

## Federal Court decisions

### Custody, care and control: non-custodial parent

**SECRETARY TO DSS v FIELD**  
(Federal Court of Australia)

**Decided:** 29 August 1989 by Morling, Beaumont and Burchett JJ.

This was an appeal, under s.44 of the *AAT Act*, against a decision of the AAT that Field was qualified for supporting parent's benefit — Field (1988) 46 SSR 592.

Field had been granted supporting parent's benefit by the DSS after Field was awarded custody of his child, J, by the Family Court. In February 1987, the Family Court discharged that order and granted custody of J to the child's mother, subject to Field having access to J. When the Family Court made that order, the DSS cancelled Field's supporting parent's benefit on the ground that he no longer had a 'dependent child', which was an essential qualification for supporting parent's benefit under s.54 of the *Social Security Act*.

#### The legislation

Section 3(1) of the Act defined 'dependent child' as meaning a child under the age of 16 years who was in the person's 'custody, care and control'.

Section 3(2) provided that a person could not have the custody of a child unless the person had the right to have, and to make decisions concerning, the daily care and control of the child.

#### Access, but not custody

According to the Family Court's order, Field had the right to access to the child for substantial periods. Under the access order it was anticipated that the child would spend 108 nights and 109 days with Field in each year.

The Federal Court said that a child could not be regarded as a 'dependent child' of a person for the purposes of the *Social Security Act*, merely because the person had the factual custody, care and control of the child. It was essential, because of s.3(2), that the person have a legal right to the daily care and control of the child and a legal right to make decisions concerning that daily care and control.

There might be particular cases in which a person's access rights under a Family Court order would give that person a right to have the daily care and control of the child and to make decisions concerning that daily care and control. But this was not one of those cases.

The access order made in favour of Field gave him access to the child at regular periods, but each period was relatively short (even though, when added up, they amounted to a substantial proportion of each year). The fact that these periods were intermittent meant, the Federal Court said, that Field's access right could not properly be characterised as the right to have the daily care and control of the child.

The Federal Court said that, in general, because supporting parent's benefit was payable on a fortnightly basis, it was a practicable and sensible rule that a person who had access rights to a child, in the person's own home, for periods of not less than 14 consecutive days, should ordinarily be regarded as having the right to have, and to make decisions concerning, the daily care and control of the child during those periods. Where the access rights were so extensive, such a person might well meet the requirements of s.3(1) and (2) and be regarded as having the 'custody, care and control' of the child.

Although there might be particular circumstances which would justify a finding that a parent, who had the right of access for shorter periods, had the right referred to in s.3(2), the periods involved in Field's Case were each so brief that the only possible conclusion was that he did not have the right to have, and to make decisions concerning, the daily and control of his child. However, if the Family Court were to make an order giving Field the right of access to his child for a longer period, then Field might well be entitled to supporting parent's benefit during that longer period.

#### Formal decision

The Federal Court allowed the appeal.

[P.H.]

### Recovery of overpayment: 'false statement'

**SECRETARY TO DSS v SALVONA**  
(Federal Court of Australia)

**Decided:** 29 September 1989 by Lee J.

This was an appeal under s.44 of the *AAT Act* from the AAT's decision in *Salvona* (1988) 45 SSR 575.

The AAT had set aside a decision of the DSS to raise and recover an overpayment of \$13 522, representing unemployment benefit paid to Salvona while he was living in a *de facto* relationship with a woman, J, whose income would have precluded payment of benefit to Salvona.

The AAT had decided that Salvona had not made a false statement, nor had he failed to comply with any provision of the Act, so that any payment of benefit made to him was not recoverable as an overpayment under the former s.181(1) of the *Social Security Act* [now s.246(1)].

#### The facts

Salvona had received unemployment benefits between August 1983 and January 1987. Throughout this period, he had been sharing accommodation with a woman, J, in circumstances which the AAT found amounted to a *de facto* marriage relationship.

When applying for unemployment benefit, Salvona had described himself as single on a departmental form, providing this information 'to the best of my knowledge and belief'.

During 1986, Salvona had completed an entitlement review form, on which he falsely indicated that he was not sharing accommodation with any person.

#### The legislation

The DSS had decided that there was a recoverable overpayment under s.181(1), which declared that a payment of benefit made 'in consequence of a false statement or representation, or in consequence of a failure or omission to comply with a provision of this Act' was a debt due to the Commonwealth.