs Nguyen sought review of a DSS decision to cancel her payment of family allowance paid in respect of her son. The applicant had left Vietnam in 1982 but her son remained in Vietnam with her parents. Mrs Nguyen sent food and goods to her parents to contribute to the maintenance of her son. She had made all possible efforts to bring her son to Australia without success.

The legislative requirement: 'custody, care and control'

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. This section was amended in 1985 to provide that a person who had a 'dependent child' was qualified to receive family allowance for that child. Section 6(1) defined 'dependent child' as meaning (so far as is relevant) a child under 16 'in the custody, care and control of the person'.

Section 96(5) also allows family allowance to be paid in respect of children living outside Australia where the Secretary is satisfied that it is likely that the person will bring the child to live in Australia within four years of the day that the person began to live in Australia.

The Tribunal found that it was the applicant's parents who were responsible for the day to day maintenance, training and advancement of her son. The applicant was not in a position to communicate with her parents to the extent necessary to exercise the degree of daily care and control necessary to entitle her to receive family allowance.The Tribunal referred to *Hung Manh Ta* (1984) 22 *SSR* 247, *Le* (1986) 32 *SSR* 403, *Al-Halidi* (1985) 25 *SSR* 303 and *Schneider* (1986) 30 *SSR* 381.

The AAT commented:

> Mrs Nguyen has made considerable personal financial sacrifices to enable her to make a contribution to her son's maintenance but payment of maintenance alone is not enough for the purposes of Part VI of the Act to justify the conclusion that the applicant has custody, care and control of her child (*Hung Manh Ta*). Mrs Nguyen was unable to tell the Tribunal if the money raised from the sale of goods she has sent to Vietnam is sufficient to cover the costs of [her son's] upbringing. Custody, care and control of a child may be delegated to another but it must be limited in time and purpose. The Tribunal is satisfied that the applicant's confidence in her parent's ability to bring up [her son] according to her wishes is well founded. He is learning English at school as a language which is her wish and he helps his grandparents. However, her demonstrated interest in and concern for his welfare, the affection she has for him and her financial support does not qualify her for family allowance...
> (Reasons, para.13)

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: farmer

WALLER and SECRETARY TO DSS (No.S86/25)
Decided:24 October 1986 by A.P.Renouf, B.C.Lock and J.T.B.Linn

The applicant applied to the AAT for review of a decision to cancel his unemployment benefit.

The facts

The applicant had informed the DSS in March 1984 that he was in receipt of income from share farming on his mother's property. At that time the claim for unemployment benefit was rejected on the basis that he had not taken reasonable steps to obtain work. Benefit was paid when more information was supplied by the applicant as to his efforts to obtain work. But it was cancelled again in September 1985 when it was decided that he had not taken reasonable steps to find work.

At the time of this cancellation the applicant had also informed the DSS that he would be renting 600 acres of the share farm for the running of sheep. That would only take one or two days per month. His aim was to make the farm profitable and so no longer require unemployment benefits. He was financing the running of the farm with loans and money received in unemployment benefit.

The legislation

Section 107(1)(c) of the *Social Security Act* provides that to qualify for unemployment benefit the applicant must be (i) unemployed, (ii) capable of undertaking and willing to undertake paid work that in the opinion of the Secretary was suitable to be undertaken by the person, and (iii) have taken reasonable steps to obtain such work.

Was the applicant 'unemployed'?

It was not disputed that the applicant had taken reasonable steps to obtain work. The issue for the AAT was whether he was 'unemployed'.

Dealing first with the period when the applicant was engaged in share-farming on his mother's property the Tribunal found that he was so committed to this activity that he could not be regarded as being 'unemployed'. The length of time, intensity of his involvement and the relatively high amount of financial expenditure led to this finding.

The same conclusion was reached in relation to the latter period when the applicant proceeded to rent part of the farm. At this point he substantially increased his investment and went heavily into debt.

Eligible for special benefit?

A question remained as to whether the applicant may qualify for special benefit. Section 124(1) of the Act reads:

> ...
> (c) with respect to whom the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, is unable to earn a sufficient livelihood for himself and his dependents (if any).

The AAT found that the applicant could not be granted special benefit. For the period between the cancellation of his unemployment benefit and prior to his renting of part of the farm the AAT said that his circumstances had not altered since he began share-farming years before. He had not become 'unable to earn a sufficient livelihood for himself and his dependents'.

As for the time commencing the date that he rented part of the farm the AAT could find no authority for the proposition that special benefit should be paid to fund his living expenses until the next wool clip. The Tribunal commented:

> What happened from 3 October was that the applicant embarked upon a business venture financed by loans which he thought would be profitable (but which he has since realized was a mistake). He thus found himself lacking cash to enable him to carry on until income from the venture became available. He therefore borrowed money from the State